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How Artificial Intelligence is Reshaping Municipal Law

HOW ARTIFICIAL INTELLIGENCE IS RESHAPING MUNICIPAL LAW

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Introduction

You've surely been inundated with "AI" everywhere you turn. Uninvited chatbots consuming your screen when online shopping, a persistently recursive customer service representative when trying to reach an airline, your phone summarizing text messages. The pervasiveness of what we commonly refer to as "AI" has turned it into a semantically overloaded term, often used more for marketing than to describe actual technological capacity. Understanding the difference between true AI and traditional algorithms is critical to your role as a city attorney.

In this paper we will provide an overview of the ways AI is legally distinct from traditional algorithmic software, challenges you might face as a city attorney as AI becomes ubiquitous, an overview of AI tools that can assist you in the practice of law, and finally ethical pitfalls to avoid when using AI.

I. What Is Artificial Intelligence?

AI is software that can "learn" from data rather than follow human-written rules. A traditional algorithm is a set of explicit instructions that will always produce the same output from the same input. This doesn't mean algorithms are simple; the software routing your GPS, detecting credit card fraud, or compressing a video file is algorithmic and extraordinarily sophisticated. The key distinction isn't complexity or capability, it's whether the system follows rules a human wrote, or derives its own rules from examples. An algorithm can be thought of as a recipe for Black Forest cake; when followed correctly and with the same ingredients, the cake will turn out the same every time. In contrast, AI can be thought of as a chef who learns how to make cakes by studying thousands of them, not by being told the rules, but by inferring them.

AI systems can perform at or above human levels on average while failing in specific, unpredictable situations. High benchmark performance does not mean reliable performance in every case. The situations where AI fails are often precisely the edge cases, unusual fact patterns or novel circumstances, where legal liability tends to concentrate.

After initial training, most modern AI systems undergo an additional process in which human evaluators rate the model's outputs, and the model is further adjusted to produce outputs those evaluators prefer. This process is known as reinforcement learning from human feedback, or RLHF, and is how AI systems are shaped to be helpful, to avoid certain outputs, and to reflect particular values and preferences. Attorneys should understand that this step means the dispositions of an AI system are not neutral. They reflect choices about what counts as a good output, whose preferences were consulted, and what feedback was rewarded made by the system's developers. Those choices can embed bias, replicate the blind spots of the evaluators, or optimize for preferences that diverge from a client's interests or a regulatory standard. When an AI system produces a biased or harmful output, the question of where in this pipeline the failure occurred is both technically complex and legally significant.

AI In Your City

Now that you have a basic understanding of how AI works, it will be easier to understand the impact it will have on your city. Several companies are working on generative AI capabilities to assist governments in areas such as cybersecurity, compliance, report writing, code management, legal research, agenda management, and even workforce management. The usual first instinct is to adopt an AI policy, but any such policy must consider what harm we are actually trying to prevent, and the most effective means of preventing harm, rather than adopting a policy that may be already covered by existing law, or, addresses concerns that are better mitigated through operational controls that have nothing specifically to do with AI.

AI as an Instrument, Not a Source of Liability

Consider the categories of harm most commonly cited in AI policy discussions: fraud, defamation, discrimination, privacy violations, copyright infringement, and breach of fiduciary duty. With narrow exceptions at the regulatory frontier none of these are new legal categories.[1] They were unlawful before AI existed. AI changes the scale, speed, and accessibility of the conduct, but it does not change its legal character. An employee who uses an AI tool to generate a misleading report has committed the same bad act as one who drafted it manually. A vendor who uses AI to fabricate invoices is committing

[1] Certain uses of AI in healthcare and hiring have attracted specific rulemaking. *See* AB 3030 (2024) and Cal. Code Regs. Title 2, Div 4.1, Chapter 5, Subchapter 2

fraud regardless of the tool. The instrument is new; the liability framework largely is not.

This matters for policy design because a policy focused on AI-as-technology tends to produce rules about the technology rather than rules about the conduct your city actually cares about preventing. You end up regulating the hammer rather than the nail. Instead, focus on where real exposure lives in your organization. The harms that AI genuinely amplifies tend to cluster around two pre-existing organizational vulnerabilities: data governance and process integrity.

AI systems are, at their core, data consumers and data producers. An organization with poor data hygiene (inconsistent classification, unclear retention policies, inadequate access controls, murky third-party data sharing agreements, etc.) was already exposed before AI. AI adoption accelerates and magnifies that exposure dramatically. Sensitive data fed into external AI tools without adequate contractual protections, personal data retained beyond its useful life that then trains a model, confidential business information that becomes part of a vendor's training corpus, etc., are data governance failures, not AI failures. The remedy is a data governance program, not an AI policy.

So What Am I Supposed to Do?

Rather than drafting bespoke AI policies, your city can reduce risk more effectively by auditing existing data management practices against the actual ways AI tools are being used in the organization with particular attention to what data employees are inputting into external tools and what contractual protections govern that data. Most commercial AI terms of service have evolved rapidly, and many organizations are operating under agreements negotiated years ago that were not drafted with current AI capabilities in mind. On the process side, the highest-leverage interventions tend to be mundane: tightening vendor onboarding verification, adding friction to out-of-pattern payment requests, requiring dual authorization for changes to banking details, and ensuring that customer-facing or counterparty-facing communications have human review checkpoints before transmission. These are not AI policies; they are good operational hygiene that happens to also mitigate AI-enabled risk.

AI-Specific Policy Language Should be Narrowly Crafted

When specific AI policy language is needed it should be narrow, tied to concrete conduct, and embedded within existing policy frameworks rather than standing alone. An acceptable use addendum to an existing technology policy, a section added to a data classification policy addressing AI tool inputs, a paragraph in a vendor management policy addressing AI-generated deliverables, etc. The goal is to close specific gaps, not to create a comprehensive regulatory scheme for a technology that is changing faster than any policy document can track.

There is also a candid institutional argument for this approach. A robust, standalone AI policy creates its own compliance obligations and its own liability surface. If the policy is detailed enough to be meaningful, it is detailed enough to be violated, and violations of internal policy can be used against your city in litigation. A policy that prohibits employees from inputting confidential information into AI tools is only as good as an organization's ability to enforce and document compliance with it. If that infrastructure doesn't exist, the policy may do more harm than good. The cities that will navigate the AI transition most effectively are likely not those with the most comprehensive AI policies, but those with the strongest data and operational discipline, those who treat AI as one more reason to do the basics well, rather than as a novel problem requiring a novel legal framework built from scratch.

Finally, keep in mind that part of AI's impact on your city will be how it becomes a target for data harvesting, whether through contracts or other avenues. Training AI models requires an enormous amount of data. The early internet was fantastic for this data. Humans posted on social media, documents from governments, corporations, NGOs, etc., were gradually put online, and thus the internet was mostly a reflection of society. Beginning in the late 2010s, however, social media began to be taken over by bots of various kinds. These early bots were simple, they could regurgitate certain snippets or summarize other real written work, but soon they were able to engage in more complex activity and a trickle became a monsoon as bots started to generate content based solely on what other bots were doing, such that most of the data traffic now flowing through the internet is not generated by humans.[2] This poses a major

[2] "The Internet is Mostly Bots" https://www.theatlantic.com/technology/archive/2017/01/bots-bots-bots/515043/

problem if you are training an AI model, which needs lots of data, and not just any data, but good quality data. So much data that most AI models are now running out of good quality data and are increasingly facing a positive feedback loop that can spiral into AI failure.[3]

You should expect as a public agency attorney that you will increasingly face more Public Records Act requests that blanket entire categories of data or document type, because government records remain one of the last few sources of data that are both good quality and by law must be available for anyone to see, replicate, and use. This makes government records the equivalent of low-background steel for the AI industry.[4] You can manage an influx of these requests by advising your clients that if a record doesn't require redaction and is relatively easy to prepare, a transparency portal can reduce staff time for PRAs by eliminating the need to manually process repetitive requests.

II. The Darker Side of AI

While AI has a lot of promise to make certain tasks easier and faster, there are some unique issues that cities will have to face. SB 707 requires cities with populations of 30,000 or greater to offer 2-way teleconferencing as an option for public attendance at all public meetings. As AI deepfakes, voice replication, and visual distortion have become better, it is very likely that your city will eventually encounter artificial public speakers in the near future. Consistent application of the Brown Act at all public meetings will be your best defense as a city attorney until vendors are able to find a technological solution.[5]

Large language models have also dramatically lowered the cost and skill threshold for generating facially legitimate-looking legal and administrative documents. A malicious

[3] The positive feedback loop can be triggered by a confabulation, generating a demand for more training data, which in turn is lower quality, which results in even more confabulations.

[4] Low-background steel was produced prior to the first atomic tests and is necessary for certain scientific purposes because post-atomic steel is contaminated with certain radioisotopes. In much the same way, written work that predates the bot-driven internet era, or is generated independent of it, is not contaminated and remains useful for training models.

[5] Zoombombing is still likely to be your most persistent issue when at the dais, but AI reduces the cost.

actor targeting an organization's accounts payable function can now use AI chatbots to rapidly produce high volumes of demand letters, invoices, contractual claims, regulatory complaints, and dispute filings that are superficially coherent, professionally formatted, and difficult to distinguish at first glance from legitimate correspondence. What previously required legal knowledge, drafting skill, and significant time investment can now be accomplished by anyone in minutes. The economics of nuisance litigation and administrative harassment have fundamentally changed: the cost to the attacker is near zero, while the cost to the defender of processing, reviewing, responding, and escalating, remains substantial. Specific vectors include fabricated vendor invoices referencing real contract details scraped from public sources, AI-drafted demand letters asserting breach of contract or legal violations with plausible but false factual predicates. Deepfakes can also be used to mimic your city's personnel and direct staff to transmit funds to a threat actor.[6]

These actions violate numerous state and federal laws (such as mail or wire fraud statutes), however, enforcement remains impractical or impossible in many situations because threat actors are often located in places without an extradition treaty.[7] If the conduct involves interstate communications and intent to defraud, the Computer Fraud and Abuse Act[8] would also apply, and if automated tools are used to interact with organizational systems, RICO can also potentially apply if there is a pattern of conduct by an organized group.[9] The practical challenge for your city and your office is attribution. AI-generated content leaves few traditional forensic fingerprints, and the low barrier to entry means actors may operate across jurisdictions or through intermediaries, complicating both identification and service, so to the extent you can help facilitate evidence preservation, that should be your top priority.

[6] How Scammers Used Deepfake Video to Dupe a Company Out of Millions https://www.mcafee.com/ai/news/how-scammers-used-deepfake-video-to-dupe-a-company-out-of-millions/
[7] 18 U.S.C. §§ 1341, 1343
[8] 18 U.S.C § 1030
[9] 18 U.S.C. §§ 1961-1968

III. Advising Your Clients

On the procedural and operational side, cities should establish a formal triage protocol for unsolicited invoices that requires cross-referencing against internal contract and vendor databases before any payment or response is initiated. Anything that cannot be matched to a known counterparty relationship, purchase order, or prior correspondence should be treated as suspect regardless of how professionally it presents. Accounts payable staff should be trained specifically on AI-generated document characteristics, not to detect them technically, but to flag anomalies like claims with no prior relationship history, unusual specificity about internal processes, or pressure tactics around response deadlines.

On the legal and evidentiary side, your role as counsel should be to help set up procedures to preserve all incoming suspect communications in their original digital form, including metadata, routing information, and headers, as these may be critical to later attribution efforts. Organizations should also consider whether their vendor agreements and payment terms include provisions requiring disputes to be submitted through specific channels, which creates a cleaner basis for dismissing out-of-channel claims without engaging their merits. If your city is facing systematic campaigns rather than isolated incidents you should consider coordinated reporting to the FBI's Internet Crime Complaint Center (IC3) and relevant sector regulators, as pattern documentation across organizations is often necessary to trigger meaningful law enforcement attention.

The fundamental challenge is that the legal system is built around the presumption that generating a facially legitimate claim requires some minimum investment of knowledge and effort, which historically served as a natural filter on frivolous filings. AI has broken that assumption. The procedural and substantive responses available today were designed for a different threat environment, and organizations and courts alike are still adapting. Proactive internal controls are, for now, a more reliable first line of defense than post-hoc legal remedies.

IV. AI Tools for City Attorneys

While generative AI presents significant risks and requires care, the AI tools available to lawyers are incredibly powerful, and will only grow more efficient and useful.[10] The ABA's Task Force on Law and Artificial Intelligence noted in 2025: "[A]s the transformative power of the technology has become more widely known, the conversation has shifted from **whether** to use the AI technology to **how** to use it."[11] Generally, these AI tools fall into three categories. The first are publicly accessible tools such as OpenAI's ChatGPT[12] or Anthropic's Claude[13]. Free and publicly available, these tools are not trained on legal sources specifically, and are more likely to confabulate or make mistakes when asked legal questions. Further, the information placed into free versions is not private, and prompts are incorporated into the model and used to train it. Thus, while certain tasks, like drafting an email, can be done quickly and cheaply with ChatGPT, lawyers should carefully scrutinize what goes into, and comes out of, these tools.

Privacy issues can be mitigated by using a subscription version of these tools. Both ChatGPT and Claude have subscription versions that do not train their models on the data provided.[14] And Microsoft's Copilot operates within Microsoft Office tools such as Word, Excel, PowerPoint and Teams.[15] For example, you can draft an outline in Word, and ask Copilot to convert it to a PowerPoint presentation.[16]

Next are "off-the-shelf" legal tools that use a large language models (LLMs), such as Westlaw Advantage[17] and Lexis+AI.[18] These tools are trained on legal databases, and programmed to limit their responses to real authority. They also keep client data secure,

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[10] Many of the topics explored here were previously raised in Lee & Slentz, Artificial Intelligence and the Practice of Law, 2023 Cal Cities Annual Conference and Expo**.** This section reflects updates to the observations made in that prior article.

[11] ABA Task Force on Law and Artificial Intelligence, Addressing the Legal Challenges of AI, <https://www.americanbar.org/groups/centers_commissions/center-for-innovation/artificial-intelligence/> [as of Mar. 24, 2026].

[12] See Open AI, ChatGPT, <https://chatgpt.com/> [as of Mar. 24, 2026].

[13] See Anthropic, Claude, <https://claude.ai> [as of Mar. 24, 2026].

[14] See OpenAI, Enterprise privacy at OpenAI, <https://openai.com/enterprise-privacy/> [as of Mar. 24, 2026]; Anthropic, Plans that grow with you, <https://claude.ai/upgrade> [as of Mar. 24, 2026].

[15] Microsoft, What is a copilot? <https://www.microsoft.com/en-us/microsoft-copilot/copilot-101/what-is-copilot> [as of Mar. 24, 2026].

[16] *Ibid.*

[17] Thomson Reuters, Fast-track your legal research with Westlaw Advantage <https://legal.thomsonreuters.com/en/products/westlaw-advantage> [as of Mar. 24, 2026].

[18] LexisNexis, Lexis+ AI: The Generative AI for Lawyers, https://lexis-legal.ai/ [as of Mar. 24, 2026].

meaning the tool can be used without risking confidentiality. These tools have quickly gained wide use, with Thomson Reuter's CoCounsel, which can be used for a host of drafting and document review tasks, recently reaching over 1 million users worldwide.[19] Other tools focus more directly on a single aspect of legal work. These include Spellbook, a contract drafting platform that interfaces directly with Microsoft Word,[20] and Everlaw, which is designed for eDiscovery.[21] AI mediators have even begun to appear, although the efficacy of having an LLM act as a mediator waits to be seen.

Finally, there are boutique and in-house products, which go a step further and train a model based on a firm's own data. For example, Harvey AI is a legal services AI platform that "combines general internet data from the GPT model with legal-specific data, including case law and reference materials. When engaged by a law firm, Harvey AI undergoes further training using the firm's own work products and templates," which allows Harvey AI to tailor its product directly to client needs.[22] While these products offer the most benefit to consumers, they also take significant resources to build or buy, and may not be justifiable for public entities and smaller firms.

The potential applications of generative AI to legal tasks are nearly endless, but it performs certain tasks better than others. These include legal research, natural language drafting, and searching large databases for particular information. Conversely, generative AI still struggles at drafting tasks that require strict fidelity to the source documents, like producing a privilege log.

V. Legal Research and Analysis

Attorneys spend significant time researching and summarizing the law, and the prospect of telling a computer what you want and getting the right answer in minutes or seconds is enticing. In practice, legal research using an LLM can be risky if the model isn't trained on and limited to legal sources. ChatGPT and other broad-based tools can

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[19] LawSites, Three Years After Launching As First AI Legal Assistant, CoCounsel Reaches 1 Million Users, https://www.lawnext.com/2026/02/three-years-after-launching-as-first-ai-legal-assistant-cocounsel-reaches-1-million-users-and-thomson-reuters-teases-whats-ahead.html [as of Mar. 24, 2026].
[20] Spellbook, AI tailored for contracts, <https://www.spellbook.legal/> [as of Mar. 24, 2026].
[21] Everlaw, Discover the difference with Everlaw, <https://www.everlaw.com/> [as of Mar. 24, 2026].
[22] Williams, *Introducing Harvey AI: Revolutionizing the Legal Field with Artificial Intelligence*, Martindale AVVO (May 25, 2023) <https://www.martindale-avvo.com/blog/harvey-ai-artificial-intelligence/#:~:text=It%E2%80%99s%20built%20on%20Open.AI%E2%80%99s%20GPT%20AI%2C%20just%20like,legal-specific%20data%2C%20including%20case%20law%20and%20reference%20materials> [as of Mar. 24, 2023].

be surprisingly accurate, but are also convincing even when wrong. AI tools offered by Westlaw and Lexis, which are trained on a legal database and only return results from that database, present a safer and more accurate option. But these tools are often, by design, less creative. Using the two types of platforms in tandem is often an effective way to conduct legal research.

For example, ChatGPT gives a (correct) answer in a few seconds when asked: "In California, are monetary exactions imposed by the legislature, such as development impact fees, subject to the essential nexus and rough proportionality test under *Nollan v. California Coastal Commission* (1987) 483 U.S. 825 and *Dolan v. City of Tigard* (1994) 512 U.S. 374?" Westlaw's AI research will give the same answer, but with more nuance and greater citations to authority. See Exhibit A for ChatGPT's response.

LLM's can also apply the law to facts and help with legal analysis. Consider the following generic prompt:

> "I am the City Attorney for a general law city in California. The City received a complaint from a recently discharged employee that his supervisor discriminated against him. The City commissioned a third-party investigation by an attorney that determined the supervisor violated City policy but did not engage in any discriminatory conduct. A request has now been made under the California Public Records Act. Must we disclose the report? Please make the best arguments for and against disclosure, with their likelihood of success if challenged in court."

ChatGPT gives a detailed summary that is mostly correct, but misses a key point, that the report is likely an attorney-client privileged document prepared in anticipation of litigation and therefore exempt under the CPRA. Westlaw flags this issue. See Exhibit B for a comparison of responses from ChatGPT and Westlaw.

Documents may also be uploaded to LLMs for analysis. For example, ChatGPT can be given a complaint, told to issue spot for the best arguments to make at the pleading stage, and will produce a decent guideline for drafting a demurrer. Taking this step as you proceed from the research stage to the drafting stage may help identify arguments or issues missed in your initial research.

Overall, public generative AI tools such as ChatGPT are becoming increasingly useful in conducting legal research, but still tend to state their conclusions with more confidence than is merited. Conversely, tools designed for lawyers are more guarded in

their responses, but can still significantly shorten the time to complete research tasks. All such tools should be treated as a prolific first year associate: prone to errors and misunderstandings, but able to sift large amounts of data and provide concise summaries that will quickly point attorneys in the right direction.

VI. Brainstorming

LLMs are very good at "brainstorming" type activities, where the tool is prompted with information and produces a list of possible responses (generative AI makes a great thesaurus). These abilities can be applied to a variety of legal tasks, such as deposition preparation, claim and defense identification, and drafting interrogatories. For example, we gave Claude AI the following prompt:

> I am the City Attorney for the City of Pawnee. Several years ago, the City obtained a large open pit in a tax seizure that had been dug out by a condominium developer to host a basement before going bankrupt. Recently, local resident A. Dwyer (who lives next to the pit) fell in and broke both his legs. The incident happened at night, and we suspect he was under the influence of alcohol.
>
> A. Dwyer has sued the City for negligence, premises liability, and infliction of emotional distress. Please prepare deposition questions for A. Dwyer related to his claims.[23]

Given this information, Claude produces 6 pages of deposition topics and questions, including what is shown in Exhibit C.

Similarly, when given a follow up prompt to "draft interrogatories related specifically to A. Dwyer's knowledge of the pit's dangerousness," Claude produces a list of 25 interrogatories that can be used as a guide. As with most generative AI output, simply copying and pasting the results into a pleading would be a mistake. But these tools can help formulate questions, brainstorm different categories of questioning, and speed up the process of drafting discovery.

[23] See generally *Parks and Recreation:* Pilot (NBC Universal broadcast, April 9, 2009).

VII. Document Review

Generative AI tools are also excellent for sifting large amounts of information, which makes them ideal for assisting with discovery tasks. For example, a tool can be given a document and asked to summarize its contents. As with all AI prompts, the more information given to the tool, the more accurate and helpful the output.

More impressive is generative AI's ability to sort through large databases for information. During discovery, large databases of information can be uploaded, and then searched rapidly to answer simple questions. Cities can also build a document bank, making it possible to rapidly search their own precedent for answers.

VIII. Drafting and Revision

Generative AI is also good at producing first drafts of documents. Here, ChatGPT was asked to "draft a California ordinance prohibiting short term rentals in the city" and produced a draft set forth in Exhibit D.

While not perfect, the ordinance is decent starting place for drafting, and would save the user significant time. The user can then take that base and modify as necessary, or continue to prompt the model for revisions. Legal specific tools also offer a variety of contract drafting options, and will create, review, and revise contracts based on certain parameters.

IX. Pitfalls to Avoid When Using AI

Bixler v. Church of Scientology[24]

Boies Schiller represents plaintiffs in a lawsuit against the Church of Scientology and actor Danny Masterson. Plaintiffs contend they were subjected to harassment, surveillance, threats, and defamation after they came forward with sexual assault allegations against church member Masterson. Masterson was convicted of rape in 2023. The trial court denied the church's anti-SLAPP motion, and the church appealed. Boies Schiller filed an opposition brief full of AI errors, and the church then highlighted the AI errors in a table attached to the reply detailing 17 instances of AI errors.[25] The table identified the following types of errors:

[24] *Bixler v. Church of Scientology* (2nd Dist., B339009).

[25] *Bixler* (reply brief, Sept. 8, 2025).

citations to authorities that do not support the proposition;
citations with wrong reporter number or page numbers;
citations to authorities that do not exist; and
citations using incorrect case names.

Bixler is arguably the biggest AI failure in California courts. It involves a powerhouse national litigation firm working on a high-profile case. After the church identified the AI errors in the reply brief, Boies Schiller partner John J. Kucera submitted a declaration with a motion to file a corrected response brief admitting to AI-generated citation errors in the opposition brief.[26] Kucera accepted all responsibility and apologized for the errors, which he claimed occurred despite firm-wide AI usage policies.[27]

On February 19, 2026, the Court of Appeal issued an order to show cause on sanctions alleging the law firm submitted a brief with "at least ten purported case authorities that have been miscited or mischaracterized in more than fifteen places."[28] The Court is considering sanctions under California Rules of Court, Rule 8.276, subdivision (a)(4), Rule 8.204, subdivision (a)(1)(B), and Rule 8.1115, subdivision (a).[29]

X. AI Technology is not Infallible

At its core, an AI confabulation (hallucination) is a plausible looking but factually incorrect output or answer generated by an AI model. Importantly, AI errors are not technical glitches in an AI model, but result from a systemic vulnerability in how AI models are designed, built, and used. AI errors happen because AI models are pattern-matchers, not factual databases.

LLMs, the most commonly deployed consumer AI models, work by predicting the most likely next word. AI processes prioritize language fluency and giving the perceived desired answer over giving the correct answer. AI models can be completely false. When the AI model does not have enough data, or when the data is muddled, uncertain, or conflict, the answer is often incorrect.

As demonstrated by the *Bixler* case, using an AI model to draft legal analysis for briefs submitted to the court is risky. The AI model can give you a completely believable discussion of the elements of a cause of action and then cite to a case that does not exist.

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[26] *Bixler* (motion for leave to file corrected brief, Sept. 19, 2025).
[27] *Id*.
[28] *Bixler* (order to show cause, Feb. 19, 2026).
[29] *Id*.

Attorneys using AI models for this purpose must check the output to make sure that the AI did not commit errors that will be embarrassing if first found by the Court or opposing counsel.

Courts Punish Attorneys Who Include AI Errors in Briefs

Sanctions

California courts rely on several grounds to impose sanctions for AI errors. The leading published case in California, *Noland v. Land of the Free,* imposed sanctions for a violation of California Rule of Court, Rule 8.204, subdivision (a)(1)(B) requiring each brief to "[s]tate each point under a separate heading or subheading summarizing the point, and support each point by argument and, if possible, by citation of authority."[30] The *Nolan* court also relied on Code of Civil Procedure section 907 which allows sanctions for a frivolous appeal.[31] *People v. Alvarez* found a violation of California Rule of Court, Rule 8.1115, subdivision (a) barring citation to unpublished opinions because the attorney cited non-existent cases.[32] As authority for sanctions, *People v. Alvarez* imposed sanctions under Code of Civil Procedure section 128.7, subdivisions (b)(2), (c) and (h)[33] after deeming the attorney's behavior unprofessional.[34] *Noland* and *Alvarez* also relied on California Rule of Court, Rule 8.276, subdivision (a)(4) which allows sanctions for committing an unreasonable violation of the Rules of Court.[35]

Other Courts of Appeal have looked to the rules of professional conduct.[36] Rule of Professional Conduct, Rule 3.3, subdivision (a)(2) imposes a duty to not "knowingly misquote to a tribunal the language of a book, statute, decision or other authority." Similarly, Courts have found that AI errors cause an attorney to violate Business and professions Code section 6068, subdivision (d) which imposes a duty "never to seek to mislead the judge or any judicial officer by an artifice or false statement of fact or law."[37]

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[30] *Noland v. Land of the Free, L.P.* (2025) 114 Cal.App.5th 426, 447; see also, *Schlichter v. Kennedy* (2025) 116 Cal.App.5th 24, 33.

[31] *Noland, supra,* 114 Cal.App.5th at pp. 442, 447.

[32] *People v. Alvarez* (2025) 114 Cal App.5th 1115, 1119 ("*Alvarez*").

[33] Code of Civil Procedure section 128.7, subdivisions (b)(2) bars frivolous argument; Subdivision (c) authorizes sanctions upon attorneys; Subdivision (h) allows sanctions for unnecessary delay, actions that needlessly increase the cost of litigation and to deter improper conduct by attorneys.

[34] *Alvarez, supra,* 114 Cal App.5th at p. 1120.

[35] *Noland, supra,* 114 Cal.App.5th at p. 442; *Alvarez, supra,* 114 Cal App.5th at p. 1119; *Shayan v. Shakib* (2025) 116 Cal App.5thy 619, 624 [finding "unreasonable" violation of the rules of court].

[36] *Shayan v. Shakib* (2025) 116 Cal App.5thy 619, 624.

[37] *Id*.

Federal trial courts have imposed sanctions for AI errors as violating Federal Rule of Civil Procedure, Rule 11.[38] Rule 11 requires attorneys to sign filings certifying that after reasonable inquiry, the filings are not frivolous, intended to harass, or designed to cause unnecessary delay. Other federal courts have relied on 28 U.S.C. section 1927 which states: "Any attorney or other person admitted to conduct cases in any court of the United States or any Territory thereof who so multiplies the proceedings in any case unreasonably and vexatiously may be required by the court to satisfy personally the excess costs, expenses, and attorneys' fees reasonably incurred because of such conduct."[39] Federal appellate courts rely on Federal Rule of Appellate Procedure 46, subdivision (c) and the court's inherent authority.[40]

Types of Sanctions, Punishments, and Penalties

Lesser Penalties: Some courts have declined severe penalties in favor of general admonishment.[41] For example, in *Shelton v. Parkland Health*, the court determined judicial admonition was sufficient because filing the defective brief was sanctionable but not malicious.[42] Such admonishments usually carry a warning that future submissions with AI errors will be sanctioned.[43]

Monetary Sanctions: Courts impose monetary sanctions to penalize attorneys who have AI errors in filings. Courts generally link the monetary sanction to the fees the other side incurred responding to the defective filing.[44] Courts have also ordered sanctions

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[38] *ByoPlanet International, LLC v. Johansson* (S.D.Fla., July 17, 2025) 792 F. Supp. 3d 1341, 1351.

[39] *Lewis v. Eagle County Government* (D.Colo., Nov. 4, 2025, No. 25-cv-02269-NYW-NRN) 2025 WL 3639608, at p. *8–*9.

[40] *Fletcher v. Experian Information Solutions, Inc.* (5th Cir., Feb. 18, 2026, No. 25-20086) ___ F.4th ___, 2026 WL 456842, at p. *6.

[41] *Mareiorozyan v. Automobili Lamborghini America, LLC* (Los Angeles Super Ct., Nov. 19, 2025, No. 23VECV04028) 2025 WL 3669607, at p. *6 [denying motion to disqualify, monetary sanctions, and reporting to the State Bar but "strongly admonishes Plaintiff's counsel"]; *Yamin v. American States Preferred Ins. Co.* (Los Angeles Super. Ct., Oct. 16, 2025, No. 24SMCV03322) 2025 WL 3122627, at p. *2.

[42] *Shelton v. Parkland Health* (N.D.Tex., Nov. 10, 2025, No. 3:24-CV-2190-L-BW) 2025 WL 3141108, at p. *5.

[43] *Park v. Lee* (Los Angeles Super. Ct., Oct. 31, 2025, No. 22STCV03583) 2025 WL 3246457, at p. *4 [warning that court will assess sanctions on its own motion for future AI errors].

[44] *Howell Management Services, LLC v. Vashisht-Rota* (Dec. 15, 2025, D086055) 2025 WL 3628442, at p. *10 [nonpub. opn.] [awarding $59,235 in attorney's fees sanctions]; *Puerto Rico Soccer League NFP, Corp. v. Federación Puertorriqueña De Futbol* (D.P.R., Sept. 23, 2025, No. CV 23-1203 (RAM)) 2025 WL 2709484, at p. *8 [awarding $24,492.10 in attorney's fees based on very low prevailing hourly rates in Puerto Rico]; *ByoPlanet*, *supra*, 792 F. Supp. 3d at p. 1357 [attorney ordered to "pay the attorneys' fees for Defendants' counsel in these four cases for all time spent responding to any filing in which generative AI was used to develop hallucinated cases and fabricated quotations]; But see, *Noland, supra,* 114 Cal.App.5th at p. 448 [declining to award attorney's fees to opposing counsel because court found the AI errors].

paid to the court for AI errors found by the court.[45]

Rejected Filings: Courts may reject or strike the offending filing and deny the offending attorney the ability to correct the filing.[46] At least one Court noted that an errata cannot be used to correct AI hallucinations in filings.[47]

Disqualification: By revoking pro hac vice admissions, federal courts have effectively disqualified attorneys who submitted filings with AI errors.[48]

Dismissal: In one of the most egregious cases, *ByoPlanet*, the Florida district court hearing four cases determined an attorney acted in bad faith by signing the pleadings and ordered dismissal under the Rule 11 and the court's inherent powers.[49] After the attorney repeatedly submitted filings with AI errors in citations, the court ordered the cases dismissed without prejudice and without leave to amend and directed the clerk to assign any refiled cases to the same department.[50] Other courts have dismissed cases for similar violations.[51]

Bar Notification: State and federal courts refer attorneys who submit briefs with AI errors to the State Bar.[52]

Other Penalties: Angry courts imposed unique sanctions in certain egregious cases. In *ByoPlanet*, the Court ordered the offending lawyer to attach a copy of the sanctions

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[45] *Schlichter, supra,* 116 Cal.App.5th at p. 33 [ordering $1,750 sanction payable by the attorney to the court]; *Alvarez, supra,* 114 Cal App.5th at p. 1120 [ordering $1,500 sanction to "reimburse the court for a small portion of the time and resources expended on this issue"]; *Tercero v. Sacramento Logistics, LLC* (E.D.Cal., Sept. 9, 2025, No. 2:24-cv-00953-DC-JDP) 2025 WL 2605020, at p. *13 [ordering $1,500 paid to the court].

[46] *L.A. Housing Outreach, LLC v. Medoff* (2025) (Dec. 17, 2025, B341160) [nonpub. opn.] [granting motion to strike reply brief and awarding monetary sanctions]; *Mavy v. Commissioner of Social Security Administration* (D.Ariz. Aug. 14, 2025, No. CV-25-00689-PHX-KML (ASB)) 2025 WL 2355222, at p. *13.

[47] *Yamin, supra,* 2025 WL 3122627, at p. *2 ["it is not the proper office of an 'errata' to change the substance of the prior brief [by] chang[ing] the legal authority entirely."]. But see *Shayan, supra,* 116 Cal App.5th at p. 624 [striking filing but allowing attorney to refile corrected brief].

[48] *In re Jackson Hospital & Clinic, Inc.* (Bankr. M.D.Ala., Nov. 20, 2025, No. 25-30256-CLH) 2025 WL 3251167 at pp. *17-*18; *Mavy, supra,* 2025 WL 2355222, at p. *12 ("*Jackson Hospital*").

[49] *ByoPlanet*, *supra*, 792 F. Supp. 3d at pp. 1354, 1357. But see *Shayan, supra,* 116 Cal App.5th at p. 625 [declining to dismiss appeal because prejudice can be remedied and future misconduct deterred by other sanctions].

[50] *ByoPlanet*, supra, 792 F. Supp. 3d at pp. 1354, 1357.

[51] *Dubinin v. Papazian* (S.D.Fla., Nov. 21, 2025, No. 25-CV-23877-RAR) 2025 WL 3248187, at p. *3.

[52] *Tercero, supra,* 2025 WL 2605020, at p. *13; *Shayan, supra,* 116 Cal App.5th at p. 624 [ordering service of sanction order on State Bar]; *ByoPlanet*, supra, 792 F. Supp. 3d at p. 1357; *Mavy, supra,* 2025 WL 2355222, at p. *13.

order with any case he files in the Southern District of Florida within two years of the date of the order.[53] In *In re Jackson Hospital*, the Bankruptcy Court imposed numerous sanctions including a public reprimand, an order to provide a copy of the order to all clients, and directing the attorney's firm to provide a copy of the order to every attorney with an updated AI policy.[54] Courts have ordered offending lawyers to provide a copy of the order to judges in current and future cases.[55]

Ethical Issues

Relying on AI for legal research without checking whether the results are accurate or the authorities it produces exist is an abdication of professional responsibility.

Duty of Candor: Every attorney owes a duty of candor to the courts. That means the attorney must be forthright to the judge, never knowingly deceive or withhold negative facts or contrary legal authority. If a client lies on the witness stand and the attorney knows it to be false testimony, the attorney has a duty to disclose that to the judge. If the attorney knows a document is falsified, the attorney cannot submit it as genuine. Attorneys must tell judges when there isn't any case law on point, or when the law a lawyer argues for is contradicted by existing authority. In contrast, AI has no duty of candor to anyone.

If attorneys first make the mistake of relying on AI for legal research and then fail to confirm the accuracy of its results before including it in a court filing, that's a violation of the duty of candor. When an attorney signs a court filing, it carries representations that are imposed by law.

> California Rule of Professional Conduct, Rule 3.3 - Candor Toward the Tribunal: "(a) A lawyer shall not knowingly: (1) make a false statement of fact or law to a tribunal or fail to correct a false statement of material fact or law previously made to the tribunal by the lawyer; (2) fail to disclose to the tribunal legal authority in the controlling jurisdiction known to the lawyer to be directly adverse to the position of the client and not disclosed by opposing counsel or knowingly misquote to a tribunal the language of a book, statute, decision or other authority."
>
> Federal Rule of Civil Procedure 11: "(b) Representations to the Court. By presenting to the court a pleading, written motion, or other paper—

[53] *ByoPlanet*, supra, 792 F. Supp. 3d at p. 1357.
[54] *Jackson Hospital, supra,* 2025 WL 3251167 at pp. *17-*18;
[55] *DOC App, Inc. v. Leafwell, Inc.* (M.S.Fl., Nov. 26, 2025, No. 2:25-cv-838-SPC-NPM) 2025 WL 3288251, at p. *6.

> whether by signing, filing, submitting, or later advocating it—an attorney or unrepresented party certifies that to the best of the person's knowledge, information, and belief, formed after an inquiry reasonable under the circumstances: . . . (2) the claims, defenses, and other legal contentions are warranted by existing law or by a nonfrivolous argument for extending, modifying, or reversing existing law or for establishing new law . . . ."

No attorney can honestly file something with a state or federal court that contains unconfirmed AI citations.

Other rules of professional conduct are triggered by AI use. California Rule of Professional Conduct, Rule 3.1 states that "a lawyer shall not" "assert a position in litigation … without probable cause" or "present a claim or defense in litigation that is not warranted under existing law." California Rule of Professional Conduct, Rule 8.4(c) defines professional misconduct as "conduct involving dishonesty, fraud, deceit, or reckless or intentional misrepresentation."

In addition to impacts AI errors may have in litigation, AI raises broader issues for practicing attorneys. Legal research shouldn't just be about finding a case that supports your position and moving on. A competent attorney uses the research process to pick up on all the other related law that makes the stated position better or worse. Relying on AI to simply give you case cites skips the full research process. You may get accurate results and an accurate case cite, but you may miss other important aspects of the issue. For example, AI may find a case that says a party is required to exhaust administrative remedies before filing suit, but you completely missed out on the exceptions that might apply to your case. This does not serve the client's interests.

XI. Conclusion

AI is already having a lasting impact on the practice of law. It accelerates and simplifies basic legal work, freeing attorneys to pursue more complex tasks. However, as with any technology, attorneys must be mindful of their ethical duties, including how to competently and safely use large language models, how to advise clients on their use of this new technology, and to prepare their organizational clients for a rapidly evolving world.

EXHIBIT A
CHATGPT RESPONSE CASE STUDY– MONETARY EXACTIONS

Inquiry: "In California, are monetary exactions imposed by the legislature, such as development impact fees, subject to the essential nexus and rough proportionality test under *Nollan v. California Coastal Commission* (1987) 483 U.S. 825 and *Dolan v. City of Tigard* (1994) 512 U.S. 374?"

Short answer:

Yes—after 2024, monetary exactions imposed by legislation (such as development impact fees) are subject to the "essential nexus" and "rough proportionality" requirements of *Nollan v. California Coastal Commission* (1987) and *Dolan v. City of Tigard* (1994) under the Takings Clause. This was clarified by the U.S. Supreme Court in *Sheetz v. County of El Dorado* (2024).

However, the doctrinal details of how those tests apply to generally applicable legislative fee schedules remain unsettled.

---

1. Pre-2024 California Rule (Legislative Fees Not Subject to *Nollan*/*Dolan*)

Before *Sheetz*, California courts distinguished between ad hoc administrative exactions and legislatively imposed fees.

The California Supreme Court's decision in *San Remo Hotel L.P. v. City & County of San Francisco* (2002) held:

> Nollan/Dolan applies to discretionary, individualized permit conditions.
>
> Legislatively imposed development impact fees are instead reviewed under a deferential "reasonable relationship" test, often tied to the Mitigation Fee Act (Gov. Code § 66001).

The rationale was that legislative fees apply broadly and involve no individualized discretion, reducing the risk of governmental leveraging identified in *Nollan* and *Dolan*.

This distinction was followed by California appellate courts and reaffirmed in the Court of Appeal decision in *Sheetz v. County of El Dorado*, which held that generally applicable traffic impact fees were exempt from the *Nollan*/*Dolan* tests.

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2. The U.S. Supreme Court's Decision in *Sheetz* (2024)

The U.S. Supreme Court unanimously rejected the legislative vs. administrative distinction.

In *Sheetz v. County of El Dorado* (2024) the Court held:

The Takings Clause does not distinguish between legislative and administrative permit conditions.

Therefore permit exactions imposed by legislation can still violate the unconstitutional conditions doctrine.

Accordingly:

Legislatively imposed impact fees are not categorically exempt from the *Nollan*/*Dolan* essential nexus and rough proportionality tests.

---

3. What the Court Did *Not* Decide

The Court deliberately left several key issues unresolved, including:

Whether the specific El Dorado County fee satisfied *Nollan*/*Dolan*. The Court remanded the case for further proceedings.

How the "rough proportionality" test applies to generally applicable fee schedules (as opposed to individualized conditions).

Whether individualized determinations are required for legislatively imposed exactions affecting a class of developments.

Some concurring opinions suggested that general legislative schemes may satisfy *Nollan*/*Dolan* through broader studies rather than parcel-specific findings, but the Court did not adopt a definitive standard.

---

4. Current Doctrinal Framework (Post-Sheetz)

After *Sheetz*, the operative framework is:

Exaction doctrine applies to monetary exactions (recognized in *Koontz v. St. Johns River Water Management District* (2013)).

It applies regardless of whether the condition is imposed by administrators or by legislation (holding of *Sheetz v. County of El Dorado* (2024)).

The government must ultimately demonstrate:

Essential nexus between the exaction and a legitimate governmental interest (*Nollan*).

Rough proportionality between the exaction and the impacts of the development (*Dolan*).

But the precise evidentiary standard for legislative fee programs is still developing in lower courts.

✅ **Bottom line:**

Historically in California: legislative impact fees were not subject to *Nollan/Dolan*.

Now (post-2024): they are, because the Supreme Court has held that legislatures are not exempt from the unconstitutional conditions doctrine in land-use permitting.

EXHIBIT B
CHATGPT RESPONSE CASE STUDY WITH WESTLAW RESPONSE
EMPLOYMENT DISCRIMATION MATTER

Inquiry: "I am the City Attorney for a general law city in California. The City received a complaint from a recently discharged employee that his supervisor discriminated against him. The City commissioned a third-party investigation by an attorney that determined the supervisor violated City policy but did not engage in any discriminatory conduct. A request has now been made under the California Public Records Act. Must we disclose the report? Please make the best arguments for and against disclosure, with their likelihood of success if challenged in court."

ChatGPT Response:

1. Default rule under the CPRA

The CPRA requires disclosure of public records unless a statutory exemption applies. The principal exemptions relevant here are:

Government Code §7922.000 (public interest balancing test)

Government Code §7927.700

Investigative reports concerning employee misconduct fall squarely within the category courts have repeatedly analyzed.

---

2. Strong argument FOR disclosure

A. Courts require disclosure of substantiated misconduct

The most important precedent is:

Bakersfield City School District v. Superior Court

The California Supreme Court held that records of investigations into substantiated employee misconduct must generally be disclosed, subject to redactions.

The Court emphasized:

The public has a significant interest in knowing how government agencies investigate and address misconduct by public employees.

Disclosure promotes accountability and confidence in government operations.

Here, the report concluded that the supervisor violated City policy. That finding likely qualifies as substantiated misconduct, which strongly favors disclosure under *Bakersfield*.

Likelihood of success of disclosure argument

High (≈70–85%) that at least some version of the report must be produced, because:

Courts frequently order disclosure with redactions when misconduct is substantiated.

The misconduct finding strengthens the public interest side of the balancing test.

B. The public interest in agency investigations

Courts emphasize that disclosure allows the public to evaluate:

whether the agency adequately investigated misconduct, and

whether it appropriately disciplined the employee.

This reasoning was reinforced in:

City of San Jose v. Superior Court

The court held that investigative records about misconduct by public employees are often disclosable once the investigation is complete.

---

3. Strong arguments AGAINST disclosure

A. Personnel file exemption and privacy interests

The City can rely on Government Code §7927.700, which protects personnel and similar files when disclosure would constitute an unwarranted invasion of personal privacy.

Relevant privacy interests include:

the supervisor's personnel privacy, and

the complainant employee's privacy.

Courts often permit redaction of:

witness names

personal identifying information

sensitive factual details

The privacy interest may be stronger if:

the misconduct was minor, or

disclosure would cause significant reputational harm disproportionate to the public interest.

Likelihood of success

Moderate to low (≈25–40%) for withholding the report entirely.

Courts rarely allow complete nondisclosure when misconduct is substantiated.

B. The investigation rejected the discrimination allegation

A stronger argument is that the investigation exonerated the supervisor of discrimination, which was the primary allegation.

The City could argue:

The complaint concerned serious allegations of discrimination.

The investigation found no discriminatory conduct.

Disclosure could unfairly stigmatize the supervisor despite the finding.

Courts sometimes weigh reputational harm where allegations are unsubstantiated.

However, because the report found some policy violation, courts may still treat the matter as substantiated misconduct.

Likelihood of success

Moderate (≈35–45%) for narrowing disclosure or requiring significant redactions.

C. Catchall balancing exemption

Under Government Code §7922.000, the City can argue:

The public interest in nondisclosure clearly outweighs disclosure because:
the report concerns personnel discipline,
disclosure could discourage candid participation in workplace investigations, and
the allegations of discrimination were unsubstantiated.

However, courts generally hold that the public interest in government accountability outweighs these concerns once misconduct is found.

Likelihood of success

Low to moderate (≈30–40%).

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4. Likely judicial outcome

If litigated, the most likely result is:

Disclosure of the report with redactions.

Typical court-ordered redactions include:

complainant identity
witness names
personal contact information
sensitive personal details unrelated to misconduct

Courts often require agencies to produce:

the factual findings, and
the conclusion regarding policy violations.

---

5. Practical litigation risk assessment

Outcome	Estimated likelihood
Full nondisclosure	~20–30%

Outcome	Estimated likelihood
Disclosure with significant redactions	~50–65%
Disclosure with minimal redactions	~10–20%

The most likely outcome is partial disclosure.

---

6. Practical approach used by many cities

Many California public agencies handle this situation by:

Producing the investigative report, but redacting:

- Complainant identity
- Witness identities
- Personal details

Sometimes also redacting legal analysis or attorney advice portions if present.

✅ **Bottom line:**

Because the investigation substantiated a violation of City policy, courts are likely to find a significant public interest in disclosure under the CPRA. The City's strongest position is not full nondisclosure but disclosure with targeted redactions protecting privacy interests.

This answer is mostly correct, but misses a key point, that the report is likely an attorney-client privileged document prepared in anticipation of litigation and therefore exempt under the CPRA.[56] Westlaw flags the issue, as noted below:

Westlaw Response:

The strongest argument against disclosure rests on the attorney-client privilege and work product doctrine. Cal. Gov't Code § 7927.705 exempts records "the disclosure of which is exempted or prohibited pursuant to federal or state law, including, but not limited to, provisions of the Evidence Code relating to privilege" (West's Ann.Cal.Gov.Code § 7927.705). Cal. Evid. Code § 952 defines "confidential communication between client and lawyer" as information transmitted in confidence for legal consultation, including legal opinions and advice formed during that relationship (West's Ann.Cal.Evid.Code § 952). Because the City commissioned an attorney to conduct the investigation, the

[56] See *City of Petaluma v. Superior Court* (2016) 248 Cal.App.4th 1023.

report likely contains legal analysis, opinions, and recommendations that fall within this privilege (West's Ann.Cal.Evid.Code § 952).

EXHIBIT C

CLAUDE RESPONSE CASE STUDY – TRIP AND FALL MATTER

Inquiry: I am the City Attorney for the City of Pawnee. Several years ago, the City obtained a large open pit in a tax seizure that had been dug out by a condominium developer to host a basement before going bankrupt. Recently, local resident A. Dwyer (who lives next to the pit) fell in and broke both his legs. The incident happened at night, and we suspect he was under the influence of alcohol. A. Dwyer has sued the City for negligence, premises liability, and infliction of emotional distress. Please prepare deposition questions for A. Dwyer related to his claims.[57]

Claude Response: Deposition Topics and Questions

A. Activities Earlier That Day/Evening

1. Walk me through everything you did on the day of the incident, from the time you woke up until the incident occurred.
2. Where were you in the hours leading up to the incident?
3. Who were you with earlier that evening?
4. Did you consume any alcoholic beverages at any point on the day of the incident?
   [NOTE TO COUNSEL: This is a key area. Probe thoroughly: what was consumed, how much, over what time period, and where.]
   (a) If yes, what did you drink?
   (b) How many drinks did you have?
   (c) Over what period of time?
   (d) Where were you when you were drinking?
   (e) Who were you with?
5. Did you consume any prescription medications, over-the-counter medications, or other substances on the day of the incident?
   (a) If yes, what did you take, and at what time?
   (b) Are any of those substances known to cause drowsiness, impaired balance, or impaired judgment?
6. How would you describe your physical and mental state in the hour before the incident?
7. Do you recall what time it was when you left your residence that evening?

[57] See generally *Parks and Recreation:* Pilot (NBC Universal broadcast, April 9, 2009).

8. What was your intended destination or purpose for being outside at that time?

B. Approach to the Property

9. How did you come to be in the vicinity of the pit on the night of the incident?
10. Did you intentionally walk onto the City's property, or were you attempting to walk somewhere else?
11. Describe the route you took leading up to the incident.
12. What was the lighting like in the area at the time of the incident?
    (a) Were there streetlights nearby?
    (b) Was there any lighting at or around the pit?
    (c) Were you carrying a flashlight or using your phone's flashlight?
13. Were you wearing any corrective lenses at the time — glasses or contact lenses?
    (a) If you normally wear them, were you wearing them that night?
14. How would you describe the visibility conditions at the time — weather, moonlight, ambient light from nearby homes?
15. At any point before you fell, did you see the pit or observe the edge of the excavation?
16. Were you paying attention to where you were walking at the time you fell?
17. Were you using your phone or any other device at the time of the incident?

C. Plaintiff's Own Conduct

[NOTE TO COUNSEL: These questions go directly to comparative fault, assumption of risk, and contributory negligence defenses. Be thorough.]

18. Is there any reason you could not have walked on the public sidewalk or street instead of crossing onto the City's property that night?
19. Did anyone invite you or give you permission to be on the City's property that night?
20. Were there any barriers, fencing, or ropes around the pit that you crossed or circumvented before falling?
21. Did you observe any warning signs or postings before proceeding onto the property?
22. Do you believe your consumption of alcohol that evening had any effect on your balance, coordination, or awareness?

23. In hindsight, do you believe that walking near the pit at night, after drinking, was a wise decision?
24. Had anyone warned you — a neighbor, a friend, a family member — not to go near the pit?
    Is there anything you could have done differently that evening to avoid this incident?

EXHIBIT D

CHATGPT DRAFT ORDINANCE – SHORT TERM RENTALS

ORDINANCE NO. ___

AN ORDINANCE OF THE CITY COUNCIL OF THE CITY OF _____, CALIFORNIA, ADDING CHAPTER ___ TO TITLE ___ OF THE _____ MUNICIPAL CODE PROHIBITING SHORT-TERM RENTALS

WHEREAS

The City Council of the City of _____ finds and declares:

A. The City's residential neighborhoods are intended to provide stable housing for residents and long-term occupants.

B. The proliferation of short-term rentals has the potential to reduce the availability of long-term housing and increase housing costs for residents.

C. Short-term rentals may introduce transient commercial activity into residential neighborhoods, which can result in increased noise, parking congestion, public safety issues, and other neighborhood disturbances.

D. The City Council finds that the regulation and prohibition of short-term rentals is necessary to protect the public health, safety, and welfare of City residents and to preserve the residential character of neighborhoods.

E. The City has authority pursuant to its police powers under Article XI, Section 7 of the California Constitution to regulate land uses within its jurisdiction.

NOW, THEREFORE, THE CITY COUNCIL OF THE CITY OF _____ DOES ORDAIN AS FOLLOWS:

SECTION 1. Addition of Chapter ___

Chapter ___ is added to Title ___ of the _____ Municipal Code to read as follows:

Chapter ___

Short-Term Rental Prohibition

Section ___.010 Definitions

For purposes of this Chapter, the following definitions apply:

"Short-Term Rental" means the rental or lease of a residential dwelling unit, or any portion thereof, for a period of **less than thirty (30)**

consecutive days, whether advertised, offered, or facilitated through any medium including online platforms.

"Dwelling Unit" means a structure or portion thereof designed or used as a residence for one household.

"Hosting Platform" means any person or entity that participates in the short-term rental market by collecting a fee or facilitating the listing, advertising, booking, or payment for short-term rentals, including but not limited to websites and mobile applications.

"Owner" means the person or entity holding legal or equitable title to a dwelling unit.

Section ___.020 Prohibition

A. **Short-Term Rentals Prohibited.**

No person shall rent, lease, advertise, maintain, or operate a short-term rental within the City.

B. **Advertising Prohibited.**

No person shall advertise or offer a dwelling unit for use as a short-term rental within the City.

C. **Hosting Platforms.**

No hosting platform shall facilitate, advertise, or process bookings for a short-term rental located within the City.

Section ___.030 Long-Term Rentals Permitted

Nothing in this Chapter shall prohibit the rental or lease of a dwelling unit for a period of **thirty (30) consecutive days or longer**.

Section ___.040 Enforcement

A. This Chapter may be enforced by the City Manager, Code Enforcement Officer, or any other official designated by the City.

B. Violations of this Chapter constitute a public nuisance and may be enforced through administrative citations, civil action, or any other remedy authorized by law.

C. Each day a violation exists constitutes a separate offense.

Section ___.050 Administrative Fines

A. Any person who violates this Chapter shall be subject to administrative fines as follows:

First violation: $1,000

Second violation within twelve months: $2,000

Each additional violation within twelve months: $5,000

B. Each rental transaction or booking shall constitute a separate violation.

Section ___.060 Remedies Not Exclusive

The remedies provided in this Chapter are cumulative and not exclusive. The City may pursue any other remedy available under state or local law, including injunctive relief.

SECTION 2. Severability

If any section, subsection, sentence, clause, or phrase of this ordinance is held invalid or unconstitutional by a court of competent jurisdiction, such decision shall not affect the validity of the remaining portions of this ordinance.

SECTION 3. Effective Date

This Ordinance shall take effect **thirty (30) days** after adoption.

SECTION 4. Publication

The City Clerk shall certify to the adoption of this Ordinance and shall cause the same to be published or posted as required by law.

ADOPTED this ___ day of ____**, 20**.
CITY OF _____

Mayor
ATTEST:

City Clerk

Optional Additions Many California Cities Include

If you want the ordinance to be more litigation-resistant, cities often add:

Explicit housing element findings (loss of long-term housing stock)
Evidence findings about STR impacts
Grandfather/amortization clause for existing STRs

2026 Land Use and CEQA Litigation Update

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Land Use & CEQA Litigation Update

Cases Reported September 1, 2025, through April 15, 2026

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Wednesday, May 13, 2026
2:45 – 4:45 Session

League of California Cities
City Attorney Spring Conference
Spring 2026

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I. CEQA Case Summaries

A. *Save Our Access v. City of San Diego* (2025) 115 Cal.App.5th 388

HOLDING

The Court of Appeal held that:

(1) The City failed to analyze potential impact of ballot measure on noise levels, air quality, biological resources, and geological conditions in the area; and

(2) Deferral of full environmental analysis of ballot measure until individual site-specific projects were proposed was not adequate.

Facts

In 2020, voters in the City of San Diego approved a ballot measure relying on a 2018 Program EIR, which was invalidated by the Court of Appeal in *Save Our Access v. City of San Diego* (2023) (*Save Our Access I*) 92 Cal.App.5th 819 for inadequate CEQA review. While the appeal in *Save Our Access I* was pending, the City prepared a Supplemental EIR and voters again approved removal of the height limit in 2022, prompting a second CEQA challenge. In *Save Our Access v. City of San Diego* (2025) ("*Save Our Access II*") 115 Cal.App.5th 388, the Fourth District Court of Appeal considered San Diego voters' second attempt in five years to eliminate the 30-foot coastal height limit in the Midway-Pacific Highway Community Planning Area to facilitate redevelopment.

Claims Raised

Petitioners argued that the City had not complied with CEQA requirements to adequately inform the public of the potential environmental impacts of approving the *second* ballot measure to remove the height limit in the Midway-Pacific Highway area, to identify possible mitigation measures, and to disclose the reasons for approving removal of the height limit even if there are significant environmental impacts.

Analysis

The Court identified multiple topics—noise, air quality and greenhouse gases, biological resources, and geologic hazards—that, in its view, had not been sufficiently addressed in either the Program EIR or the Supplemental EIR. For example, with respect to noise, the Court determined that because the PEIR had assumed that the 30-foot height limit would remain in place, it had not assessed whether taller buildings could reflect and refract more ambient noise, or whether constructing taller buildings would itself increase noise.

The Court invited the parties to submit supplemental briefs addressing whether any changes to CEQA from recently enacted Assembly Bill No. 130 and Senate Bill No. 131 impact the issue presented in this appeal. The Court further held that the AB 130 CEQA exemption for infill housing applies only to specific development projects, not to legislative actions such as removing a height limit, even if that action would facilitate infill housing.

The Court of Appeal again invalidated the 2022 ballot measure, holding that the Supplemental EIR failed to adequately analyze the broader environmental consequences of eliminating the height limit and improperly relied on assumptions embedded in the earlier Program EIR that were premised on the continued existence of the 30-foot cap.

Practice Tip

Save Our Access II applies a fairly rigorous form of scrutiny to the City's conclusion that the assumptions underlying the Program EIR would remain valid even with the 30-foot height limit removed. If other courts follow that approach, some argue that it could significantly lessen the benefit (in the form of time and cost savings) of tiering off an earlier environmental document if some of the relevant conditions have changed.

B. *Tulare Lake Basin Water Storage District v. Department of Water Resources* (2025) 115 Cal.App.5th 342

HOLDINGS

The Court of Appeal held that:

(1) CEQA's whole-of-an-action requirement and prohibition against piecemealing is not incorporated into the Sacramento-San Joaquin Delta Reform Act's certification of consistency requirement; and

(2) Delta Reform Act did not require the California Department of Water Resources (DWR) to submit a certification of consistency before engaging in preconstruction geotechnical work

Facts

DWR planned to conduct preconstruction geotechnical work in the Sacramento-San Joaquin Delta and Suisun Marsh as part of preparations for the Delta tunnel project. Various municipal, tribal, and public interest entities objected, arguing that DWR could not begin this work until it certified that the tunnel project was consistent with the Delta Plan, as required by the Sacramento-San Joaquin Delta Reform Act of 2009. The Delta Reform Act created a new governance approach for the Sacramento-San Joaquin Delta, prioritizing the coequal goals of creating a more reliable water supply and protecting/restoring the Delta ecosystem. The disputed geotechnical work included soil borings, groundwater monitoring, test trenches, and other activities intended to inform the project's design and mitigation measures.

The Trial Court found that DWR's planned geotechnical work was an integral part of the tunnel project, which was a "covered action" under the Delta Reform Act, and concluded that DWR was required to certify consistency before initiating any part of the project, including the geotechnical work. Accordingly, the Trial Court issued preliminary injunctions preventing DWR from conducting the preconstruction geotechnical work until it submitted a certification of consistency with the Delta Plan. DWR subsequently approved a more limited set of

preconstruction geotechnical tasks and filed an ex parte application to modify or stay the preliminary injunctions to allow those more limited geotechnical tasks to proceed. The Trial Court denied the ex parte application, concluding the scaled-down geotechnical work was still part of the covered action requiring DWR to complete the certification process before engaging in geotechnical work.

DWR then prepared and submitted a certification of consistency to the Delta Stewardship Council for the scaled-down geotechnical work and several of the plaintiffs appealed that certification to the Council. The Council dismissed the appeals, concluding that it lacked jurisdiction to rule on them because the geotechnical work was not a covered action under the Delta Reform Act.

Claims Raised

Petitioners argued that the Delta Reform Act's certification of consistency requirement incorporated CEQA's "piecemealing" and "whole-of-an-action" concepts so as to render the proposed preconstruction geotechnical work inseparable from the overall Delta Tunnel project and thus precluding DWR from proceeding with the geotechnical work absent a certification of consistency.

Analysis

The Court of Appeal disagreed with the Trial Court and concluded that the Delta Reform Act did not incorporate CEQA's piecemealing and whole-of-an-action concepts. It did so for three primary reasons. First, the purposes of the two statutory schemes (CEQA and the Delta Reform Act) differ. CEQA includes the whole-of-an-action and piecemealing concepts to make sure that EIRs fully inform decisionmakers of all reasonably foreseeable impacts before a project is considered for approval. The Delta Reform Act, on the other hand, requires certification of consistency with the Delta Plan after project approval, but before implementation of a covered action. In sum, the certification of consistency requirement is not an informational document like an EIR, but one geared to ensuring plan consistency. The Court cautioned parties against applying concepts from another law that serves a different purpose. Second, the Court of Appeal discussed why DWR's proposed preconstruction geotechnical work did not meet all of the Delta Reform Act's requirements to be considered a covered action, and the Court also found insufficient indication that the legislature, in enacting the Delta Reform Act, intended its certification requirement to include the CEQA concepts. Third, the Court of Appeal found that the Delta Stewardship Council's dismissal of the plaintiffs' appeals was entitled to great weight since its decision was an adjudication of law by an administrative agency with expertise regarding the Delta Reform Act and was well-reasoned.

Practice Tips

Be wary when importing concepts from one statute and attempting to apply them to a separate statute, especially when they entail separate statutory schemes with different purposes.

C. *Make UC a Good Neighbor v. Regents of University of California* (2025) 117 Cal.App.5th 282

HOLDING

Petitioners were not "successful parties" entitled to recover attorney fees under Code of Civil Procedure section 1021.5 where their temporary appellate victories were subsequently abrogated by legislation and reversed by the Supreme Court.

Facts

Make UC A Good Neighbor and the People's Park Historic District Advocacy Group ("Good Neighbor") brought action against Regents of the University of California ("UC Regents") alleging violations of the California Environmental Quality Act ("CEQA") and seeking writ of mandate voiding approvals of the university's development plan, the People's Park housing project in Berkeley, and related environmental impact report ("EIR"). The Trial Court denied the writ petition, and Good Neighbor appealed. The Court of Appeal (*Make UC a Good Neighbor v. Regents of University of California* (2023) 88 Cal.App.5th 656) reversed and remanded, ruling in favor of Good Neighbor. Both parties petitioned for review to the Supreme Court.

In 2023, via AB 1307 (Wicks), the California Legislature enacted legislation abrogating the Court of Appeal's holdings. AB 1307 specified that the effects of noise generated by project occupants and their guests on human beings is not a significant effect on the environment for residential projects for purposes of CEQA. The Legislature also provided that "institutions of public higher education shall not be required, in an environmental impact report prepared for a residential or mixed-use housing project, to consider alternatives to the location" of the proposed project if certain requirements are met.

The Supreme Court (*Make UC a Good Neighbor v. Regents of University of California* (2024) 16 Cal.5th 43) granted UC Regent's petition, denied Good Neighbor's petition, and subsequently reversed in light of AB 1307. On remand, the Trial Court entered judgment for UC Regents and denied Good Neighbor's motion for attorney fees. Petitioners appealed.

Claims Raised

Good Neighbor argued it was a "successful party" and thus entitled to recover its attorneys' fees under Code of Civil Procedure section 1021.5, the "private attorney general" statute, because it secured important legal precedents when the Court of Appeal ruled in its favor on two issues.

Analysis

To obtain an attorney fee award under section 1021.5, the movant must establish that (1) it is "a successful party" in an action; (2) the action resulted in the enforcement of an important right affecting the public interest; (3) the action conferred a significant benefit on the general public or a large class of persons; and (4) the necessity and financial burden of private enforcement (or enforcement by one public entity against another) make an award appropriate. This case turns on the

"successful party" requirement. The successful party is "the party to litigation that achieves its objectives." The question is whether the Supreme Court's opinion is inconsistent with, or disapproved, the relevant parts of the Court of Appeal's opinion. If not, it remains citable, binding precedent.

Once the Supreme Court issues a decision, rule 8.1115(e)(2) governs its status: "[U]nless otherwise ordered by the Supreme Court under (3), a published opinion of a Court of Appeal in the matter ... is citable and has binding or precedential effect, except to the extent it is inconsistent with the decision of the Supreme Court or is disapproved by that Court." Under California Rules of Court, rule 8.1115, the Supreme Court's reversal disapproved the Court of Appeal's opinion on both issues, meaning they are not citable precedent. This is unambiguous disapproval, so Good Neighbor was not a successful party.

D. *Krovoza v. City of Davis* (2025) 117 Cal.App.5th 623

HOLDING

Petitioners failed to establish that the unusual circumstances exception applied to negate the City's claimed CEQA exemptions under either of the alternative tests for proving that exception because evidence a project would violate a standard in the City's noise ordinance standing alone does not constitute substantial evidence that the project will have a significant effect on the environment when the only substantial evidence in the record showed that the playground equipment relocation project would actually reduce noise at all measures locations.

Facts

The City installed Sky Track playground equipment (described to be akin to a zip line) at Arroyo Park in May of 2019. In response to noise complaints from neighbors, the City retained a noise expert who took noise measurements at the location of the equipment and at nearest residences which showed that the equipment's noise level at the nearest residences was under the City's noise threshold during the day but exceeded the noise threshold at night. In response, the City attempted to mitigate the nighttime noise by erecting signs and making social media posts indicating the park was closed from sunset to 8 am daily, installing additional rubber bumpers at both ends of the equipment to absorb noise from the track, and assigning staff to lock/chain the equipment to prohibit its use at night. While effective, vandalism of the lock mechanisms and City staffing challenges minimized the effectiveness of those efforts.

In response the City decided to explore relocating the equipment and hired a different noise consultant to assist in the evaluation. That consultant's noise measurements showed that the equipment's noise levels actually exceeded both the City's day and night noise thresholds at the nearest residences under certain circumstances and in response the City closed the Sky Track equipment pending its relocation. The new noise consultant studied four different alternative locations for the Sky Track equipment within the park and found that if the equipment was moved to any one of three of the four alternative locations (i.e., Alternatives A, B and C) the noise levels at the nearest residences would be reduced at all three testing locations and would meet the City's day and night standards at those nearest residences. The City approved the relocation of the Sky Track to alternative location B and found that the project was exempt under

the CEQA Guidelines' categorical exemptions for Class 3 (new construction, installation, or conversion of limited number of small structures, facilities, equipment), Class 4 (minor alterations to land, water, vegetation), and Class 11 (construction or placement of accessory structures) pursuant to CEQA Guidelines sections 15303, 15304, 15311. Petitioners filed a writ petition challenging the exemption. The Trial Court denied the petition and petitioners appealed.

Claims Raised

Petitioners alleged that evidence the playground equipment created noise exceeding the City's noise standards established that the unusual circumstances exception is met under either of the two tests articulated by the California Supreme Court in *Berkeley Hillside Preservation v. City of Berkeley* (2015) 60 Cal.4th 1086 and thus that the exception negated all three of the categorical exemptions relied upon by the City.

Analysis

Pursuant to the *Berkeley Hillside* decision, the unusual circumstances exception may be established by: (1) showing *with evidence* that the project *will* have a significant effect on the environment; or (2) showing the project has some feature that distinguishes it from others in the exempt class, such as its size or location and there is a reasonable possibility of a significant effect on the environment due to that unusual circumstance.

The Court of Appeal rejected the Petitioners' arguments under both tests. The Court started by highlighting several key legal principles, including that the party challenging the exemption has the burden of producing evidence supporting an exception and that under both of the *Berkeley Hillside* tests the phrase "significant effect on the environment" means "a substantial, or potentially substantial, *adverse change* in the environment. Applying these principles, the Court agreed with the City's position that a project's violation of an agency's noise ordinance, standing alone, cannot constitute substantial evidence that the project *will* have a significant noise impact unless there is evidence showing the project results in an adverse change in the environment. The Court next found that if anything, the playground equipment relocation project would reduce the equipment's noise at the nearest residences. Without evidence of an adverse change in the noise, the Petitioners' claims failed.

Practice Tips

Proving an exception to a CEQA exemption requires substantial evidence that the baseline conditions will actually change in an adverse way, which entails measuring project's effects against the baseline conditions, not just against a standard expressed in a City ordinance.

E. *Coalition of Pacificans for an Updated Plan v. City of Pacifica* (2025) 117 Cal.App.5th 647

HOLDINGS

The Court of Appeal held that:

(1) Government Code 65589.5(p)(1) does not prohibit courts from considering a housing development project's potential environmental impacts when deciding whether to award attorney fees in a case challenging the project's approval; and

(2) The Trial Court abused its discretion and erred: (a) in using a statewide benchmark (i.e., two million housing unit statewide deficit) to conclude the project's eight units did not further the HAA's policy of expanding the housing supply; and (b) in ruling that the City of Pacifica as a whole was not an "urban area" to conclude the project did not further the HAA's policy of encouraging in fill housing development in existing urban areas.

Facts

Petitioners partially prevailed on CEQA claims challenging the adequacy of an initial study/mitigated negative declaration prepared for an eight unit housing development project and the Trial Court entered judgment for Petitioners and issued a writ commanding the City to set aside the project approvals. Petitioners then sought to recover their attorneys' fees jointly and severally from the City and Real Parties in Interest by filing a motion under CCP section 1021.5. The Trial Court issued a tentative ruling indicating its intention to grant the motion but, after modifying the tentative during the hearing on the fee motion, directed Petitioners to prepare a formal order after meeting and conferring with the City and Real Parties. While the motion was still pending and before the Trial Court issued its final ruling, a new provision added to the Housing Accountability Act (HAA) by AB 1633 became effective.

Specifically, AB 1633 added subdivision (p) to Government Code section 65589.5 which, in the case of a successful challenge to the approval of a housing development project, requires a court in ruling on a fee motion under CCP section 1021.5 to give due weight to certain additional factors when considering whether section 1021.5's substantial benefit and necessity of private enforcement criterion were satisfied. Those additional factors include whether the approval furthered the policies of the HAA, the suitability of the site for housing, and the reasonableness of the approving agency's action. After requesting additional briefing and argument on the new HAA provision, the Trial Court issued its final order granting the motion and awarding Petitioners nearly $1.3 million.

In addition to ruling that Petitioners satisfied the requirements of section 1021.5 given they had provided expert evidence that the project may have significant impacts, the Trial Court also considered the new HAA factors and found that the project's eight units would not substantially advance the policies of the HAA given the statewide deficit of two million housing units. The trial Court also found that the policy encouraging urban infill development was not furthered because the City of Pacifica was not an urban area and that the City had acted unreasonably in approving the project given its potential environmental impacts. Both the City and Real Parties appealed the order granting the fee motion.

Claims Raised

The City and Real Parties contended that the Trial Court erred in its interpretation and application of the housing-related factors new Government Code section 65589.5(p)(1) required the court to give due weight to in determining whether the requirements for a fee award under CCP 1021.5 have been met.

Analysis

The Court first addressed and ultimately rejected Real Parties' argument that the new Government Code section 65589.5(p)(1) imposes significant restrictions on fee awards by requiring that Courts can consider *only* the factors listed in that provision and may not take into account a project's potential environmental impacts. The Court looked at both the plain language and legislative history of the statutory language at issue and concluded that because neither states that a Court is prohibited from considering other factors there is no basis to conclude a trial Court must ignore a project's potential environmental impacts when making the required determinations under CCP section 1021.5. However, the Court cautioned against relying on claims of the mere possibility of a significant impact that are enough to satisfy the low threshold fair argument standard of review applicable to MND challenges to support a finding that a project site is not suitable for housing development. As such, the Court made clear that if a Court is to weigh potential environmental impacts under Government Code section 65589.5(p)(1)'s "suitability" factor, it should do so in a manner consistent with the preliminary nature of its inquiry in the underlying proceeding.

Nonetheless, the Court went on to find the Trial Court abused its discretion twice over in finding that the project did not further the HAA's policies of expanding housing supply in urban infill sites. First, the Court found that the Trial Court erred when it downplayed the significance of the project's housing units by comparing the projects' eight housing units to the entire state's housing deficit. The Court held that by employing such a de minimis or drop-in-the-bucket analysis, the trial Court rendered the factor meaningless because no project alone could be found to make a significant impact on a the state's estimated two-million-unit shortfall. Second, the Court found the Trial Court erred when it concluded that the project did not further the HAA policy encouraging in fill housing development in existing urban areas because it found the City of Pacifica was not an urban area. The Court held that it was inappropriate for the Trial Court to use a categorical approach that designates an entire county or City as being urban or not urban.

Practice Tip

Practitioners seeking or opposing fees pursuant to a CCP section 1021.5 motion in cases challenging a local agency's approval of a housing development project must now carefully address and give due weight to the factors in Government Code section 65589.5(p) when considering section 1021.5's significant benefit and necessity of private enforcement prongs.

F. *City of Vallejo v. City of American Canyon (Buzz Oates)* (2026) 117 Cal.App.5th 1112

HOLDINGS

The Court of Appeal held that:

(1) An analysis of water supply in an EIR may incorporate by reference information in an urban water management plan;

(2) American Canyon waived its failure to exhaust administrative remedies defense by not raising it in the Trial Court;

(3) American Canyon's EIR was not legally inadequate for failing to disclose differences between contracted amounts of water and amounts delivered; and

(4) An EIR's failure to discuss place of use restrictions did not amount to an actionable abuse of discretion where the restrictions only affect the areas within a project where water subject to a license could be used, and not the quantity of water available as a while.

Facts

Developer proposed construction and operation of a 2.4 million-square-foot industrial warehouse complex on undeveloped, industrially zoned land in the City of American Canyon which would require 23.9 acre-feet (af) of potable water supply per year. American Canyon does not currently have access to groundwater so it relies on outside sources of water, receiving most of its water supply from the State Water Project, with the rest (approximately 23% in a normal year) supplied by the adjacent City of Vallejo pursuant to a contract (the "1996 Agreement") between the two cities. Vallejo also receives water from the State Water Project but Vallejo also holds an appropriative water right known as License 7848. The 1996 Agreement authorizes three types of water purchases: (1) up to 3,206 af of potable treated water per year; (2) up to 500 af of raw water diverted from the Sacramento-Bay Delta pursuant to License 7848; and (3) up to 500 af of emergency raw water in dry years only. The 1996 Agreement is the subject of a separate breach of contract lawsuit between American Canyon and Vallejo, the details of which are not part of the record.

American Canyon prepared an EIR under CEQA to assess the industrial warehouse project's potential environmental impacts that included a Water Supply Assessment which incorporated American Canyon's 2020 Urban Water Management Plan (the "2020 Plan"). 90 minutes before the public hearing scheduled to consider certification of the EIR and approval of the project, Vallejo sent an email to American Canyon attaching two letters alleging both the EIR and the 2020 Plan were inadequate. American Canyon continued deliberations on the project to review Vallejo's comment letters but after receiving a legal opinion from outside counsel that its water supply assessment for the project was legally sufficient it certified the EIR and approved the project. Vallejo and two environmental groups filed writ petitions in Napa County Superior Court. The actions were consolidated and transferred to Sacramento Superior Court. The environmental groups both settled and the Trial Court denied Vallejo's petition for writ of mandate and Vallejo appealed.

Claims Raised

Vallejo argued that the project EIR violated the water supply disclosure requirements of CEQA and also the provisions of Water Code sections 10910 and 10911. Specifically, Vallejo's CEQA claims alleged the EIR violated CEQA because it failed to disclose the actual volumes of water American Canyon purchased under the 1996 Agreement, failed to explain that the License 7848 water came with place of use restrictions, failed to disclose the impact of emergency curtailment orders on water supply availability and failed to disclose the contract litigation. Vallejo's non-CEQA claim essentially realleged its CEQA arguments under the Water Code statutes.

Analysis

Before addressing the merits of Vallejo's arguments the Court of Appeal first tackled American Canyon's assertion that Vallejo's claims were barred for failure to exhaust administrative remedies. Ultimately, the Court concluded that American Canyon had waived the defense because it failed to raise it in the Trial Court.

On the merits, the Court began by reviewing the four principles from the California Supreme Court's seminal decision in *Vineyard Area Citizens for Responsible Growth, Inc. v. City of Rancho Cordova* (2007) 40 Cal.4th 412 concerning the sufficiency of an EIR's water supply analyses. Under *Vineyard*, an EIR must present sufficient facts for decisionmakers to evaluate water supply, must not defer analysis of future sources, must identify supplies bearing a reasonable likelihood of availability rather than relying on "paper water," and must discuss alternative sources where future supplies remain uncertain. At the same time, the Court emphasized, a project need not have "definitely assured water through signed, enforceable agreements."

The Court then applied those core water supply principles and rejected Vallejo's first claim that the contracted amounts under the 1996 Agreement represented "paper water" rather than a reliable source of supply, pointing out that American Canyon had received all of its contracted water under the 1996 Agreement for all but one year since 1999 and purchased less than its full allotment due to cost, not supply constraints. Because these water supplies were neither uncertain nor unlikely to be available, the Court found there was no evidence in the record to conclude the contracted water supply entitlements were merely "paper water."

The Court moved on to also reject Vallejo's argument that the EIR's failure to disclose place of use restrictions in the 1996 Agreement was prejudicial error. The Court emphasized that while those restrictions prevented delivery of the contracted supply directly to the project site, the restriction only affected where water could be used, not the overall volume of water available. Because the EIR concluded that total projected water supplies in American Canyon would be sufficient to meet the project's water demand in all years and scenarios, the omission of the place of use restrictions was not substantial and was harmless.

The Court also found Vallejo's claims that the EIR was inadequate due to the EIR's failure to disclose the possibility of emergency water curtailments on water supply availability were without merit because the EIR mentioned past curtailment and that American Canyon's water from both the State Water Project and from Vallejo came from the Delta watershed through the

North Bay Aqueduct and that both sources could be curtailed.

Finally, the Court similarly rejected Vallejo's claims that the EIR was inadequate for failing to discuss alternative water supply sources and the breach of contract litigation between the cities. The Court noted that alternative water supplies need only be discussed in an EIR if the lead agency is unable to determine whether a particular water supply source would be available, which was not the case here, and concluded that without any evidence in the record about the substance of the breach of contract litigation (which was due to Vallejo's failure to provide an adequate record on that point) there was no way for the Court to assess whether that omission undermined the EIR's conclusion of an available and sufficient water supply.

Practice Tips

Make sure to raise the failure to exhaust administrative remedies defense early and often to ensure it isn't deemed waived. An EIR's omission of relevant information does not automatically invalidate an EIR, it must be shown that the omission was prejudicial because it precluded informed decision making and public participation.

G. *Physicians for Social Responsibility - Los Angeles v. Dept. of Toxic Substances Control* (2026) 118 Cal.App.5th 1071

HOLDING

The Petitioner, as the non-prevailing party in a CEQA action, was not entitled to attorneys' fees under the "catalyst theory" because a judicial resolution on the merits had been reached.

Facts

The Boeing Company (Boeing) owns land, known as Area IV, which was previously leased to the U.S. Department of Energy (DOE) and contaminated due to DOE's nuclear research program in the 1980s. The DOE is responsible for supervising and implementing the cleanup of radioactive contamination. The California Department of Toxic Substances Control (DTSC) is the lead agency responsible for regulating the cleanup of chemical contamination.

Boeing sought to demolish several of its buildings within Area IV. Environmental group brought action against DTSC seeking writ of mandate to compel compliance with CEQA regarding demolition of buildings. Among other claims, the group asserted that Boeing's demolition and disposal activity was subject to CEQA but that DTSC failed to consider the environmental impact of such activity.

The Trial Court denied the group's petition for writ of mandate and then denied the group's motion for attorney fees based on the agency's intervening voluntary action in including demolition project in environmental assessment and subjecting it to mitigation identified in EIR. Group appealed.

After the Court of Appeal issued its decision, but before the Supreme Court denied review, DTSC issued a final EIR which analyzed the demolition activity for informational purposes, "in

order to provide a conservative assessment of the impacts from the site cleanup."

Claims Raised

According to the Petitioner, DTSC's analysis of Boeing's demolition in the EIR means Petitioner obtained the primary objective of the litigation, i.e., "review in the Final EIR, reflecting DTSC's efforts to comply with CEQA and to mitigate the impacts of the entire Santa Susana Field Laboratory remediation, including Boeing's demolition." Petitioner contends it was a "successful party" under a catalyst theory applicable to CCP section 1021.5 and filed a motion for attorney fees to be recovered from DTSC.

Analysis

The Court of Appeal disagreed with Petitioner's CEQA claims, concluding that although the soil and groundwater remediation programs were undisputably subject to CEQA, the demolition of the Area IV buildings was a private activity entirely within Boeing's discretion and constituted activity that was not subject to discretionary approval by a public agency, and thus not subject to CEQA. Thus, Petitioner did not obtain any of the relief sought through either the judgment issued by the Superior Court or the decision by the Court of Appeal.

H. *Bair v. California Department of Transportation* (2026) ___ Cal. App. 5th ___ (2026 WL 835777, Mar. 26, 2026, Case No. A172681)

HOLDING

Because discharge of a prior writ conclusively determined that an addendum correcting deficiencies in a prior EIR complied with CEQA, petitioners' renewed challenge was barred by res judicata.

Facts

The California Department of Transportation's (Caltrans) is the lead agency for a highway construction project consisting of improvements to a stretch of U.S. Highway 101 that passes through Richardson Grove State Park in Humboldt County, home to a stand of old growth redwood trees.

Petitioners (citizens and environmental groups) had filed two prior petitions against the project. The first petition resulted in an appellate decision invalidating Caltrans' EIR for failing to properly evaluate the project's impacts on the redwood trees (*Lotus v. Department of Transportation* (2014) 223 Cal.App.4th 645, the "*Lotus* writ"). The second (Super. Ct. Humboldt County, No. CV170543) resulted in a Trial Court judgment and writ of mandate invalidating the addendum to the EIR Caltrans prepared to correct the earlier deficiency, because Caltrans had failed to circulate the Addendum for public review and comment. After Caltrans circulated the Addendum for public comments and recertified the EIR and Addendum, both writs were discharged, and Petitioners did not appeal from those orders.

Petitioners filed a third petition for writ of mandate challenging Caltrans's compliance with CEQA in connection with the project. The Trial Court denied the petition, and Petitioners appealed.

Claims Raised

Petitioners asserted, among other causes of action, that the 2017 Addendum fails to adequately disclose, analyze and mitigate the project's impacts on old-growth redwood trees, because (1) the EIR fails to identify or use any threshold of significance to measure the project's impact on redwood trees; and (2) the 2017 Addendum's conclusion of less than significant impact is not supported by substantial evidence. Petitioners further argue that no Court has yet ruled on the substantive adequacy of the 2017 Addendum, despite the fact that the prior writs were discharged.

Analysis

The discharge of the *Lotus* writ conclusively established the Addendum's substantive adequacy and the discharge of that writ was final and therefore bars re-litigation of the issue petitioners have raised again in this case. The petition in this case alleges (both expressly and indirectly) that it seeks to compel Caltrans to fix the very same CEQA deficiencies that the *Lotus* writ compelled it to fix, and thus in substance is challenging Caltrans' compliance with the *Lotus* writ.

Practice Tips

Where, through the return-to-writ process, a Court has found that corrected approvals docs pass muster and thus discharges the writ, res judicata bars a new suit filed by the petitioners to challenge those corrected approvals.

However, this case does not address the situation where the writ commanded the agency merely to rescind the CEQA document, and the writ was discharged following rescission, and the agency later takes a new set of actions. There, a new suit may be appropriate to challenge the new action.

II. Land Use Case Summaries

A. *New Commune DTLA v. City of Redondo Beach* (2025) 115 Cal.App.5th 111

HOLDING

A zoning overlay cannot be used to satisfy the minimum density and residential use requirements set out in Government Code section 65583.2(h)(2) where the base zoning expressly permits development that does not include housing.

Facts

The City of Redondo Beach applied a residential overlay across several commercial and industrial districts, allowing up to 55 dwelling units per acre while retaining the underlying commercial and industrial entitlements. This approach meant developers could still build entirely nonresidential projects on sites counted toward the City's lower-income housing need.

Claims Raised

A housing developer challenged the City's Housing Element and the inclusion of two specific properties in the City's RHNA inventory.

Analysis

The Court held that the overlay failed to meet statutory requirements because it did not guarantee minimum residential density, as suburban sites must allow at least 20 units per acre under Government Code section 65583.2(h)(2), and it violated the residential-only mandate requiring at least 50% of lower-income sites to be designated exclusively for residential use.

Practice Tip

This decision reflects a stricter judicial enforcement of Housing Element law than California HCD's prior approvals, raising questions about the validity of other certified Housing Elements and signaling that jurisdictions may need to reassess their plans to reduce litigation risk.

B. *Airport Business Center v. City of Santa Rosa* (2026) 116 Cal.App.5th 501

HOLDINGS

The Court of Appeal held that:

(1) As matter of first impression, determination that City-owned asset constitutes surplus land under the Surplus Land Act does not require agency to find that land is of no use to public;

(2) Substantial evidence supported City's determination that land constituted surplus land within meaning of the Act; and

(3) City's resolution declaring property to be surplus land satisfied Act's requirements that land would be declared surplus land "as supported by written findings."

Facts

In 2016, the City of Santa Rosa adopted a Housing Action Plan, which includes a program to identify public land that can potentially be used for housing development. As part of that process, the City conducted a review of City-owned downtown parking facilities, and in 2019 it commissioned a study to determine how frequently the public was using parking spaces in the downtown area. The company that prepared the study concluded from the data that there "may be an opportunity to build housing and other commercial uses on existing public parking facilities in Downtown Santa Rosa." During this time period, the City also conducted a site survey and prepared a report on the overall condition of five City-owned public parking structures.

In April 2022, the City Council considered declaring one of those parking structures, Garage 5, as nonexempt surplus land, subject to the retention of some public parking on the site. The City had determined it did not have a public use for the property other than the continued need for some public parking, and that beneficial use of the property could be maximized if the City were to dispose of it. Some local business owners objected to the proposed resolution on the basis that removing Garage 5 would cause financial hardship. The City Council did not take formal action on the Garage 5 proposal at its April 2022 meeting.

The City conducted additional study sessions throughout 2022. Key findings included that only 30 percent of downtown public parking spaces were being utilized, and if the City were to sell parking facilities, including Garage 5, the remaining parking facilities could accommodate parking demand.

In December 2022, the City Council of the City of Santa Rosa adopted a resolution declaring that a property the City was using as a parking garage constituted surplus land under the Surplus Land Act.

A local business owner, Airport Business Center ("Petitioner"), filed a petition for writ of mandate to set aside the resolution. The trial denied the petition, and Petitioner appealed.

Claims Raised

Petitioner contended that the City violated the Surplus Land Act by designating the property as surplus land despite an ongoing need for public parking. Petitioner further argued that the requirement that an agency must take formal action to declare land as surplus is substantive, not just procedural, and the essential predicate for declaring land to be surplus is that it must be not "necessary" for the "agency's use." Petitioner also construed this requirement to mean that if land is serving a public use, then the land is, by definition, necessary and cannot constitute surplus land.

Analysis

A property becomes subject to the dispositional requirements of the Surplus Land Act once an agency makes a formal decision that the property is not essential for its continued work and operations, and that the property does not constitute exempt surplus land. Government Code section 54221(b)(1) does not exclude from the definition of surplus land property that is being used for a public purpose, nor does it equate a property that is necessary for the agency's use with a property that is serving the needs of the populace.

The Court reasoned that by equating the word "necessary" with something that is merely useful, the Petitioner ignored not just the plain meaning of that word itself, but also other language in the Surplus Land Act, especially the related explication of "agency's use," which suggests that the surplus land determination turns on whether a property is essential for the agency's operational needs. The Petitioner also attempted to add a restriction that would prohibit an agency from disposing of its own property, if that property is currently used for a public purpose.

The Court said that Petitioner's "proposal to impose an additional restriction on the agency's ability to designate land as surplus would not only change the scope of the statutory definition, it would also potentially undermine the purpose of the Act by erecting a substantial roadblock for agencies considering whether to make underutilized assets available for the development of affordable housing."

C. *Rodriguez v. City of Los Angeles* (2025) 116 Cal.App.5th 488

HOLDING

The Court of Appeal held that written agreement between City and predecessor in interest was equivalent to condition attached to building permit, and thus survived foreclosure.

Facts

In 2005, the City of Los Angeles ("City") granted nonparty Jose Benavidez a 35 percent density bonus for the development of residential units on his property. The density bonus allowed Benavidez to develop one more unit than otherwise would be authorized, resulting in a three-unit project. In exchange, Benavidez agreed to rent one of the three units exclusively to low-income households for at least 30 years. Benavidez and the City memorialized these terms in a written agreement, which the City recorded against the property in January 2006. In 2013, a lender foreclosed on the property.

In 2019, Petitioners Jose Luis Rodriguez and Guillermina Rodriguez ("Petitioners") purchased the property, allegedly unaware of the 2006 agreement. In 2023, the City sent a notice demanding that Petitioners comply with the agreement.

Petitioners brought action against City for quiet title and declaratory relief. The Trial Court sustained the City's demurrer to the complaint without leave to amend. Petitioners appealed.

Claims Raised

Petitioners alleged that City granted owners' predecessor in interest 35 percent density bonus for development of residential units on property and allowed predecessor in interest to develop one more unit than was otherwise authorized in exchange for predecessor in interest renting one of the units exclusively to low-income households for at least 30 years, that City and predecessor in interest memorialized terms in written agreement, which City recorded against property that predecessor in interest later defaulted on loan secured by mortgage on property and lender foreclosed on property, and that foreclosure extinguished all junior interests in property, including agreement.

Analysis

Permit conditions survive foreclosure and are enforceable against successor owners. An agreement granting a property owner a density bonus for the development of residential units on his property in exchange for an agreement to exclusively rent one unit to low-income households for a period of 30 years was equivalent to a condition attached to a permit, and the agreement therefore survived the foreclosure of the property.

D. *Diamond Sands v. Clark County Nevada* (9th Cir. 2026) 164 F.4th 759

HOLDING

The District Court did not abuse its discretion in finding a property owner failed to show serious questions that county fines against it for its short-term rental activity were grossly disproportionate to the gravity of the underlying offense where the property owner had knowledge of the improper short-term rentals and failed to eliminate the violations, the fines were on the low end of the authorized range, and the ordinance prohibiting unlicensed short-term rentals was aimed at deterring harm to residents.

Facts

Diamond Sands Apartments, LLC owns and operates a 360-unit apartment complex in Las Vegas, Nevada. Clark County, Nevada, where Las Vegas is located, enacted an ordinance that prohibits short-term property rentals without County authorization and allows the imposition of up to a $10,000 fine per violation, among other penalties. Presumably in an effort to comply with that ordinance, Diamond Sands's apartment units are leased pursuant to long-term rental agreements that prohibit tenants from renting units to third parties without authorization.

Clark County, however, received numerous complaints that certain units at Diamond Sands were being used as short-term rentals, including for loud parties and the County's Code Enforcement Unit investigated and confirmed through in-person inspections and interviews with residents that several units had been rented for short-term stays through the Airbnb platform. Based on those investigations, the County issued notices of abatement to Diamond Sands for violating the short-term ordinance and, after follow-up inspections confirmed continued violations the County issued two administrative citations assessing fines totaling $4,000 on the subject apartment complex. The County identified additional violations but did not issue administrative citations or additional fines in those instances. Diamond Sands paid $2,000 to clear one of the citations but disputed the other and filed suit in the United States District Court for the District of Nevada,

asserting facial and as-applied challenges to Clark County's ordinance under the Eighth Amendment's Excessive Fines Clause.

Claims Raised

Diamond Sands argued that the County's enforcement scheme unconstitutionally penalizes property owners for short-term rental activity conducted by tenants and sought declaratory and injunctive relief to enjoin the County from enforcing the ordinance. The District Court denied Diamond Sands motion for preliminary injunction and Diamond Sands appealed.

Analysis

The Ninth Circuit began by noting that the Eighth Amendment doesn't require strict proportionality between the underlying offence and the fine imposed, and that the guiding quiestion is whether the fine is grossly disproportional to the gravity of the offense. Four factors inform the analysis of gross proportionality: (1) nature and extend of the underlying offense; (2) whether the 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. The Court then went on to explain why it rejected Diamond Sands' claims that the District Court erred in holding that the first, third and fourth factors cut in favor of the fines' proportionality.

As to the first factor, the Court rejected Diamond Sands claim that it was not the party causing the short-term rental violations and thus had no culpability by noting that property owners may bear a non-trivial degree of culpability for the misuse of their property by others. Central to the Court's ruling on this factor was the fact that the County first issued notices of abatement and only issued subsequent citations imposing fines after confirming additional violations. Thus, because Diamond Sands had knowledge of the improper short-term rentals and failed to eliminate the violations, it bore some culpability for the violations even though they were committed by Diamond Sands' tenants and not directly by Diamond Sands.

As to the third factor, the Court explored the other penalties authorized by the ordinance (e.g., misdemeanor citations, suspend or revoke short-term rental licenses, or audit a violator's financial records) and held that selecting a fine instead, and choosing to impose a fine on the low end of the authorized range was not grossly disproportionate.

Finally, as to the fourth factor, the Court rejected Diamond Sands's claim that the County was required to present evidence of the extent of the harm from the violations as Diamond Sands relied on a case addressing evidence required to substantiate an additional late payment fee for failing to timely pay a fine in the first instance. Further, the Court looked to the short-term ordinance's legislative findings to hold the fines had a rational basis given those findings explained that short-term rentals negatively impact the availability of affordable housing to County residents, increase public nuisances in the community from loud parties and interfere with the County from collecting transient lodging taxes. All told, the Court easily found that the harms caused by the offense were real and multi-faceted and that the fines were not grossly disproportionate.

Practice Tip

To ensure fines imposed together with administrative citations are not overturned as violating the Eighth Amendment, consider issuing notices of abatement first before imposing fines for subsequent violations and make sure that the ordinance includes legislative findings detailing the harms that the ordinance and the penalties it authorizes for violations seek to redress.

E. *Californians for Homeownership v. City of La Habra* (2025) 117 Cal.App.5th 1216

HOLDINGS

The Court of Appeal held that:

(1) A City Council was not required to hold additional public hearings to consider minor modifications to the City's housing element where the modifications were not a new and distinct amendment to the housing element;

(2) The City Council validly delegated its authority to the City Manager to make further technical or clerical revisions as needed to obtain a finding of substantial compliance from HCD;

(3) The housing element was presumed valid due to HCD's certification; and

(4) No prejudice resulted from any error. The Court concluded that the Trial Court correctly rejected Petitioner's arguments and affirmed.

Facts

The City of La Habra's City Council adopted the "sixth cycle" revision of its housing element via resolution at a public hearing in September 2022, and directed the City Manager to submit it to HCD for review. The resolution also gave the City Manager the power to make further "technical or clerical revisions to the Housing Element as may be necessary to obtain a finding of substantial compliance from [HCD]." The City submitted the adopted housing element to HCD the next day.

HCD notified the City that further revisions, outlined in a five-page appendix, would be required to substantially comply with state law. Over the next several months, City staff met with HCD personnel twice and made minor and technical changes to the housing element. At HCD's suggestion, the City posted the revised housing element to its website and sent a link to the webpage to interested parties.

In February 2023, the City Manager approved the "technical and clerical revisions to the adopted 2021–2029 Housing Element" under the authority delegated to him by resolution. He then forwarded the housing element to HCD for review and certification. HCD determined the housing element, with the modifications approved by the City Manager in February 2023, substantially complied with state law.

A nonprofit housing advocacy organization ("Petitioner") filed a petition for writ of mandate challenging revision of City of La Habra's housing element based on City's failure to hold formal public hearings and adoption by unelected City Manager rather than City Council. The Trial Court denied petition. Petitioner appealed.

Claims Raised

Petitioner contended that the February 2023 revision of the City of La Habra's housing element was invalid because: (1) the City Council and planning commission did not hold public hearings on that particular version; and (2) the version was adopted not by the City Council, but rather by the City Manager.

Analysis

As to the public hearing issue, because the modifications were not a new and distinct "amendment" to the housing element, there was no need for additional hearings under Government Code sections 65355 or 65353. Post-adoption "amendments" are part of a larger revision and certification process and not a new amendment subject to additional Article 6's public hearing requirements.

As to adoption by the City Manager, the City Council gave the City Manager the express authority via resolution to make further technical or clerical revisions as needed to obtain a finding of substantial compliance from HCD. The Court concluded that this is a valid delegation of authority under La Habra Municipal Code section 2.16.200, which provides that it "shall be the duty of the City Manager to perform such other duties and exercise such other powers as may be delegated to him from time to time by ordinance or resolution or other official action of the City Council."

In any event, the Court stated that even if additional public hearings or comment period were required or if the February 2023 modifications were not correctly adopted, the housing element is presumed valid in light of HCD's April 2023 certification. Finally, Petitioner did not show any prejudice, substantial harm, or that a different outcome would have occurred.

F. *Mustaqeem v. City of San Diego* (2026) 118 Cal.App.5th 22

HOLDINGS

(1) Municipal ordinance allowing City to impound a sidewalk vendor's equipment and/or goods based on violations of the City's sidewalk vending regulations facially conflicted with state statute;

(2) Municipal ordinance prohibiting sidewalk vending in City ballpark district around the time of park events was not based on any objective health, safety, or welfare requirement, and thus ordinance likely violated statutory limits on vending restrictions;

(3) Vendor failed to establish a likelihood of success on the merits on claim that City's general regulations governing sidewalk vending in ballpark district amounted to a de facto ban on sidewalk vending in the City's most viable commercial areas; and

(4) Statute did not prohibit City from conditioning sidewalk vending permits on vendors agreeing to release, indemnify, or hold harmless the City from liability.

Facts

SB 946 (Lara, 2018), codified in Government Code Section 51036 through 51039. decriminalizes sidewalk vending and prohibits local bans on public sidewalks, but allows municipalities to regulate sidewalk vendors through licensing programs and reasonable regulations based on objective health, safety, or welfare concerns.

A licensed sidewalk vendor ("Mustaqeem") regularly sold packaged snacks outside of the Petco Park ballpark in the City of San Diego ("City"). After receiving several citations and having his product and an envelope of cash impounded, Mustaqeem brought an action against the City for writ of mandate, injunctive relief, and declaratory relief, alleging violations of SB 946. Mustaqeem moved for a preliminary injunction barring the City from enforcing certain provisions of its municipal code. The Trial Court denied the request for a preliminary injunction, and Mustaqeem appealed.

Claims Raised

Mustaqeem asserted that the City of San Diego's municipal code conflicts with SB 946 because it: (1) improperly requires indemnification as a condition to obtaining a permit; (2) effectively create a ban on sidewalk vending within the City; (3) imposes a limitation on the hours of operation in the Ballpark District that is more restrictive than any limitations on hours of operation imposes on other businesses or uses on the same street; and (4) improperly punishes vendors with impoundment.

Analysis

The Court of Appeal "conclude[d] that at least two of the City's sidewalk vending regulations—namely regulations that purport to allow the impoundment of Mustaqeem's items and that restrict vending operating hours beyond those of other area businesses—are in direct conflict with the state law on their face."

Impoundment

The Court interpreted SB 946 as unambiguous; enumerated monetary fines or the recission of the vendor's permit are the only allowed penalties, and impoundment of a vendor's equipment and/or goods is not authorized for any reason. Because the City of San Diego's ordinance allows a vendor's product and/or equipment to be impounded for various reasons, it violates state law. While food and equipment suspected of being unsanitary or contaminated may be impounded pursuant to Health and Safety Code section 114393, there is nothing in the record to suggest that the City of San Diego's reason for impounding Mustaqeem's supplies had anything to do with food safety.

Restrictions on Vending Hours

The Court stated that Government Code section 51038 is clear "that the City may restrict the

hours of vending in residential areas and may also restrict the hours of vending in non-residential areas so long as those restrictions are not more restrictive that the limitation on hours of operation of other businesses on the same street." However, when considering whether an hours-based restriction on sidewalk vending violates state law, the Court held that a reviewing Court "must consider the prohibition on limiting vendors' hours of operation . . . *in addition to* the general 'objective health, safety, or welfare concerns' requirement." The Court indicated that an hours-based restriction on sidewalk vending could potentially be appropriate in some factual circumstances, if the City were able to "demonstrate a *direct* relationship to *objective* health, safety, or welfare concerns to justify any restriction on sidewalk vending" and if the health, safety, or welfare concern could not be mitigated by more narrowly tailored provisions (e.g., prohibiting sales in the right of way or within 15 feet of an intersection, etc.). The Court remanded this issue to the trial court, and did not indicate what facts would justify an hours-based restriction on sidewalk vending in non-residential areas.

Effective Ban on Sidewalk Vending

The Court noted that, on the limited record before it, "Mustaqeem has not provided adequate argument or analysis to establish the City's sidewalk vending regulations as a whole effectively preclude vending in any viable area within the City." The Court did not elaborate on what may be considered an effective ban on sidewalk vending.

Indemnification as a Condition of Permitting

The Court stated that "[b]ecause sidewalk vendors sell their wares on public streets, it is appropriate for the City to require them to mitigate any potential liability associated with their commercial activities." The Court concluded that nothing in Government Code section 51038 would preclude "the City from requiring sidewalk vendors to release and indemnify it as a condition of permitting."

Practice Tip

If adopting an ordinance to regulate sidewalk vendors, carefully consider the requirements of Government Code section 51036 through 51039.

G. *The Committee for Tiburon LLC v. Town of Tiburon* (2026) 118 Cal.App.5th 259

HOLDING

If a local government updates its general plan and housing element site inventory without an actual project proposed for any site, a program-level EIR for such a general plan/ housing element need not analyze site-specific impacts of developing the site, and may defer detailed site-level review to a future project-level EIR through tiering.

Facts

In 2020, the Town of Tiburon began updating its "General Plan 2040" and housing element to meet state-mandated Regional Housing Needs Assessment (RHNA) goals, identifying 17 potential sites for its Housing Element inventory, including "Site H." The plan proposed rezoning Site H from "residential planned development" (max 7 units) to "very high density

residential," allowing 93 to 118 units. The Town prepared a program EIR for the General Plan update, analyzing cumulative impacts of adding 916 housing units townwide, including Site H, but declined site-specific analysis as "premature and overly speculative" absent a concrete project.

Petitioners challenged the program EIR for failing to include site-level analysis for Site H, arguing that known density and environmental constraints made such analysis feasible. The Trial Court agreed, finding the impacts "foreseeable" and "ripe" and the omission of site-level impacts analysis for Site H from the Program EIR improper, and granted the petition. The Town appealed.

Claims Raised

The Petitioners alleged that the Town violated CEQA by: (1) failing to analyze or acknowledge significant environmental impacts on aesthetics, biological resources, hydrology, land use, and transportation specifically resulting from the changing land use designation and rezoning of Site H, and (2) asserting that these impacts were "reasonably foreseeable" and feasible to analyze at the general plan stage because the rezoning effectively mandated dense development.

Analysis

The Court applied a de novo (independent) review to the question of whether CEQA requires site-specific analysis at the program EIR stage for a general plan, when no site-level project has been proposed.

Based on the relevant statutory, regulatory, and decisional authorities, the Court emphasized that program EIRs are designed to handle broad policy alternatives and cumulative impacts early in the planning process. The CEQA Guidelines state that detailed site-specific information may be deferred until a project of a more limited geographic scale is proposed. When an actual housing project has not yet been proposed, the lack of project-specific details precludes an informed and meaningful review of environmental impacts and mitigation measures, and deferral of such a review to a site-specific, project-level EIR analysis is appropriate. The local agencies are not required to engage in "speculative analysis" or "foresee the unforeseeable." The Court distinguished this case from *Vineyard Area Citizens for Responsible Growth, Inc. v. City of Rancho Cordova* (2007) 40 Cal.4th 412, noting that *Vineyard* involved a concrete development project with known phases, whereas a General Plan/Housing Element is a planning document that does not guarantee every site will be built out. In sum, the Court of appeal overturned the Trial Court's decision and rejected the Petitioners claims, handing the City a significant victory.

Practice Tips

- When using a program EIR for general plan updates, analyze impacts assuming maximum permitted density across sites and clearly distinguish program-wide impacts from site-specific impacts, explaining why the latter cannot be meaningfully evaluated without a proposed project.

- In response to comments alleging program level EIRs should analyze project-level impacts as well, clearly state that future development projects will undergo site-specific CEQA review and that the agency will tier from the program EIR.

LEAGUE OF
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Housing Approvals and Density Mandates

Session: Housing Approvals and Density Mandates

Abundance Meets Approval: The Nuts and Bolts of AB 130 and SB 131

By Lauren Langer and Amanda Daams[1]

INTRODUCTION

On June 30, 2025, two budget trailer bills — Assembly Bill 130 (AB 130) and Senate Bill 131 (SB 131) — were signed by Governor Newsom and went into effect *immediately*. In addition to significant modifications to the California Environmental Quality Act (CEQA), AB 130 made numerous changes to California's already complex housing laws, including, most notably, the Permit Streamlining Act (PSA). SB 131 enacted a number of new CEQA statutory exemptions, as well as a new more narrow CEQA review process for projects that narrowly miss qualifying for a statutory or categorical exemption. By attaching these provisions to the budget, the Governor was able to swiftly move these changes through the legislative process. These changes were so critical that we understand the Governor applied a budget contingency clause to ensure their passage (meaning that if AB 130 and SB 131 did not pass, the entire state budget would have been inoperative).

The Governor's office characterized the trailer bills as "a comprehensive streamlining package that breaks down long-standing development barriers, modernizes CEQA review for critical housing and infrastructure, and creates new tools to speed up production, reduce costs, and improve accountability across the state." The challenge with this approach is that cities were tasked with implementing these bills without any lead time — the provisions took effect immediately. Developers immediately began pushing cities for answers on how they could use these new tools, and cities were quickly trying to catch up. This paper is intended to provide a comprehensive analysis of the changes and guidance on how to implement the significant provisions in the trailer bills.

[1] Special thanks to BBK attorneys Sarah Owsowitz, Sergio Rudin, Ryan Stager, Todd Leishman and Ethan Walsh, who all contributed to this paper and the analysis of the bills.

KEY TAKEAWAYS

- AB 130 makes significant changes to the PSA as applied to housing projects. As a result of the bill:
    - *Ministerial.* Ministerial entitlement permits for certain qualifying housing projects are now subject to the PSA.
        - Cities must act on these ministerial actions within 60 days of submittal of a complete application, or they will be deemed approved.
    - *Discretionary.* Housing projects that qualify for a new infill housing CEQA exemption created by AB 130 must be approved or denied within 30 days from the later of (a) the date that tribal consultation (as required by AB 130) is complete, or (b) the deadline for a determination of consistency with objective standards under the Housing Accountability Act — or they will be deemed approved.
        - The advanced-notice and cure provisions of the PSA are removed, creating ambiguity and meaning that arguably, a project could be automatically deemed approved if the city fails to meet the statutory deadlines.
- AB 130 creates a new statutory CEQA exemption for infill housing developments that meet certain conditions. As noted above, projects qualifying for this exemption must be approved within 30 days under the amended PSA.
- SB 131 establishes a new streamlined CEQA process for evaluating housing development projects that fail to qualify for statutory or categorical CEQA exemptions due to a single disqualifying condition.
- SB 131 also establishes several new statutory CEQA exemptions, including an exemption for rezoning actions to implement provisions of a housing element, exemptions for new agricultural employee housing meeting certain criteria, and others.
- AB 130 prevents cities from making local modifications to building codes that would affect residential units, with certain limited exceptions.
- AB 130 eliminates several former sunset provisions that applied to existing housing law, making them permanent.
- AB 130 imposes a new requirement that cities and counties annually inspect homeless shelters in their jurisdictions.

1. PERMIT STREAMLINING ACT CHANGES

The PSA, originally passed in 1977, has long been intended "to ensure clear understanding of the specific requirements which must be met in connection with the approval of development projects and to expedite decisions on such projects."[2] AB 130's key PSA amendments are summarized below. Most relevant to cities, AB 130:

1. Brings ministerial entitlement approvals under the PSA for qualifying housing projects,

2. Establishes new, shorter deadlines for approving or denying housing projects, and

3. Arguably, shortcuts the "deemed approved" process by removing the public-notice requirement.

And generally, the bill eliminates several former sunset provisions of housing law, making them permanent (discussed in more detail below).[3]

1.1 Ministerial Housing Now Subject to PSA

The PSA's applicability depends on whether a project qualifies as a "development project." The PSA defines this term as "any project undertaken for the purposes of development … includ[ing] a project involving the issuance of a permit for construction or reconstruction but not a permit to operate."[4] Historically, this only applied to discretionary projects; the definition of "development project" specifically excluded ministerial projects — but no longer.

AB 130 changes this by amending the "development project" definition to now include any "*housing* development project that requires an entitlement from a local agency, regardless of whether the process for permitting the entitlement is discretionary *or ministerial*."[5] This is a major change: A ministerial housing project (e.g., one that involves no personal judgment or subjective decision making, such as projects under SB 35/423 or SB 4) were not subject to the PSA before, but now they are.

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[2]Gov. Code § 65921.

[3] *See* AB 130, sec. 12 (eliminating repeal date for Gov. Code § 65905.5 [five-hearing limit]), sec. 13 (for § 65913.10 [determination of historic site]), sec. 16 (for § 65940 [compilation of complete-application checklist]), sec. 18 (for § 65941.1 [preliminary applications]), sec. 19 (for § 65943 [deemed complete]), sec. 21 (for § 65950 [deemed approved]).

[4] Gov. Code § 65928, as it read before June 30, 2025.

[5] Gov. Code § 65928(b)(1)(B), as it reads following AB 130 (emphasis added).

Note that this new inclusion of ministerial approvals under the PSA is specific to *housing* development projects; it does not apply to projects without residential uses. And note too that *not all* housing projects are ministerial; many housing projects still require discretionary approvals such as a tentative map, a zone change or general plan amendment, a conditional use permit, a site plan approval, or design approval. The PSA still applies to discretionary approvals.

As explained in the following sections, broadening the "development project" definition to cover ministerial housing projects significantly impacts how these applications will need to be processed moving forward. But there is a limit to this expanded scope of "development project." AB 130 clarifies that a "development project" under the PSA does *not* include post-entitlement phase permits covered by Government Code section 65913.3. As a practical matter, by specifically excluding post-entitlement phase permits for housing projects from the PSA, AB 130 establishes two distinct development-permit phases: (1) the entitlement permit phase covered by the PSA, and (2) the post-entitlement permit phase covered by Government Code section 65913.3.

1.2 No More Notice-and-Cure before "Deemed Approved"

The PSA has long had a deemed-approved provision under which a project is automatically deemed approved if the city "fails to act to approve or disapprove a development project within the time limits" required by the PSA. But there was a significant safety valve, a chance for the city to avoid that outcome in most cases: Before the application was deemed approved, the applicant first had to give the city advance notice that the applicant would provide public notice of the automatic approval … and the city had 60 days to act to avoid the automatic approval. Additionally, if faced with a writ of mandate to compel the city to hold the hearing, as a practical matter the city could notice and *hold the hearing* before the applicant-petitioner could get a ruling from a court, thus mooting the writ. The reason this safety valve existed was because other neighboring property owners had their own due-process rights to receive notice and an opportunity to be heard before a project was approved. Under AB 130, that safety valve was removed.

AB 130 deletes the entire advanced-notice and cure-period portion of the statute, leaving just the automatic deemed-approved provision (which appears to conflict with the long-recognized principle that neighboring property owners have due-process rights that must also be considered).[6] So now if a city fails to act (approve or deny the project) by any of the PSA's deadlines (the existing CEQA-based deadlines for discretionary projects, the new 60-day one for ministerial housing projects, or the new 30-day one for discretionary housing projects that qualify for the new statutory CEQA exemption, discussed below in more detail), the project could be automatically deemed approved.

[6] Gov. Code § 65956(b).

The statute still provides that if the project requires a public notice or a public hearing and the city fails to provide notice or a hearing at least 60 days before expiration of the deadlines, the remedy (for the lack of notice or hearing) is for the developer to petition the court to require the city to give the notice and hold the hearing. And yet, the Legislature has now removed language that allowed the applicant to provide the notice if the city refused to do so. Before, once the applicant provided notice, the city had a certain amount of time to take action before the project would be deemed approved. But now, there is no provision for the applicant to provide the notice. In short, AB 130's changes create ambiguity about the relationship between a failure to notice and hold the hearing and the project being deemed approved. Whether or not an applicant brings an action to compel notice and hearing, the project could be deemed approved by operation of law if the city delays.

Oddly, even after AB 130, the statute is clear that the PSA does not alleviate the city's obligation to provide notice and a hearing. So for discretionary projects, the existing CEQA-based deadlines (Gov. Code section 65950) still apply and run from when the CEQA is approved, and the CEQA determination is still made by the review authority.

Nevertheless, understanding the interplay between the PSA and CEQA is now even more critical. City staff should familiarize themselves well with timelines for processing environmental review set out in CEQA.[7] While the timelines are directory, with provisions for extensions and extraordinary delays, they provide a roadmap for demonstrating that the City is proceeding in a timeline required by law.[8] Projects that are discretionary, exempt from CEQA review, but approved at the staff level present unique timing challenges and the PSA is less clear on when they must be approved. Here is the most reasonable timeline that we have identified. CEQA provides that the City must determine within 30 days of deeming an application complete whether it intends

[7] The deadlines for acting on an application run from the date of certification of an EIR, adoption of a negative declaration, or a determination that the project is exempt. Gov. Code § 65950. The lead agency must approve or disapprove a development project within the following timelines:

- 180 days from the date of certification of the EIR;
- 120 days from the date of certification for certain development projects (Gov. Code § 65950(c));
- 90 days from the date of certification of the EIR for certain affordable housing projects;
- 60 days from the date of adoption of the negative declaration;
- 60 days from the determination that the project is exempt from CEQA;
- 60 days from the date of receipt of a complete application if the project is subject to ministerial review by the public agency; or
- 30 days from the conclusion of the process outlined in Pub. Res. Code §21080.66(b), if the project is exempt from CEQA. Gov. Code § 65950.

[8] See 14 Cal. Code Regs. 15100, et seq.

to proceed with a Negative Declaration or EIR.[9] This suggests that the City should also determine if it intends to proceed with a CEQA exemption within that same 30-day period. Given the ambiguity between the PSA (after AB 130) and CEQA, it would be prudent to follow this schedule for CEQA exempt projects to avoid arguments of delay. Keep in mind that the CEQA-triggered PSA deadlines can run from the determination that the project is exempt. While the other PSA deadlines are triggered by the review authority's decision to *adopt* a negative declaration or *certify* an EIR, there is no case law explaining whether, for an exempt project, the 60-day deadline runs from the date that the city *determines* that it will proceed with an exemption under CEQA regulation 15102 or the date that the review authority actually approves the project with the exemption. With no other guidance on this point, the safest approach is to act on exempt, staff-approved projects no later than 90 days after an application is deemed complete (30 days to determine whether a negative declaration or EIR will be required and 60 days from that determination).[10] A 90-day mutual extension is allowed under the PSA.

1.3 New Deadlines to Approve or Deny Ministerial and Discretionary Housing Projects

Government Code section 65950 in the PSA has long established deadlines for a city to approve or deny a project, but historically these deadlines received attention only rarely because (a) the PSA only applied to discretionary projects, (b) discretionary projects require CEQA review, and (c) all the deadlines in section 65950 ran from CEQA determinations — and as a practical matter, approval (or denial) of a project almost always happens concurrently with the CEQA determination, at the same meeting. The same general framework is still in place, but now there are two new extremely significant deadlines for which cities must be aware.

1.3.1 Ministerial Housing: 60 Days

With the PSA's definition of "development project" now expanded to include ministerial housing approvals, and with CEQA not applying at all to ministerial actions, the CEQA-based deadlines in Government Code section 65950 have no application. AB 130 addresses this by adding a new 60-day deadline to approve or deny a housing project that is subject to ministerial review.

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[9] 14 Cal. Code Regs. §15102.

[10] If the city is waiting on the applicant to submit information that is required as part of the application or for CEQA review and the clock is running, Government Code Section 65956(c) does provide grounds to base a denial ("Failure of an applicant to submit complete or adequate information pursuant to Sections 65943 to 65944, inclusive, may constitute grounds for disapproving a development project"). CEQA contains a similar provision to suspend deadlines or deny a project if the applicant is creating unreasonable delay.14 Cal. Code Regs. § 15109.

This deadline applies to all housing projects subject to ministerial review, except for housing in commercial zones under AB 2011.[11] This is noteworthy because several ministerial housing statutes, such as Government Code sections 65913.4 (SB 35/423) and 65913.16 (SB 4), provide longer deadlines to approve or deny projects. *AB 130's across-the-board 60-day deadline overrides and replaces those deadlines*,[12] so city staff should not rely on those other deadlines.

The 60-day clock starts running on the date that the city receives a complete application — not 60 days from when the city *confirms* or gives *notice* that the application is complete. It is 60 days from when the complete application was submitted to the city. If the initial submittal was incomplete, the 60 days runs from the date that the applicant submits the last piece of the complete-application puzzle (again, *not* from when the city might later confirm that that last piece completes the puzzle).

As a practical matter, with only a short 60 days to get all the way to project approval or denial, city staff must make completeness determinations as soon as possible upon receiving an application for a ministerial approval because every day that the city delays in confirming completeness is one day fewer to evaluate the project to make a decision. This is especially tricky for cities that accept applications electronically, as the clock can start to run if an application is submitted outside business hours and sits for a few days before a member of staff actually receives the application.

This 60-day deadline has other practical implications, as well. The 60-day deadline does not stop when the city gives the applicant comments on corrections that need to be made before the project is compliant and approvable; the clock continues to run while the applicant mulls over the needed changes, and if the applicant waits to respond, the project could be deemed approved after 60 days. City staff can go back and forth with an applicant multiple times about *completeness* (always within 30 days of a submittal) — but once a complete application has been submitted, the clock is running to approve or deny.

Lastly, with a 60-day clock running from the date the complete application is submitted, cities should make sure that they have posted a complete-application checklist that includes everything that the city needs in order to make its decision within 60 days. That means *all* information needed by *all* city departments. This also means all third-party-agency approvals (e.g., fire, water, sewer, and school districts). Whatever the city needs to see from other agencies should

[11] New paragraph (6) of Gov. Code § 65950(a). But note that ministerial housing in commercial zones under AB 2011 still have their own, sometimes longer, deadlines ("except as provided in subdivision (a) of Section 65912.114 and subdivision (a) of Section 65912.124 …"). The rest of the discussion that follows about implications of the deadline apply to the longer deadlines, too.

[12] Gov. Code § 65953(b).

either be included in the city's complete-application checklist, or the City can approve the ministerial project subject to subsequent third-party-agency approval.

1.3.2 Discretionary Housing Under New CEQA Exemption: 30 Days

As noted above, when it comes to discretionary housing projects, the long-standing CEQA-driven deadlines remain largely intact and untouched. But there is one new, potentially significant exception for a certain kind of discretionary process.

AB 130 creates a new statutory CEQA exemption, which is discussed at length below. But for the purposes of discussing the PSA, the CEQA exemption requires a city, acting as the lead agency, to approve or deny a qualifying project within 30 days from the later of two specified application-processing events.

At the outset, the new AB 130 CEQA exemption requires the city to initiate tribal consultation within 14 days after the "application for the project" is "deemed complete" under the Housing Accountability Act (HAA).[13] And "deemed complete" under the HAA means either: "that the applicant has submitted a preliminary application … or, if the applicant has not submitted a preliminary application, has submitted a complete application [under] Section 65943."[14] So "deemed complete" in this context includes, among other things, submittal of just a preliminary application.

"Deemed complete" triggers tribal consultation, which has its own timelines:

- 14 days from submittal of the "application for the project" to give notice to tribes
- 60 days for tribes to request consultation
- 14 days to initiate consultation upon request from tribe
- 45 days to conclude consultation once initiated, subject to 15-day extension by tribe

— for a total ranging from 74 days (if no tribe requests consultation) to 148 days (if tribe requests consultation and extension).

[13] Pub. Res. Code § 21080.66(b)(1)(A)(i), referencing HAA's definition of *deemed complete* in § 65589.5(h)(5).

[14] Gov. Code § 65589.5(h)(5).

In early September 2025, the Legislature passed SB 158.[15] Among other things, SB 158 further amends the PSA to require the city to approve or deny a project that qualifies for AB 130's CEQA exemption within 30 days from the later of:

- The conclusion of AB 130's tribal consultation process or
- The "expiration of the applicable time limit in paragraph (2) of subdivision (j) of [Government Code] Section 65589.5."[16]

Government Code section 65589.5 is the HAA, and subdivision (j)(2) is the provision that requires cities to notify applicants whether a proposed project is "inconsistent, not in compliance, or not in conformity" with "an applicable plan, program, policy, ordinance, standard, requirement, or other similar provision" (e.g., objective general plan, zoning, subdivision and design standards criteria).[17] This notification must be made in writing and occur within 30 days (if the project contains less than 150 units) or 60 days (if more than 150 units) from the "date that the application for the housing development project is determined to be complete." So, following SB 158, a project that qualifies for AB 130's CEQA exemption must be approved or denied within 30 days from the *later* of:

- the date that the AB 130 tribal-consultation process concludes; or
- the date that is 30 days (if fewer than 150 units) or 60 days (if more than 150 units) from the date that the city finds the project's full development project application is complete.

Whichever date occurs *last* triggers the 30-day deadline to approve or deny the project. For example, if tribal consultation concludes on May 30, 2026, and the HAA inconsistency determination is due by June 30, 2026, the 30-day deadline to approve or deny the project would start on June 30, 2026 (as that date is *after* May 30, 2026).

Given these new deadlines, each city must meticulously watch the calendar: It must mind the above deadlines because if the city fails to act, one way or the other, to approve or deny, the project might just be deemed approved. To the extent that timely approval or denial of a project poses a challenge, an city can mitigate its risk by entering into one tolling agreement for up to 90

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[15] As originally enacted, AB 130 required the city to approve or deny a qualifying project within 30 days from the end of the tribal consultation process, all potentially based on only a "preliminary application" (that spare instrument created by SB 330 for the sole purpose of establishing early and superior vesting). See Gov. Code §§ 65589.5(o) and 65941.1 generally. This presented a real complication because the applicant might not even have submitted a full application by the time the city was required to make a final decision on the project: state law gives the applicant up to 180 days from submittal of a valid preliminary application to submit the actual "application for [the] development project" with all that is required of a full application. Gov. Code § 65941.1(e)(1).

[16] Gov. Code § 65950(a)(7), as amended by SB 158.

[17] Gov. Code § 65589.5(j)(2)(A).

days[18] with a cooperative applicant (developer applicants may often be open to it, and may even ask for it, to avoid compressing the timeline to the point of increasing the chance of an adverse decision). But, cities should not let the 30-day deadline pass without approving or denying the project or entering into a tolling agreement.

2. CEQA CHANGES

2.1 New Infill Housing Development Exemption[19]

As noted above, AB 130 creates a new statutory CEQA exemption for qualifying housing development projects under Gov. Code § 65589.5. The exemption applies to projects that meet each of the following conditions:

- The site must not exceed 20 acres in size, except for a builder's remedy site,[20] which cannot be more than four acres;[21]

- The project must be located in an incorporated city or urban area, as defined by the United States Census Bureau;[22] [23]

- The project site must meet one of the following criteria:

    - site previously developed with an urban use,
    - 75 percent or more of the site perimeter adjoins parcels developed with urban uses,
    - 75 percent or more of the area within a quarter-mile of the site is developed with urban uses, or

[18] Gov. Code § 65957.

[19] To support infill development and land use planning, SB 131 directs the Office of Land Use and Climate Innovation to develop, define, and publish a statewide map of eligible "urban infill sites" by July 1, 2027, following public review and input from local governments. (Pub. Res. Code § 21083.03.)

[20] A "builder's remedy project" is a housing development proposed in a city or county that lacks a state-compliant housing element, where the project includes affordable housing and is entitled to proceed even if it conflicts with local zoning, provided it meets specific density and location criteria set forth in Government Code § 65589.5(h)(11).

[21] Pub. Res. Code § 21080.66(a)(1), as amended by AB 158. Previously under AB 130, builder's remedy projects could be up to five acres. Following SB 158, these projects are limited to four acres.

[22] To qualify as an urban area, the area must encompass at least 2,000 housing units or have a population of at least 5,000.

[23] Pub. Res. Code § 21080.66(a)(2).

- for sites with four sides, three of the four sides are developed with urban uses and at least two-thirds of the site perimeter adjoins parcels developed with urban uses.[24]

- The project must be consistent with the applicable general plan and zoning ordinance, as well as any applicable specific plan and local coastal program;[25]

- The project must meet minimum residential density requirements:

  - 5 units per acre in unincorporated nonmetropolitan counties,[26] or
  - 10 units per acre in suburban jurisdictions, or
  - 15 units per acre in metropolitan jurisdictions.[27]

- The project site must not be located on specified hazardous or sensitive lands, including:

  - parcels in the coastal zone that are
    - not zoned for multifamily housing,
    - lack a certified local coastal program, or
    - are vulnerable to five feet of sea level rise;
  - prime farmland, farmland of statewide importance, grazing land, or land designated for agricultural preservation by local ballot;
  - wetlands;
  - very high fire hazard severity zones or state responsibility areas without required mitigation;
  - hazardous waste sites, *unless* remediated or approved for residential use;
  - delineated earthquake fault zones, *unless* compliant with seismic safety standards;
  - 100-year floodplains or regulatory floodways ,*unless* compliant with FEMA standards;

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[24] Pub. Res. Code § 21080.66(a)(3)(A)–(D).

[25] *Id*., at (a)(4)(A). If the zoning and general plan are not consistent with one another, a project is deemed "consistent with both if the project is consistent with one." (*Id*., at (a)(4)(B).) Additionally, approval of a density bonus, concessions/incentives, waivers or reductions in development standards, and a reduced parking ratio under state density bonus law is not grounds for finding the project inconsistent with the zoning ordinance, general plan, or local coastal program. (*Id*., at (a)(4)(C).)

[26]Pub. Res. Code § 21080.66(a)(5)'s provisions concerning density reference Government Code § 65583.2, which establishes minimum density standards for sites that local governments identify as suitable for lower-income housing in their Housing Element, and specifies the required densities based on jurisdiction type.

[27] Pub. Res. Code § 21080.66(a)(5).

- lands under conservation easements or designated for conservation in habitat or natural resource protection plans; or
- habitat for protected, sensitive, or special-status species under federal or state law.[28]

- As noted above, the project must comply with the tribal-consultation process set forth in Public Resources Code section 21080.66(b). Specifically:

  - The city must notify all California Native American tribes traditionally and culturally affiliated with the project site within 14 days of the project application being "deemed complete"[29] or, for projects whose applications were "deemed complete" before July 1, 2026, within 14 days "of notifying the local government that the project is eligible to be exempt."

  - Tribes have 60 days to request consultation, and if a request is made, the city must begin consultation within 30 days.

  - Consultation must conclude within 45 days, with a one-time 15-day extension allowed.

  - The process must be conducted in good faith and result in binding mitigation conditions to avoid significant impacts to tribal cultural resources, unless waived by the tribe.

  - Unless otherwise agreed, the conditions of project approval must, among other related items, require tribal monitoring during all ground-disturbing activities, avoid tribal cultural resources where feasible, and comply with protocols for the discovery of human remains or burial grounds.[30]

- The project must not require demolition of a historic resource that was placed on a national, state, or local historic register before the date a preliminary application was submitted for the project under Government Code section 65941.1 (i.e., an "SB 330 application");[31]

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[28] *Id*., at (a)(6).

[29] Gov. Code § 65589.5 subdivision (h), paragraph 5.

[30] *See id*., at (b)(1)–(5).

[31] *Id*., at (a)(7).

- If the project was deemed complete on or after January 1, 2025, it cannot include any transient lodging (e.g., hotel, motel, or bed and breakfast inn);[32]

- The project must include a condition of approval requiring a phase I environmental assessment for hazardous substance releases, with mitigation requirements based upon results;[33]

- The project must comply with specific environmental hazard and air filtration standards if located within 500 feet of a freeway; and

- The project must comply with labor requirements, including payment of prevailing wage for 100 percent affordable projects and use of a skilled and trained workforce for buildings exceeding 85 feet in height.[34, 35]

2.2 Limited CEQA Review for "Near Miss" Projects

SB 131, discussed in more detail below, establishes a CEQA process for housing development projects that narrowly fail to qualify for a statutory or categorical CEQA exemption due to a single disqualifying condition.[36] In those situations, the new law limits CEQA review to just those environmental effects that are caused solely by that condition and the law waives the need for analysis of project alternatives, cumulative impacts, and growth-inducing effects. This near-miss provision does not apply to builder's remedy projects that exceed four acres, to projects with multiple disqualifying conditions, or to projects that involve distribution centers or oil and gas infrastructure, or that are located on natural and protected lands, as defined in Public Resources Code Section 21067.5.[37]

SB 131 defines a "condition" as a "physical" or "regulatory" feature of the project or its "setting" or an effect upon the environment caused by the project.[38] These are new concepts. The scope and depth of analysis that is required will vary depending on the nature of the disqualifying condition. However, if the disqualifying condition is not due to an environmental impact, but

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[32] *Id*., at (a)(8).

[33] *Id*., at (c)(1).

[34] *Id*., at (d)(1)–(2).

[35] Following SB 158, a lead agency that determines that a project is exempt from CEQA under Public Resources Code section 21080.66 and approves the project must file a notice of exemption with the county clerk and state clearinghouse in accordance with the requirements of Public Resources Code section 21080.66(f).

[36] Pub. Res. Code § 21080.1(b).

[37] *See id.*, at (b)(4). Builder's remedy projects are excluded via (b)(4)(E)(i)-(ii), which was added by SB 158.

[38] *Id*., at (b)(5)(A).

instead is "physical" or "regulatory," or relates to the "setting," SB 131 does not address how the limited CEQA review should be conducted.

2.3 New Statutory Exemptions (SB 131)

SB 131 establishes several new statutory CEQA exemptions, several of which are highlighted here:[39]

- **Rezoning to Implement Housing Elements**: Exempts rezoning actions that implement the provisions of a housing element that were adopted in accordance with Government Code section 65583(c), so long as the rezoning does not authorize distribution centers[40], oil and gas infrastructure[41], or development located on natural and protected lands, as defined in Public Resources Code Section 21067.5.[42]

- **Wildfire risk reduction projects**: Exempts certain small-scale vegetation management and fire resilience activities if they comply with all other applicable laws and meet defined criteria. This includes:

    - Prescribed burns or fuel reduction projects (less than 50 contiguous acres) near residential subdivisions, with environmental and tribal protections;
    - Defensible space clearance up to 100 feet from public roadways used as evacuation routes;
    - Residential home hardening or defensible space activities within 200 feet of homes in high or very high fire hazard severity zones;
    - Fuel breaks up to 200 feet from structures, clearing flammable vegetation and trees under 12 inches in diameter.[43]

- **Public park and non-motorized trail projects funded by the 2024 bond measure**: Exempts activities and approvals related to the planning, acquisition, design, construction, operation, or maintenance of public park or trail facilities funded in whole

[39] Additional exemptions include: Disadvantaged community water system projects. Pub. Res. Code § 21080.48; Updates to the state's climate adaptation strategy. Pub. Res. Code § 21080.55; Agricultural employee housing. Pub. Res. Code § 21080.44; High-Speed Rail Maintenance and Station Projects. Pub. Res. Code § 21080.70.

[40] Public Resources Code § 21060.4 defines "Distribution center" as "warehouse distribution center, as defined in Section 2100 of the Labor Code, that is 50,000 square feet or larger."

[41] Public Resources Code § 21064.8 defines "Oil and gas infrastructure" as "a facility used for the production, processing, transmission, storage, or distribution of petroleum or natural gas."

[42] Pub. Res. Code § 21080.085.

[43] Pub. Res. Code § 21080.49.

or part by the 2024 Safe Drinking Water, Wildfire Prevention, Drought Preparedness, and Clean Air Bond Act.[44]

- **Certain essential services and industrial use projects**: Exempts narrowly defined projects that consist exclusively of one of the following uses but does not apply to any project located on "natural and protected lands," as defined in Public Resources Code section 21067.5.[45]

    - Day care centers (as defined in Health & Saf. Code § 1596.76) located outside residential areas;
    - Rural health clinics or federally qualified health centers less than 50,000 square feet in size;
    - Nonprofit food banks or food pantries located on sites zoned exclusively for industrial uses; and
    - Advanced manufacturing facilities (as defined in Public Resources Code § 26003) that are located on sites zoned exclusively for industrial use.

2.4 Procedural Changes

SB 131 requires that the state CEQA Guidelines must be updated by January 1, 2027, and every two years thereafter to improve clarity, address vague terminology, and reduce litigation risk over city (acting as lead agency) determinations.[46]

Finally, in the event of litigation, SB 131 provides that, for projects not involving a distribution center or oil and gas infrastructure, the administrative record no longer includes internal electronic communications, such as emails that were not presented to the final decision-making body unless such emails or documents were reviewed prior to project approval by the lead agency executive, a local agency executive (as defined in Government Code § 3511.1(d)), or another supervisory-level official involved in reviewing the project. Further, the city retains discretion to include other materials not specifically required.[47]

3. LIMITS ON LOCAL BUILDING CODE AMENDMENTS

Every three years, new versions of the California Building Standards Code (Title 24, California Code of Regulations) are approved by the California Building Standards Commission ("Commission"). By operation of state law, these new building codes go into effect in every

[44] Pub. Res. Code § 21080.57.

[45] Pub. Res. Code § 21080.69.

[46] Pub. Res. Code § 21094.5.5(c).

[47] *See* Pub. Res. Code § 21167.6(e)(10).

jurisdiction in California 180 days after adoption by the Commission.[48] Accordingly, all local amendments to the California Building Standards Code must be readopted every three years when the new statewide codes go into effect. Historically, cities were only allowed to make modifications to the state building codes to address local climatic, geological, or topographical conditions, and adoption of local amendments requires specific findings in the adopting ordinances, which must be filed with the Commission after adoption.[49]

In addition to the existing limitations above, AB 130 provides that effective October 1, 2025, through June 1, 2031, Health and Safety Code section 17958(b) and Health and Safety Code section 17958.7(c) now prevent local jurisdictions from making modifications to building codes *that would affect residential units*, unless one of the following *also* applies:

- The modifications (that would affect residential units) are substantially equivalent to local amendments previously filed with the Commission and in effect as of September 30, 2025.
- The Commission deems the modifications necessary "as emergency standards to protect health and safety."
- The modifications relate to "home hardening" (which changes may be proposed by a fire-protection district under Health and Safety Code section 13869.7).
- The modifications are local amendments "adopted to align with a general plan [that is] approved on or before June 10, 2025, and that permits mixed-fuel residential construction consistent with federal law while also incentivizing all-electric construction as part of an adopted greenhouse gas emissions reduction strategy."
- The changes or modifications are related to administrative practices, are proposed for adoption during the intervening period between code cycles, and exclusively result in any of the following:
    - Reductions in time for a city to issue a postentitlement permit.
    - Alterations to a city's postentitlement fee schedule.
    - Modernization of, or adoption of, new permitting platforms and software utilized by the city.
    - Reductions in cost of internal operation for a city.

[48] Health & Safety Code § 17958.

[49] Health & Safety Code § 17958.7.

- Establishment, alteration, or removal of local programs related to enforcement of building code violations or complaints alleging building code violations.

Health and Safety Code section 17958.7(c) now also provides that the Commission "shall" reject building code modifications affecting *residential* construction unless one of the above conditions is satisfied. Given the new statutory authority, we expect that local amendments will be subject to increased scrutiny, particularly if adopted as "emergency standards to protect health and safety." In its Informational Bulletin No. 25-03[50]to local building departments, the Commission states that any emergency standards need to be adopted as emergency or urgency measures, with all findings required under state law to adopt an urgency ordinance.

With regards to existing local amendments, cities are allowed to re-adopt their local amendments for the 2025 Building Standards Code cycle as long as they are "substantially equivalent." However, this is not defined in the statute, and the Informational Bulletin No. 25-03, the Commission states that the local amendments readopted under this authority must not have any "material change in regulatory effect."

4. CHANGES TO SB 4 (2023) – AFFORDABLE HOUSING ON CHURCH AND SCHOOL LAND

AB 130 also makes minor modifications and clarifications to SB 4, the "Affordable Housing on Faith and Higher Educations Lands Act of 2023," which established a new streamlined, ministerial approval process for qualifying affordable housing projects located on land owned by an independent institution of higher education or a religious institution on or before January 1, 2024.

SB 4 provided that an affordable-housing development does not qualify as a "use by right" if it is adjoined to any site where more than one-third of the square footage on the site is dedicated to "light industrial use."[51] AB 130 clarifies that the definition of a "light industrial use" is an industrial use that is not subject to permitting by an air pollution control district or air quality management district, whereas SB 4 as originally adopted defined a "light industrial use" to include any use (rather than clarifying that this limitation only applied to industrial uses not permitted by the applicable districts).[52]

AB 130 also clarifies that childcare centers are allowed as ancillary uses included within the affordable-housing project without limitation on the number of children in all zoning districts

[50] Information Bulletin 25-03: AB 130 Impacts, https://www.dgs.ca.gov/BSC/News/Page-Content/Building-Standards-Commission-News-List-Folder/IB-25-03-AB-130.

[51] Gov. Code § 65913.16(c)(5)(A).

[52] *Id*., at (b)(7).

within a jurisdiction.[53] SB 4 previously established a limitation on parking requirements for any religious institutional use or other use that that was previously existing on the site, that was included in the affordable-housing development project that is eligible as a use by right. Under the prior version of the law, the parking requirement for nonresidential space on the site could not exceed the lesser of the amount of existing parking or the amount required under a conditional use permit. AB 130 eliminated that requirement and instead provides that the parking requirement for the total project, including the religious institutional or other previously existing use, shall not exceed one space per residential unit.[54]

Finally, SB 4 originally provided that development projects that were permitted as a use by right under this law would be permitted as a height of one story above the maximum height otherwise applicable to the parcel. AB 130 clarifies that the project may be developed at a height of one story or 11 feet above the maximum height that would otherwise be applicable to the parcel.[55]

5. CHANGES TO SB 684/1123 – MINISTERIAL 10-LOT SUBDIVISIONS AND 10-UNIT PROJECTS

AB 130 refines the ministerial subdivision and project approval process under SB 684. SB 684, as modified by SB 1123 commencing in 2025, requires cities to ministerially approve (1) a subdivision resulting in 10 or few parcels for certain housing development projects and (2) a housing development project consisting of 10 or fewer units on a parcel resulting from a subdivision under the applicable law. Among other provisions to help facilitate development of these subdivisions, the law provides that for developments on parcels that are not identified in a jurisdiction's housing element for the current planning period, proposed developments that are to be subdivided under this law need only result in the greater of either: (a) at least 66 percent of the maximum allowable residential density as specified by local zoning or (b) at least 66 percent of the applicable residential density under Government Code section 65583.2, subdivision (c)(3)(B).[56]

AB 130 allows that when utilizing this law to subdivide property into 10 or fewer residential parcels, the proposed subdivision may designate a remainder parcel that retains existing land uses or structures, does not contain any new residential units, and is not exclusively dedicated to serving the housing development project.[57] The remainder parcel is not counted against the 10-

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[53] *Id*., at (h)(1)-(2).

[54] *Id*., at (k)((1).

[55] *Id*., at (j).

[56] Gov. Code § 66499.41(a)(5)(B).

[57] *Id*., at (a)(1)(B).

parcel maximum, and it is excluded from the calculation of residential density for purposes of determining the allowable density on parcels not identified in the jurisdiction's housing element for the current planning period.[58]

6. SUNSET DATES REMOVED

AB 130 made permanent certain provisions in the Housing Crisis, Housing Accountability and Permit Streamlining Acts that formerly had sunset dates. These changes signal the permanence of the recent state housing laws, and that creation of housing will continue to be critically important to the Legislature for the foreseeable future. The bill also repeals the expiration provisions of the Housing Crisis Act of 2019 and eliminates the limitation that certain provisions of the Act only applied to projects that submit a preliminary application before January 1, 2030.

While these revisions do not change the status quo for how housing projects are currently handled today, they do eliminate a degree of uncertainty about the permanence of these processes. For example, the following provisions are now permanent:

- The five hearing limit for housing projects;[59]
- The requirement to determine whether the site of a proposed housing development project is an historic site at the time the application is deemed complete;[60]
- The ability for applicants to submit a preliminary application and the requirement that a housing development project can only be subject to the ordinances, policies, and standards in effect when a preliminary application was submitted;[61]
- The Housing Accountability Act definitions for "objective" and what it means for a project to be "deemed complete" and "determined to be complete;"[62] "
- The requirement to replace residential units (no net loss);[63]

[58] *Id*., at (a)(1)(B), (a)(5)(B)(iii).

[59] Gov. Code § 65905.5(a).

[60] Gov. Code § 65913.10(a).

[61] Gov. Code §§ 65941.1, 65589.5(o)(1).

[62] *Id*., at (h)(9)[objective], (h)(5)[deemed complete], (h)(10)[determined to be complete].

[63] AB 130 repealed Government Code section 66301, which previously contained a January 1, 2034 sunset date for Government Code section 66300 et seq.

- The requirement to electronically publish lists of the information required for a housing development project to be deemed complete (application checklists).[64]

7. MISCELLANEOUS

AB 130 and SB 131 also include a few miscellaneous but notable provisions.

First, the Legislature updated the process for determining the methodology for regional housing needs assessment (RHNA).[65] While this does not require any action or implementation on the part of cities or counties it is worth noting.

Second — and this does require action by cities and counties — is the new requirement to annually inspect homeless shelters in their jurisdiction. The inspections may be announced or unannounced. Cities with populations under 100,000 may partner with their county to conduct the inspection. The requirements can be found Health and Safety Code Section 17974.1.

Following the annual inspection, the city or county must issue a notice to correct within 10 days of identifying a substandard condition during the inspection. AB 130 also includes requirements for shelters to display occupant-right information[66] and a requirements that the city or county's annual report to the state Housing and Community Development Department (HCD) now include the number of complaints received each year that a shelter is substandard.[67]

HCD will withhold state funding if the city or county fails to comply with reporting requirements or fails to take action to correct a violation at a shelter.[68] These provisions appear intended to improve the shelter system and provide accountability to those who oversee shelters, as shelters are critical component of moving people off the street and addressing the housing crisis holistically.

8. CONCLUSION

There is a lot in these two last-minute budget-rider bills to take in. We hope this summary provides helpful guidance to practitioners like us who had to figure out how to implement these changes essentially overnight.

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[64] Gov. Code § 65943.

[65] Gov. Code § 65584.04.

[66] Health & Safety Code § 17974.1.5.

[67] Health & Safety Code § 17974.5.

[68] *Ibid*.

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"Denser, Higher, and Beyond": Understanding State Density Bonus Law and Senate Bill 79 (2025)

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This paper analyzes State Density Bonus Law and Senate Bill 79, two major state housing tools available to developers for overriding local zoning density and development standards. Almost every legislative session since 2017 has seen amendments to State Density Bonus Law to further expand allowable maximum density and associated benefits to facilitate housing development. Most recently, the passage of Senate Bill 79 ("SB 79") mandates local governments to allow multifamily high-density housing near high-frequency transit stops. SB 79 may be seen as an additional "layer" of density bonus beyond what Density Bonus Law would provide to projects. These laws interact to create powerful incentives for housing developments that include affordable units but also create additional regulatory complexities for cities to navigate. This paper provides an overview of these laws and aims to explain the challenges that cities face in reviewing and making decisions on housing projects eligible to utilize these statutes. We also share frequently encountered questions and potential issues in implementing these laws and managing expectations of staff, reviewing bodies, and the public.

I. State Density Bonus Law (Gov. Code §§ 65915 - 65918)

Density Bonus Law is deeply rooted in the local government land use framework. Many city attorneys are (sometimes painfully) familiar with the fundamentals of this statute and are frequently asked to advise on its intricacies. As a refresher on the basics, Density Bonus Law requires general law and charter cities to grant a density bonus and other incentives, concessions or waivers to projects setting aside certain percentages of affordable units to low, lower or moderate income households defined by the Health and Safety Code. This requirement extends to housing for transitional foster youth, disabled veterans, homeless persons, or low income college students.[1] To qualify with affordable units, the project must offer for-sale or rental units to lower-income or very-low-income households, or for sale units to moderate-income households. The density bonus is then generally determined by a sliding scale proportional to the percentage of affordable units offered. Projects may also become eligible for density bonus through pathways other than offering affordable units, such as donating land to the city[2] or proposing a senior housing or senior mobilehome park project, including residential care facilities for the elderly.[3]

A. *Benefits for Eligible Projects Under State Density Bonus Law*

1. The project can build additional units beyond the base density.

The applicable "density bonus" is the additional units that the city must allow over the "base density", or the "maximum allowable residential density". This term is defined as the greatest number of units allowed under the zoning ordinance, specific plan, or land use element of the general plan, whichever is highest.[4] Often times, however, neither of these planning documents will contain a dwelling units-per acre density, especially in non-residential zoning districts or plan areas that allow residential development through additional discretionary approvals. If there is no base density, then the maximum number of units allowed would be determined by estimating the realistic development capacity of the site based on the objective development standards applicable to the project. The developer may provide a base density study to the city for this purpose, and the city must accept the study as long as it includes all applicable objective development standards.[5] All fractional numbers are rounded up for calculations pursuant to Gov. Code section 65915(q).

[1] Gov. Code section 65915(b)(1)(A)-(G).
[2] Gov. Code section 65915(g).
[3] Gov. Code section 65915(b)(1)(C), (f)(3)(A).
[4] Gov. Code section 65915(o)(6).
[5] Gov. Code section 65915(o)(6)(A).

Beginning in 2024, Density Bonus Law also provides additional density bonuses that may be "stacked" on top of the initial set of bonus units.[6] Stacking is available to projects that set aside enough affordable housing to first qualify for a 50 percent density bonus and then offers additional affordable units that are for sale or rental to very-low and moderate income households. In doing so, total affordable units in the project cannot exceed 50 percent (100 percent affordable projects do not get stacking bonuses). Together, some projects can achieve 100 percent density bonus, doubling the additional units that would be allowed beyond the base density.

The density bonus awarded to qualifying senior housing (including Residential Care Facilities for the Elderly) and mobilehome park projects is a set amount of 20 percent of the number of senior housing units.[7] Likewise, housing projects for foster youth, disabled veterans, or homeless persons also receive a set 20 percent density increase based on the number of the type of units that qualify the project for density bonus in the first place.[8] Finally, 100 percent affordable housing projects will receive an 80 percent density bonus based on the number of lower-income units. If such project is located within one-half mile of a major transit stop, or within a very low vehicle travel area, Density Bonus Law prohibits the city from imposing any maximum density controls.[9] Thus, the project essentially would have unlimited density.

2. <u>The project can use affordable units set aside under State Density Bonus Law to satisfy a city's inclusionary housing requirements.</u>

To qualify for density bonus through affordable units, the project must set aside a certain percentage of its "total units" for households at various income levels. Density Bonus Law specifies that "total units" includes all units designated as affordable to satisfy local inclusionary requirements.[10] As such, density bonus projects may use the same set of affordable units to meet the city's inclusionary requirements and also to qualify for state density bonus. Because of this, we now frequently see a housing development proposing affordability percentages that exceed the local inclusionary requirements in order to become eligible for a density bonus under state law.

3. <u>The project can override local regulations via incentives, concessions and waivers.</u>

Perhaps the most powerful aspect of Density Bonus Law is the availability of incentives, concessions and waivers for eligible projects. These elements are different tools that allow density bonus projects to override local standards and regulations, including objective development and design standards. Another benefit is that density bonus projects are able to rely on incentives/concessions and waivers to comply with local standards that the project may not otherwise meet. The Housing Accountability Act, for example, provides that the receipt of a density bonus, incentive, concession, or waiver under Density Bonus Law cannot be the basis for a finding that a housing development project is inconsistent with applicable plan, program, policy, ordinance, standard, requirement, or other similar provisions, including objective design standards.[11]

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[6] Gov. Code section 65915(v).
[7] Gov. Code section 65915(f)(3)(A).
[8] Gov. Code section 65915(f)(3)(B).
[9] Gov. Code section 65915(f)(3)(D).
[10] Gov. Code section 65915(o)(9). *See also Latinos Unidos del Valle de Napa y Solano v. County of Napa ("LUNA")* (2013) 217 CA4th 1160.
[11] Gov. Code section 65589.5(j)(3).

It is important to note that a project will receive these concessions, incentives and waivers as long as it qualifies for a density bonus, even if it does not seek utilize a density bonus. Recent development trends suggest that incentives, concessions and waivers may have become more attractive to developers than the potential density increase. Cities have seen many projects that do not seek to build additional units but only set aside affordable units in order to be able to obtain the ability to reduce or waive local development regulations, design standards, and other rules.

Incentives or Concessions

Cities are required to grant one or more "incentives" or "concessions" to a project that qualifies for a density bonus.[12] The specific number of incentive/concessions is determined based on the percentage of affordable units provided and the level of affordability. Incentives/concessions are defined as (1) a reduction in site development standards or a modification of zoning code or architectural design requirements, such as a reduction in setback or minimum square footage requirements; (2) approval of mixed use zoning; or (3) other regulatory incentives or concessions, which actually result in identifiable and actual cost reductions.[13] These are broad definitions and have increasingly been cited by developers to cover a wide range of local standards, regulations, policies, and requirements. The number of incentives or concessions available depends on the percentage of affordable units set aside by the project.[14] A project that qualifies for a density bonus through affordable units and that includes a childcare facility on its premises or adjacent to the project site will also receive an additional density bonus and an additional concession or incentive that makes the childcare facility feasible, unless the city is able to find that the community has adequate childcare facilities.[15]

As many city attorneys know, cities have limited discretion to deny concession and incentives requests. At the outset, the city must grant the incentive or concession unless it finds that the proposed concession or incentive does not result in identifiable and actual cost reductions to provide for affordable housing costs or rents, would cause a "specific, adverse impact" on public health or safety or historical property, or would be contrary to state or federal law.[16] The city bears the burden of proof for the denial of a requested concession or incentive.[17] This is a high threshold to meet for several reasons. First, the city cannot require developers to provide financial proformas or to demonstrate that the incentive or concession is necessary to make the project financially feasible.[18] Additionally, the definition of "specific, adverse impact" is the same stringent definition used in the Housing Accountability Act—requiring a significant, quantifiable, direct, and unavoidable impact, based on objective, identified written public health or safety standards, policies, or conditions in effect when a preliminary application is submitted under Government Code section 65941.1. Lastly, the city cannot require a developer to obtain a general plan amendment, local coastal plan amendment, zoning change, additional studies, or other discretionary approval just because the project requests a concession or incentive.[19]

Density Bonus Law does set some parameters around incentives and concession requests. At the outset, the city *can* require "reasonable documentation" from the developer to show that the project is eligible for a concession or incentive or to demonstrate that the incentives/concession

[12] Gov. Code section 65915(d).
[13] Gov. Code section 65915(k).
[14] Gov. Code section 65915(d).
[15] Gov. Code section 65915(h).
[16] Gov. Code section 65915(d).
[17] *Id.* at (d)(4).
[18] *Schreiber v. City of Los Angeles* (2021) 69 Cal.App.5th 549.
[19] Gov. Code section 65915(j)(1).

request meets the statutory definition.[20] Further, 2025 amendments to the Density Bonus Law limit concessions for commercial floor area ratio (FAR) to 2.5 times the base FAR, and provide that cities are not required to approve incentives or concessions for a hotel, motel, bed and breakfast inn, or transient lodging component of a mixed use project (except for residential hotels as defined by state law).[21] Finally, the requirement to grant concessions and incentives does not require the city to provide "direct financial incentives" for the housing development, including providing publicly owned land or granting waivers for fee or dedication requirements.[22]

Waivers or Reductions in Development Standards

In comparison to concessions and incentives that relate to cost reductions and project feasibilities, waivers under the Density Bonus Law relate to whether the project can be physically built under the city's normal standards. Specifically, cities are not permitted to apply any development standard which physically precludes the construction of the project at its permitted density and with the granted concessions/incentives.[23] Similar to the denial thresholds for concession and incentive requests, the city may only deny a waiver request if it finds that waiving the development standard at issue would cause a specific, adverse impact on public health or safety, or historical property, or would be contrary to state or federal law.[24] Again, as noted above, this is a high threshold to meet.

Waivers are in addition to the number of incentives or concessions that a project may receive, and there is no limit on how many development standards a project may waive.[25] Common examples of waivable development standards include setbacks, height, lot coverage, common open space, and external façade design requirements. It should be noted, however, that a 100 percent affordable project which receives a waiver from maximum density controls and additional height increases is not entitled to receive additional waivers, unless the city agrees to provide them.[26]

Recent caselaw has emboldened developers when using waivers. Historically, waivers were often viewed as a tool that allowed developers to waive development standards that prevented a project's density bonus units from being built. For example, if a project received a 20 percent density bonus, a project might need to waive an otherwise applicable height limit in order to physically build the project with the extra units. Now, developers claim waivers in order to excuse compliance with any development standard that would interfere with the particular project the developer wants to build. Oftentimes, the waiver requests appear to have little relation to the ability of the project to accommodate units. In taking this approach to waivers, developers rely on *Bankers Hill 150 v. City of San Diego* (2022) 74 Cal. App. 5th 755 and *Wollmer v. City of Berkeley (2011)* 193 Cal. App. 4th 1329. Those cases hold that developers cannot be required to remove amenities like courtyards in order to avoid the need for the density bonuses and that a "city would be in violation of the Density Bonus Law if it failed to waive development standards that would physically preclude construction of a project."[27] It is common to for cities to receive a letter from a developer citing these cases and arguing they require the city to grant a waiver if it would physically preclude construction of a project exactly as designed by the developer.

4. The project receives reduced parking requirements in addition to incentives,

[20] *Id*.
[21] Gov. Code section 65915(l)(1) and (2).
[22] Gov. Code section 65915(l)(3).
[23] Gov. Code section 65915(e).
[24] *Id.*
[25] *Id.*
[26] Gov. Code section 65915(e)(3).
[27] *Bankers Hill 150,* 74 Cal. App. 5th at 780.

concessions and waivers.

Separate from the incentives/concessions and waivers described above, upon developer request cities cannot require density bonus-eligible projects to provide more parking beyond the reduced parking ratios set by statute.[28] Under current law, these ratios are: 1 space for 0-1 bedroom, 1.5 spaces for 2-3 bedrooms, 2.5 for 4 or more bedrooms. Additionally, for certain projects such as 100 percent affordable projects within 0.5 miles of a major transit stop, the city cannot require any parking (unless the city has conducted parking study within the last 7 years to show that higher parking ratio is warranted, then the city can require the base parking ratio above).[29] Where parking is required, the developer may provide tandem or uncovered parking onsite, but not on-street parking.[30] This is another attractive feature of Density Bonus Law and motivates developers to provide affordable units in order to benefit from reduced parking requirements.

5. Liberal constructions under State Density Bonus Law in favor of the project.

Gov. Code section 65915(r) instructs Density Bonus Law to be "interpreted liberally in favor of producing the maximum number of total units." In practice, housing developers and regulatory agencies such as the State Department of Housing and Community Development (HCD) have relied on this provision to apply or interpret rules in favor of housing projects and override local discretion. The statute is similarly deferential to residential developments such as giving developers the ability to dictate the base density study to determine applicable base units, providing flexible approaches to reduce local standards and discretion, and expanding the types of projects that can qualify for density bonus benefits. All of these reflect the statutory goals to encourage affordable units, bridge funding gaps, and stimulate housing production.

6. The ability to assert legal remedies against denial of an incentive, concession, or waiver request, or the density bonus project.

Cities have the burden of proof for the denial of a requested concession, incentive, or waiver. Density Bonus Law provides developers the ability to initiate litigation against a city if they refuse to grant a requested incentive, concession or waiver.[31] If a court determines that the city's refusal is in violation of Density Bonus Law, it is required to award attorney's fees and cost of suit to the developer.[32] Relatedly, denying a density bonus project in violation of the statute likely also triggers a violation of the Housing Accountability Act; that law also gives a broader cause of action for applicants, individuals eligible for residency in the project, and housing advocate organizations to initiate litigation against the city.[33]

B. *Additional Density Bonus Law Provisions for Special Situations*

In addition to the fundamentals under Section 65915, the statute also contains several provisions under Sections 65915.1 – 65917.5 setting forth additional restrictions or other forms of bonuses and benefits. These situations are less common, but it is still helpful to be aware.

[28] Gov. Code section 65915(p).
[29] Gov. Code section 65915(p)(3)-(7).
[30] Gov. Code section 65915(p)4).
[31] Gov. Code sections 65915(d)(3); (e)(1).
[32] *Id.*
[33] Gov. Code section 65589.5(k).

1. Density Bonus for Condominium Conversions.[34]

Condominium conversion projects that provide at least 33 percent of the total units for low- or moderate-income households, or 15 percent to lower-income households are entitled to a density bonus of 25 percent over the number of apartments, or other incentives of equal financial value, which may include reducing or waiving local conditions of approval for a condo conversion project. Cities may impose conditions with the bonus award but are not required to provide cash transfer payments or other monetary compensation as a part of the award.

2. Density Bonus for Commercial Projects.[35]

Commercial projects that partner with affordable housing developers to construct affordable housing at the project site, or at another site close to schools, employment or major transit stops, are entitled to receive a "development bonus". This bonus is not in the form of increased density but instead is comprised of "mutually agreeable incentives" between the city and developer. The statute gives a non-exhaustive list of examples including increase in height and floor area ratio, and reduction in parking. To receive the development bonus, the partnership agreement must be approved by the city.

3. Floor Area Ratio (FAR) Bonus for High Density Infill Projects Near Transit.[36]

An urban infill, high density project in a transit priority area or within 0.5 miles of a major transit stop may request the city grant a FAR bonus in lieu of the traditional units density bonus. To be eligible, the project must meet location, density, and affordability requirements which requires 20 percent affordable units to very low income households for at least 55 years. The project must also meet local height limits in the underlying zone. For a mixed-use project, the FAR bonus only applies to the residential portion of the project.

4. Floor Area Ratio Bonus for Commercial and Industrial Projects with Child Care Facilities.[37]

As discussed above, Section 65915 provides an additional density bonus for housing projects that provide childcare facilities. Separate from that provision, commercial and industrial projects of at least 50,000 square feet may receive an FAR bonus when the project sets aside at least 2,000 square feet in the building and 3,000 square feet of outside space for a childcare facility. The project must continue to comply with height, setback, lot coverage, and other zoning district requirements as well as health and safety requirements for construction. The childcare facility may be proposed at the project site or offsite as agreed upon by the city and developer. Once the childcare facility is established, the city must make a finding that childcare needs have decreased or are no longer present before the facility may be changed for use, reduced in size, or closed.

C. *Common Issues in Applying SDBL and Processing Applications*

1. Adopting local density bonus ordinances for state and local bonuses.

Density Bonus Law requires cities to adopt ordinances to implement the state law

[34] Gov. Code section 65915.5.
[35] Gov. Code section 65915.7.
[36] Gov. Code section 65917.2.
[37] Gov. Code section 65917.2.

provisions.[38] Practically, more cities have elected to adopt ordinances that defer to state law because of the constant legislative amendments to the Density Bonus statute. The more helpful document for processing applications is the city's density bonus application procedures and checklists, which are required by Government Code section 65915(a)(3). This information is often included as a part of the city's planning application checklist to cover the density bonus project narrative and any requests for incentive/concession and waiver requests.

Additionally, some jurisdictions elect to establish local density bonuses and development incentives separate from the state Density Bonus requirements. This may be in the form of additional bonuses beyond what qualifying projects may receive under state law, or may be "gap bonuses" that are provided as a local incentive to projects ineligible to receive a state density bonus. This voluntary practice is permitted by Government Code section 65915(n); municipalities should be mindful that receipt of local bonuses do not impact state density bonus eligibility, nor are they factored into calculation of base density for those purposes.

2. Requests to waive or to receive concessions or incentives for "non-traditional" standards and requirements.

As defined by Government Code section 65915(d) and (e), the range of local requirements that may be subject to an incentive/concession or waiver request is fairly broad. However, Section 65915(j)(2) also provides that the density bonus statutes do not require local jurisdictions to waive "local ordinance or provisions of a local ordinance unrelated to development standards." Traditionally, development standards are thought to be regulations that relate to the formation, construction and design of the building. Nonetheless, various jurisdictions have increasingly observed developers requesting concessions/incentives and waivers for local requirements that are not intuitively associated with the building development stage.

One example is a developer requesting a concession or waiver against the city's "minimum density" requirement. A minimum density establishes a threshold number of units per acre that a residential project must achieve in order to propose development at the site subject to that density. The effect of such a request is to reduce the number of dwellings that are produced for the site. On one hand, it could be argued that such a request could be entertained by the city because a minimum density requirement physically precludes construction of the density bonus project, or the elimination of which would result in actual and identifiable cost reductions. On the contrary, however, it seems more persuasive that such request would be against the fundamental structure of Density Bonus Law where a base density (which is established by the minimum density standard) is necessary to calculate and award a density bonus. Likewise, such a request also seems to be against the intent of Density Bonus Law to encourage housing production and reduce financial strains on residential development, as it would reduce the number of dwelling units constructed. Such a request, if entertained, may also have negative implications for projects proposed on housing element inventory sites, which are required by state housing element law to comply with minimum density requirements in many instances. The city's ability to maintain housing production capacity under the No Net Loss statute will likewise be impaired.[39]

Other examples encountered by jurisdictions include incentive/concession requests for in-lieu fees and impact fees, and waiver requests from mixed-use projects to reduce development standards that apply to the commercial or non-residential portion of the development. In regard to fees, it should be first noted that Section 65915(l)(3) provides that cities are not required to provide

[38] Gov. Code section 65915(a).
[39]The No Net Loss requirements for housing element inventory sites are located under Gov. Code section 65863.

"direct financial incentives" for a density bonus project. Equally important is that Section 65915.1 prohibits the application of affordable housing impact fees, including inclusionary zoning fees and in-lieu fees, on a density bonus project's affordable units. On those bases, it appears municipalities are in a good position to decline concession/incentive requests for impact fees or other similar charges because doing so essentially provides financial assistance to the project, which is not required by statute. Cities may not be in as strong a position for in-lieu fees because those fees are generally intended to substitute a development standard or requirement, which in itself is waivable or for which a concession/incentive can be granted.

In mixed-use project situations, if a development standard applies solely to the commercial/nonresidential portion of the project and there is evidence supporting the argument that the standard is separable from the residential portion, then the city may be in a better position to determine that said standard is not waivable or subject to a concession/incentive request. It may also be the case that it's difficult to reach such conclusion, because it has become increasingly easy for a developer to demonstrate a particular standard precludes construction or results in cost reduction for any residential development. It is certain, however, that if the mixed-use project contains a hotel, motel, bed and breakfast inn, or other types of transient lodging except for a residential hotel defined by state law, the city is not required to grant a request for incentives, concessions, or waivers towards that project component.

3. Complications arises where "base density" is absent or only partially expressed in the city's land use documents.

As discussed in prior sections, Density Bonus Law now provides a mechanism to calculate base density in the event that the city's land use authorities do not provide a dwelling units per acre density and requires the city to accept a base density submitted by the developer. This statutory mechanism is triggered when there is no dwelling unit/acre density in the city's "applicable zoning ordinance, specific plan, or land use element of the general plan." As city attorneys know, many housing element site inventories now set a "permitted dwelling units per acre" for development site candidates as a part of the requirement to include sufficient parcels and densities to accommodate their regional housing need obligations. It would seem reasonable that these housing element densities are enforceable standards and constitute base densities for those sites in the inventory. In a 2023 technical assistance letter to the County of El Dorado, the State Department of Housing and Community Development (HCD) seemed to acknowledge that in calculating the maximum base density, "additional planning documents such as Redevelopment Plans, Community Plans, Small Area Plans, Precise Plans, Master Plans, etc., may also apply."[40] At a fundamental level, cities should consider aligning housing element density standards or projections with those contained in the land use element, specific plan, or zoning ordinance, if not already carried over or if site rezonings are not yet complete.

4. Can Accessory Dwelling Units (ADU) be counted towards the base density for Density Bonus Law eligibility?

A question that has become increasingly common is whether ADUs could be included in the base density in order for the project to qualify for a density bonus. This situation may arise in development proposals that are made up of multiple single-family subdivisions proposed as one project and each home is accompanied by a proposed ADU. It seems cities would find support in the ADU statute to reject counting ADUs towards the base density, since the ADU statute provides

[40] See HCD Letter of Technical Assistance at page 2: https://www.hcd.ca.gov/sites/default/files/docs/planning-and-community/HAU/ElDoradoCounty-TA-030923.pdf (last accessed March 20, 2026)

that ADUs "do not exceed the allowable density for the lot upon which the accessory dwelling unit is located, and that accessory dwelling units are a residential use that is consistent with the existing general plan and zoning designation for the lot."[41] Based on this language, there is some authority for a city to conclude that ADUs do not contribute to the parcel's density production and thus would not be considered as separate units for the purposes of calculating density.

However, and to the contrary, HCD stated via a technical assistance letter to the City of Carlsbad dated February 16, 2024 that a project consisting of three primary units and two ADUs can qualify for state density bonus.[42] However, that letter also stated that ADUs cannot be counted when "calculating a density bonus", because ADUs do not count towards the base density – seemingly contradicting HCD's prior conclusion in the letter. In another technical assistance letter to the City of Antioch dated November 15, 2024 regarding a project with 95 primary units and 47 ADUs, HCD similarly stated that developers can choose to use ADUs to qualify a project for a state density bonus if all ADUs proposed are counted towards the base density.[43] These opinions do not provide much clarity regarding how the density bonus should be calculated using the rationale outlined in the letters.

5. Requiring density bonus affordability/regulatory agreements and income verification enforcement.

Many cities across California implement a robust affordable housing program in conjunction with state density bonus entitlements and local inclusionary housing requirements. Affordable housing agreements or similar regulatory agreements are executed between the city and developer to restrict tenant income levels as proposed by the project to qualify for Density Bonus Law. Cities have the flexibility to dictate several aspects of how the affordable housing/density bonus program would be run, including how the restrictive covenant would be executed and how tenant income would be verified. Density Bonus Law requires affordable rental units and units in a foster youth housing project be restricted affordable for 55 years; local ordinances can also require longer affordability periods for units that are required as a condition for residential development under local ordinances and that are not financed with low-income housing tax credits.[44] Effective in 2026, AB 1170 (2025) would prohibit cities to charge a monitoring fee for 100 percent affordable density bonus projects meeting certain requirements, including if the project is subject to a recorded regulatory agreement with HCD, the state Tax Credit Allocation Committee, or the California Housing Finance Agency.[45] These issues are valuable for cities to consider in implementing affordable housing and density bonus programs.

II. Senate Bill 79 ("Abundant and Affordable Homes Near Transit Act")

Senate Bill (SB) 79, passed in 2025, preempts local standards to allow higher density, multifamily housing near high-frequency transit stops. SB 79 follows failed attempts to adopt similar legislation in 2018 (SB 827) and 2020 (SB 50). This section of the paper outlines the requirements of SB 79, the limited options it provides cities when implementing the law, and how

[41] Gov. Code section 66314(c).
[42] See https://www.hcd.ca.gov/sites/default/files/docs/planning-and-community/HAU/carlsbad-hau565-ta-02162024.pdf (last accessed March 20, 2026).
[43] See https://www.hcd.ca.gov/sites/default/files/docs/planning-and-community/HAU/antioch-hau-1174-ta-111524.pdf (last accessed March 20, 2026).
[44] Gov. Code sections 65915(c); 65915.2.
[45] Gov. Code section 65915.3.

it interacts with the other state laws. The principal elements of the law go into effect on July 1, 2026.[46]

A. *Where Does SB 79 Apply?*

SB 79's stated purpose is to facilitate the construction of more homes near transit. However, it does not apply statewide. Rather, the law only applies in "urban transit counties", which is defined as a county with more than 15 passenger rail stations.[47] That limits the law's application to the following counties: Alameda, Los Angeles, Orange, Sacramento, San Diego, San Francisco, San Mateo, and Santa Clara. Missing from this list are some of the state's counties with the largest counties by population, including some counties with relatively extensive transit systems, like Contra Costa County.[48]

Within urban transit counties, housing projects are eligible to utilize SB 79 if they are within one-quarter mile of a qualifying transit-oriented development ("TOD") stop or within one-half mile of a qualifying TOD stop if located in a city with a population of at least 35,000.[49] There are two different classification of TOD stops:

- "Tier 1 transit-oriented development stop" is a TOD stop served by heavy rail transit or very high frequency commuter rail (at least 72 trains per day across both directions).[50]

- "Tier 2 transit-oriented development stop" is a TOD stop served by light rail transit, by high-frequency commuter rail (at least 48 trains per day across both directions), or by bus rapid transit service with headways of 20 minutes or less during the morning and afternoon peak commute periods.[51]

Currently, Tier 1 TOD stops include all BART and Caltrain stations in the Bay Area, and LA Metro stations on certain high frequency lines. However, existing transit stops may change from Tier 1 to Tier 2, or vice versa, over time as service frequencies adjust. Importantly, a rail line qualifies as high-frequency or very high frequency if regular service intervals, not including temporary service changes of less than one month or unplanned disruptions, met the frequency standard at any point in the past 3 years.[52]

If new Tier 1 or Tier 2 TOD stops are added in the future, and those stops were identified in the applicable regional transportation plan on or before January 1, 2026, then SB 79 applies fully to those stops.[53] If the new stops were not identified in the applicable regional transportation plan, then the new stops are only subject to SB 79 if they qualify as a Tier 1 TOD stops.

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[46] SB 79 does not apply in unincorporated areas until the 7th regional housing needs allocation (RHNA) cycle.
[47] Gov. Code section 65912.156(q).
[48] This is a narrower scope than either SB 827 ad SB 50. Presumably these limitations were part of the legislative negotiation to secure necessary votes for passage.
[49] Gov. Code section 65912.157(a).
[50] Gov. Code section 65912.156(n), (r).
[51] Gov. Code section 65912.157(e), (o). Bus rapid transit service is defined in Public Resources Code section 21060.2 and must include, among other things, dedicate bus lanes or separate right-of-way, transit signal priority, and all-door boarding.
[52] Gov. Code section 65912.156(e), (r).
[53] Gov. Code section 65912.156(p).

If the addition of new passenger rail stations causes a county to become a "urban transit county" in the future, the county becomes subject to SB 79, except that Tier 2 TOD stops would not include any bus stations.

B. *What Does SB 79 Require and Allow?*

1. Projects must meet certain basic requirements.

SB 79 applies to housing development projects, as that term is defined in the Housing Accountability Act.[54] Housing development projects include: 1) residential projects consisting of at least two (2) units, 2) mixed use developments with at least two-thirds of the square footage designated for residential use, 3) transitional housing or supportive housing, or 4) farmworker housing. No part of the project may be designated for use as a hotel, motel, bed and breakfast inn, or other transient lodging.

To qualify for SB 79, a housing development project must meet the following requirements[55]:

- Be located within one-half (1/2) mile of a TOD stop in cities with a population of at least 35,000, or within one-quarter (1/4) mile of a TOD stop in cities with populations of less than 35,000[56];
- Contain at least five (5) residential units;
- Be on a site zoned for residential, mixed-used, or commercial uses;
- Have a minimum density of at least 30 units/acre, or the applicable local density, whichever is greater;
- The average size of the proposed residential units may not exceed 1,750 habitable square feet; and
- Meet affordability requirements (detailed below).

2. Qualifying projects are entitled to greater height, density, and FAR.

Proposed projects that meet SB 79's requirements are entitled to utilize height, density, and residential floor area ratio (FAR) standards established by the law.[57] The exact standards differ depending on whether the site is located near a Tier 1 or Tier 2 TOD stop, whether the site is within ¼ mile or ¼ mile from the TOD stop, and whether or not the site is in a City with a population of at least 35,000:[58]

For all Cities				
	Distance to TOD Stop	*Maximum Density*	*Maximum Height*	*Maximum FAR*
Tier 1 TOD Stop	Within ¼ mile	120 units/acre	75 feet	3.5
Tier 2 TOD Stop	Within ¼ mile	100 units/acres	65 deet	3.0

[54] Gov. Code sections 65912.156(g); 65589.5(h)(2).
[55] Gov. Code section 65912.157(a)(1)-(3).
[56] Distance is measured in a straight line from the nearest edge of the parcel containing the proposed project to a pedestrian access point for the TOD stop.
[57] Projects must also comply with the height, noise, and safety standards in A development proposed pursuant to this chapter shall be consistent with the height, noise, and safety standards of an adopted airport land use compatibility plan or Department of Defense Air Installation Compatible Use Zones. Gov. Code section 65912.157(j).
[58] Gov. Code section 65912.157(a)(4)-(6).

City with Population of at least 35,000				
Tier 1 TOD Stop	Within ½ mile	100 units/acre	65 feet	3.0
Tier 2 TOD Stop	Within ½ mile	80 units/acre	55 feet	2.5

In addition, projects immediately adjacent[59] to a Tier 1 or Tier 2 TOD stop are eligible to increase the otherwise applicable density by 40 units/acre, height by 20 feet and FAR by 1.0.[60]

3. Projects must meet minimum affordability requirements.

In order to qualify for SB 79, proposed projects with more than ten (10) units must provide the following minimum level of affordable housing:

- 7% of the units for extremely low-income households;
- 10% of the units for very low-income households; or
- 13% of the units for low-income households.[61]

If a city has adopted a local inclusionary zoning standard requiring greater percentages of affordable housing than required by SB 79, the city's local standard will apply.

SB 79 projects are not allowed on sites that either: 1) require the demolition of housing units subject to any form of rent control and occupied by tenants in the last 7 years, or 2) on which residential units subject to a rent control ordinance were demolished in the 7 years. California law's generally applicable restriction on demolishing housing units also apply to SB 79 projects.[62] Additionally, projects must also comply with any applicable local demolition and anti-displacement standards.

4. Projects over 85 feet must comply with Labor Standards.

SB 79 differs from many other housing production laws enacted by the Legislature over the last decade in that it does not require developers to pay prevailing way or comply with specified labor standards on most projects. SB 79 projects are only required to meet labor standards if they are over 85 feet tall, a height which is only allowable for projects adjacent to a TOD stop.[63] Projects of this height are required to meet the same labor standards as set forth in SB 35, including the payment of prevailing wage and the use of a skilled & trained workforce. While not a specific requirement in SB 79, it is generally understood that once buildings are taller than 85 feet, they must use steel-framed construction rather than wood-framed.[64]

The labor standards required for projects over 85 feet were not part of SB 79 for most of the legislative year. After extensive negotiations, the labor provisions were added, as well as clarity that the law would not authorize the construction of hotels. As a result, "UNITE HERE", a union representing hotel workers, announced support for the bill, and the State Building and Construction

[59] Adjacent means within 200 feet of any pedestrian access point to a TOD stop. Gov. Code section 65912.156(a).
[60] Gov. Code section 65912.157(e)
[61] Gov. Code section 65912.157(d).
[62] Gov. Code section 65912.157(g),(h). Government Code section 66300.6 prohibits the demolition of existing residential units unless the project will create as many units as will be demolished, and prohibits the demolition of "protected units" unless certain requirements are met, including the replacement of the protected units. A protected unit includes units that are or were rented by lower or very low-income households within the past five years.
[63] Gov. Code section 65912.157(k).
[64] See https://calmatters.org/housing/2025/09/california-housing-near-transit/.

Trades Union of California took a neutral position, rather than oppose the law.[65] In the past, the Building Trades generally opposed bills that eased restrictions on residential construction without minimum labor standards, which made passage more difficult.

C. *Local Implementation*

1. Projects override local standards

Qualifying projects may comply with the density, height and FAR standards established by SB 79, notwithstanding contradictory local zoning standards. Cities are prohibited from adopting any zoning requirements or fees that apply solely to projects that are utilizing SB 79.[66] A city's otherwise applicable standards continue to apply to SB 79 projects, but only to extent the those standards do not prevent a project from achieving the development standards allowed by SB 79.[67] For the purposes of the Housing Accountability Act, a proposed project in compliance with the requirements of SB 79 (along with any allowable local standards) is deemed consistent with applicable standards.[68]

2. Cities have options for flexibility

SB 79 provides local agencies with potentially significant flexibility to limit the scope of required density increases, at least temporarily. A city may, but is not required to, adopt an ordinance to implement SB 79 and bring its zoning code into compliance with the law.[69] If a city adopts such an ordinance, then until one year following adoption of the city's 7th Housing Element Revision, SB 79 would not apply on the following sites within the city:[70]

- Sites within a very high fire hazard severity zone;
- Sites that are vulnerable to one foot of sea level rise;
- Sites with a historic resource designated as of January 1, 2025, on a local register;
- Sites identified by the city that permit density and FAR at 50% or more of the otherwise applicable standards under SB 79:
- Sites within a TOD zone in which at least 33% of the sites permit density and FAR at 50% or more of the otherwise applicable standards under SB 79 and those sites cumulatively allow for at least 75% of the aggregate density that would otherwise be allowed in the TOD zone pursuant to SB 79. The aggregate density thresholds are lower for sites within low resource areas.[71]

This provision gives cities signficant flexibility to delay full implementation of SB 79 until 2030 (for Los Angeles, Orange, San Diego, and Sacramento Counties) or 2032 (for Bay Area counties). Until this time, covered cities would likely be able to significantly limit the amount of density required, depending on the specific characteristics of the jurisdiction.

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[65] *See* https://cayimby.org/news-events/press-releases/yimbys-craft-labor-deal-for-sb-79.
[66] Gov. Code section 65912.157(c).
[67] *Id.*
[68] Gov. Code section 65912.157(l)
[69] Gov. Code section 65912.160(c). Adoption of an ordinance to implement SB 79 is not a project under CEQA. Gov. Code section 65912.160(c)(2).
[70] Gov. Code section 65912.161(b)(1).
[71] Gov. Code section 65912.161(b)(1)(ii),(iii).

Cities must submit their proposed ordinances to HCD for review and a determination of whether or not the ordinance is in substantial compliance with SB 79's applicable requirements.[72] If HCD determines the ordinance does not comply with SB 79, the city may amend the ordinance or make finding to explain the reasons the city believes the ordinance complies with SB 79 despite HCD's determination.[73]

SB 79 also provides two other limited paths for cities to exempt themselves from portions of SB 79's requirements.[74]

First, as part of a locally adopted SB 79 ordinance, a city may designate areas within one-half (1/2) mile of a TOD stop as exempt from SB 79 if the city makes findings supported by substantial evidence that no walking path shorter than one mile from that location to the TOD stop exists.[75] This exemption is most likely to be applicable in areas where either limited railroad track crossings or freeways, require pedestrians to walk significantly out of the way order to access a TOD station on foot.

Second, a city may adopt a "transit-oriented development alternative plan" that modifies the densities and redistributes the zoned capacity provided by SB 79.[76] Any transit-oriented development alternative plan" must comply with the following requirements:[77]

- The alternative plan must maintain the same total zoned capacity, in terms of both units and residential floor area, across all TOD zones as provided by SB 79;
- The alternative plan may not reduce the maximum allowed density for any individual site by more than fifty percent (50%), except for historic sites, those in a very high fire hazard severity zone, or vulnerable to one foot of sea level rise;
- The alternative plan may not reduce the capacity in any TOD zone, in either total units or residential floor area, by more than 50%.
- A site's maximum capacity counted toward the alternative plan may not exceed 200% of the maximum density allowed by SB 79.

A transit-oriented development alternative plan may be adopted through the housing element, a program to implement the housing element, the adoption of a specific plan, a zoning overlay, or enactment of an ordinance.[78] Any alternative plan must be reviewed and approved by HCD.

D. *Transit Agencies May Adopt Their Own Zoning Standards*

SB 79 also authorizes transit agencies to adopt transit-oriented development zoning standards for agency-owned property located in a TOD zone.[79] The law establishes various requirements for these zoning standards, including that they may establish height limits greater than those established by SB 79, but may allow densities up to 200% of the maximum otherwise permitted by SB 79.[80] Significantly, Transit-oriented development zoning standards may permit

[72] Gov. Code section 65912.160(d)(1).
[73] Gov. Code section 65912.160(d)(5).
[74] A very limited third exemption exists in a city with at least 15 TOD stops for sites of at least 250 acres designated in a city's general plan on or before January 1, 2025 as an employment lands area. Gov. Code section 65912.160(e)(2)
[75] Gov. Code section 65912.160(e)(1).
[76] Gov. Code section 65912.161(a).
[77] Gov. Code section 65912.161(a)(1)-(3).
[78] Gov. Code section 65912.161(a).
[79] Gov. Code section 65912.158(b).
[80] See Gov. Code section 65912.158(a).

projects with as low as 50% of the total square footage dedicated to residential purposes, significantly less that a private developer is required to provide under SB 79. Adopted transit-agency adopted development standards control over the otherwise applicable local requirements.[81]

Development zoning standards adopted by a transit agency do not apply to property acquired by a transit agency through eminent domain after July 1, 2025, but nothing prevents a transit agency from negotiating the purchase of additional property to be used for development under the law.[82]

These provisions in SB 79 give local transit agencies significant power over development and land use on property they own, including for projects with significant commercial development.

III. Concurrently Utilizing Density Bonus Law, SB 79, & other Laws

The combined application of Density Bonus Law, SB 79, and other housing streamlining laws on residential development projects substantially reduce regulatory hurdles. These combinations can greatly change how cities process applications and how they make policy decisions to adopt or revise development and design standards. Cities will also need to manage expectations for if and how project appearances desired by the community could be achieved. As mentioned above, cities remain bound to their obligations under other laws such as housing element laws, No Net Loss, and CEQA notwithstanding these streamlining provisions.

A. *Utilizing Density Bonus Law With Other Housing Streamlining Laws*

A number of housing streamlining laws went into effect during recent years. These statutes limit local discretion differently and imposes various affordability and eligibility requirements, for projects to qualify for streamlined approval processes. However, these laws continue to facilitate a project's ability to take advantage of both the streamlining statute and density bonus provisions as long as eligibility requirements under both sets of laws are met. A project does not lose its Density Bonus Law benefits just because it is proposed pursuant to another streamlining statute. For instance, projects qualifying for ministerial approval under SB 35 (2017) are eligible to benefit from Density Bonus Law.[83] Likewise, projects proposed under the AB 2011 (2022) and SB 6 (2022) statutes, which allows for multi-family residential on sites within zoning districts that principally permit office, retail or parking uses, are eligible for density bonus benefits.[84] Supportive housing projects eligible for by-right approval under the provisions of AB 2162 (2018) are also eligible for density bonus benefits.[85] Similarly, the Housing Accountability Act generally provides for a housing project's ability to utilize density bonus, incentives, concessions and waivers to meet local standards. Within that statute, the Builder's Remedy provision further provides for an additional two incentives or concessions for eligible projects.[86]

B. *Using Density Bonus Law on SB 79 Project*

[81] In 2018, the Legislature enacted AB 2923, which gave BART similar authority over property it owned.
[82] Gov. Code section 65912.158(a)(5).
[83] Gov. Code section 65913.4(a)(4)(C).
[84] Gov. Code sections 65912.113 (f)(1); 65852.24(f)(1).
[85] Gov. Code section 65655.
[86] Gov. Code section 65589.5(f)(6)(C).

SB 79 projects are eligible for density bonuses, concessions, waivers, and all other benefits of the Density Bonus Law.[87] Because of SB 79's affordability requirements, at a minimum every SB 79 project will qualify for at least a 24.5% density bonus and at least one concession, but may be entitled to significantly more if additional affordable housing is provided.

In addition, SB 79 projects that achieve a minimum density of at least 75% of the maximum density allowed for the project site will be entitled to one additional concession if the development is providing units for low-income households, two additional concessions if providing units for very low-income households, and three additional concessions if providing units for extremely low-income households.[88] Given the propensity of many developers to rely mostly on waivers in order to facilitate approval of their proposed projects, it is not clear how widely used these additional concessions will be. However, they are a potentially significant benefit for developers trying to make a project financially feasible.

SB 79 does contain one limitation on the ability of qualifying projects to utilize the Density Bonus Law. Unlike other projects, SB 79 projects may not use a density bonus waiver to increase building height above the maximum allowed by SB 79 standards.[89]

C. *SB 79 and Housing Streamlining*

SB 79 projects may qualify for streamlined ministerial approval pursuant to SB 35, including without having to satisfy all of SB 35's standard requirements.[90] Specifically, all SB 79 projects are eligible for SB 35 regardless of whether the project is in a city that is otherwise subject to SB 35 based on its housing element or RHNA compliance. Additionally, SB 79 projects must only provide 10% of units as affordable to very-low income households in rental projects or affordable to low-income households in ownership projects.

D. *Compliance with the California Environmental Quality Act (CEQA)*

Density Bonus Law does not provide an independent CEQA exemption. In fact, the statute states that it does not "alter or lessen the effect" of CEQA and any density bonus, concessions, incentives, waivers, and parking ratios must be permitted in a manner consistent therewith.[91] However, projects eligible for density bonus are likely able to utilize other CEQA exemptions for urban infill projects either under Class 32 of CEQA Guidelines section 15332 or under the exemption recently introduced by Assembly Bill 130 (2025). The ability of density bonus-eligible projects to apply incentives, concessions and waivers to override local standards means that they can be considered "consistent with applicable zoning and general plan" for the purposes of qualifying for these infill exemptions.[92]

As another example, CEQA would not apply to projects that qualify for ministerial approval under other laws, such as under SB 35 and AB 2011. In other instances where no CEQA exemption applies, the project would need to be analyzed under the appropriate environmental review level as required by CEQA and supported by evidence in the record. Practically, environmental impact reports and other analyses under CEQA frequently do not find that the

[87] Gov. Code section 65912.157(d).
[88] Gov. Code sections 65912.157(a)(3)(D), (a)(4)(D), (a)(5)(d); 65912.157(d)(1)-(3).
[89] Gov. Code section 65912.157(d).
[90] Gov. Code section 65912.159(a). SB 35 is codified as Government Code section 65913.4. That section was later amended by SB 423.
[91] Gov. Code section 65915(m).
[92] *Wollmer v City of Berkeley* (2011) 193 Cal.App.4th 1329, 1348-49.

additional density or concessions and waivers applied towards development standards would create significant environmental impacts, even in cases where the density exceeds previously studied ranges in a tiering CEQA document.

Similarly, SB 79 does not automatically exempt projects from CEQA review or provide an independent exemption. However, SB 79 projects will often qualify for other existing CEQA exemptions. Among other exemptions, SB 79 projects may qualify for the urban infill housing statutory exemption recently enacted by AB 130. Importantly, as noted above, a project in compliance with the requirements of SB 79 (along with any allowable local standards) is deemed consistent with applicable general plan and zoning standards. With these laws combined, housing streamlining is anticipated to continue reshaping local government land use and environmental review frameworks with their effects remaining to be seen.

2026 Labor and Employment Litigation Update

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Labor and Employment Litigation Update

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Labor and Employment Litigation Update Spring 2026

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I. INTRODUCTION

In the last several months, California and Federal courts, the Public Employment Relations Board ("PERB"), and the Legislature have issued significant decisions and enacted new laws impacting labor and employment law for public agencies. Several of these developments are particularly important for cities as employers.

The cases and legislation discussed in this update span a broad range of issues that public employers routinely encounter. Recent legislation imposes new obligations on agencies, including advance notice requirements before contracting out bargaining unit work and expanded access to personnel and training records. The Legislature also enacted laws requiring employers to provide written notices of employee rights, maintain additional compliance records, and address employee training and bias mitigation efforts. Other measures expand disqualification rules for public employment, clarify reimbursement obligations and worker classification standards, and introduce new requirements affecting public safety practices and oversight.

In addition, the Legislature continued to refine enforcement procedures under the Fair Employment and Housing Act (FEHA) and expand employee protections in areas such as leave rights, workplace protections for victims of violence, and access to benefits.

The following sections highlight key developments in labor and employment law, organized into the following categories: (1) Labor and Employment Legislation; (2) Brown Act; (3) Discrimination, Harassment, and Retaliation; (4) First Amendment and Freedom of Religion; (5) Government Claims Act; (6) Labor Relations; (7) Peace Officer Records; (8) Retirement; (9) Workplace Violence; and (10) Wage and Hour.

CASES AND LEGISLATION

1. LABOR AND EMPLOYMENT RELATED LEGISLATION

1. Labor Relations

AB 339 — Requires Agencies to Give 45 Days' Notice to Employee Organizations Before Contracting

The Meyers-Milias-Brown Act (MMBA) authorizes local public employees to form, join, and participate in the activities of employee organizations of their own choosing for the purpose of representation on matters of labor relations. The MMBA also requires the governing body or management of a public agency to meet and confer in good faith regarding wages, hours, and other terms and conditions of employment with representatives of recognized employee organizations and to fully consider presentations that are made by the employee organization on behalf of its members before arriving at a determination of policy or course of action. Pursuant to existing legal obligations under the MMBA and Public Employment Relations Board (PERB) case law, an agency has an affirmative obligation to provide notice to a recognized employee organization, and to meet and confer with organization upon request regarding a proposal to contract out bargaining unit work.

Government Code section 19130 permits public agencies to contract for services, subject to certain conditions. Public agencies enter into these contracts through various, sometimes competitive methods, such as requesting proposals or quotes from external, private firms.

Starting January 1, 2026, AB 339 requires public agencies to give a recognized employee organization at least 45 days' written notice before issuing a request for proposal, a request for quotes, or renewing or extending an existing contract to perform services that fall within the scope of work of job classifications represented by that organization.

The notice to the employee organization must include details, including the following:

1. The anticipated contract duration;
2. The scope of work to be performed under the proposed contract;
3. Anticipated costs associated with the proposed contract;
4. A draft of the contract solicitation (or if not yet drafted, any information that would normally be included); and
5. The agency's justifications for contracting the work at issue.

AB 339 exempts certain contract services from the new law's notice requirements, including services for public works, software or data services that directly support public works, and services that involve planning, designing, administering, overseeing, or delivering public works projects, buildings, and infrastructure.

Additionally, AB 339 provides that, in emergencies or exigent circumstances that prevent a public agency from providing the requisite 45 days' notice, an agency must provide notice as

soon as practicable under the circumstances.

To the extent that a public agency has negotiated terms related to contracting that are more restrictive or prescriptive than those set forth under AB 339, those contractual obligations continue to apply.

2. Employment

SB 521 — Disqualification of Public Employment

The Government Code disqualifies a public employee from any public employment for five years if the employee is convicted of a felony related to bribery, embezzlement of public money, extortion, theft of public money, perjury, or conspiracy to commit those crimes, when the crime arises directly from the employee's official duties.

SB 521 expands the list of disqualifying offenses to include a conviction for a felony involving a conflict of interest. SB 521's provisions apply to all cities, including charter cities.

SB 521 also adds a permanent disqualification for a city manager or city attorney, including individuals who provide such services under contract, if the individual is convicted of any felony listed in Government Code Section 1021.5, including a conviction that relates to a conflict of interest. A city manager or city attorney convicted of any disqualifying felony will be permanently barred from holding public employment in an equivalent role.

SB 521 defines "city manager" as a person employed pursuant to Government Code Section 34851 on or after January 1, 2026 and "city attorney" as a person employed pursuant to Section 41801 on or after January 1, 2026.

SB 303 — Bias Mitigation Training

The Civil Rights Department (CRD) enforces the California Fair Employment and Housing Act (FEHA), which prohibits employment and housing discrimination based on protected characteristics. CRD investigates complaints, pursues enforcement actions, and seeks to eliminate unlawful practices.

Public and private employers provide bias mitigation or elimination training in order to educate employees on understanding, recognizing, and acknowledging bias, including employees' own personal biases, and their impact in the workplace. SB 303 provides that an employee's assessment, testing, admission, or acknowledgment of their own personal biases that is made in good faith and solicited or required as part of a bias mitigation training does not, by itself, constitute unlawful discrimination.

SB 513 — Personnel Records Related to Education and Training

The Labor Code grants current and former employees, or their representative, the right to inspect and receive a copy of personnel records maintained by an employer relating to the employee's performance and to records regarding any grievance concerning the employee.

Existing law requires the employer to make the contents of those personnel records available for inspection, as specified, and makes it a crime for an employer to violate these requirements.

SB 513 adds any records maintained by the employer that relate to employee education and training to the type of personnel records subject to inspection. SB 513 requires that an employer that maintains such education and training records ensure those records include: (1) the name of the employee; (2) the name of the training provider; (3) the duration and date of the training; (4) the core competencies of the training, including skills in equipment or software; and (5) the resulting certification or qualification.

SB 642 — Pay Scale and Wage Ranges

The Labor Code requires employers to provide applicants, upon request, a pay scale of range of wages the employer reasonably expects to pay for a position and to include that information in job postings if the employer employs more than 15 employees. The Labor Code also prohibits employers from paying employees at rates less than those paid to employees of the opposite sex or of another race or ethnicity for substantially similar work, except under specific circumstances.

Effective January 1, 2026, SB 642 updates the definition of "pay scale" to mean "a good-faith estimate of the expected salary or hourly wage range that an employer reasonably expects to pay for a position upon hire." Employers must continue to include the pay scale in job postings.

SB 642 also replaces the phrase "opposite sex" with "another sex," clarifying that the law applies across all gender comparisons. SB 642 extends the statute of limitations for filing a civil action for alleged violations from two to three years after the last date the cause of action occurs, allowing employees to seek relief for the entire period of a violation, up to six years. SB 642 specifies that a cause of action occurs under the following circumstances: (1) when an alleged unlawful compensation decision or practice is adopted; (2) when an individual becomes subject to the decision or practice; or (3) when an individual is affected by the application of the decision or practice.

SB 294 — The Workplace Know Your Rights Act

The Division of Labor Standards Enforcement (DLSE), within the Department of Industrial Relations (DIR), enforces state labor laws.

SB 294 creates the Workplace Know Your Rights Act under the Labor Code, which requires employers to provide a stand-alone written notice to each current employee about specified workers' rights. Employers must provide such notice on or before February 1, 2026 and annually thereafter.

Employers must provide notice to all current employees, new hires, and any authorized representatives describing the following rights:

1. Rights to workers' compensation benefits and contact information for the Division of Workers Compensation.
2. The right to notice of immigration agency inspections.
3. Protection from unfair immigration-related practices.
4. The right to organize or join a union and engage in concerted activities.
5. Constitutional rights when interacting with law enforcement at the workplace, including protections against unreasonable searches and self-incrimination.

Employers may provide the notice by personal service, regular mail, email, text, or another method that can be reasonably anticipated to be received within one business day.

SB 294 requires employers to issue the notice in the language normally used to communicate with employees, and to maintain compliance records for three years. The Labor Commissioner must create and post a template notice by January 1, 2026, that will include other legal developments that the Labor Commissioner deems relevant, update the template annually, and make it available in multiple languages.

SB 294 also requires that, by March 30, 2026, employers provide employees the opportunity to name an emergency contact and to indicate whether they would like the employer to notify the contact if the employee is arrested or detained on their worksite, or during work hours or during the performance of the employee's job duties, but not on the worksite, if the employer has actual knowledge of the arrest or detention of the employee. SB 294 requires that employers must provide employees the opportunity to update their emergency contact at any time.

SB 294 prohibits retaliation or discrimination against employees who exercise or attempt to exercise their rights under the Workplace Know Your Rights Act. The Labor Commissioner and public prosecutors may enforce the law, and employers who violate it may face penalties of up to $500 per employee per violation per day, up to $10,000 per employee for violations of the emergency contact provisions of the Workplace Know Your Rights Act. The law permits waiver through a collective bargaining agreement only if clearly stated, and allows local ordinances to provide greater employee protections.

SB 477 — California Civil Rights Department Enforcement Procedures

The Civil Rights Department (CRD) enforces the California Fair Employment and Housing Act (FEHA), which prohibits employment and housing discrimination based on protected characteristics. CRD investigates complaints, pursues enforcement actions, and seeks to eliminate unlawful practices.

Effective January 1, 2026, SB 477 clarifies FEHA's enforcement procedures regarding complaint processing, deadlines, and right-to-sue provisions. SB 477 provides a statutory definition for the term "group or class complaint," which means a complaint that alleges a

pattern or practice of discrimination. SB 477 notes that the definition is declaratory and reflects existing law.

SB 477 clarifies the CRD's deadline to issue a right-to-sue notice shall be no later than one year for an individual complaint and two years for a group or class complaint.

SB 477 directs CRD to issue a right-to-sue notice to a complainant whose complaint relates to a complaint filed in the name of the director or a group or class complaint upon request by the person claiming to be aggrieved or, if the person claiming to be aggrieved does not request such notice, after the complaint has been fully and finally disposed of and all related proceedings, actions and appeals conclude.

SB 477 tolls (pauses) the time to file a civil action when a complainant timely appeals the closure of a complaint by CRD, signs a written agreement with CRD, or CRD extends the complaint investigation period due to a petition to compel cooperation.

SB 590 — Leave for Designated Persons Under Paid Family Leave

The Unemployment Insurance Code established the Paid Family Leave Program that provides for wage replacement benefits for up to eight weeks for workers who take time off work for prescribed purposes, including to care for a seriously ill family member.

Effective July 1, 2028, SB 590 expands eligibility for benefits under the Paid Family Leave Program to include individuals who take time off work to care for a "designated person" who is seriously ill designated person. SB 590 defines designated person to mean any care recipient related by blood or whose association with the individual is the equivalent of a family relationship, and makes conforming changes to the definitions of the terms "family care leave" and "family member."

SB 590 requires an individual that requests benefits pursuant to the Paid Family Leave Program to care for a designated person for the first time to identify the designated person and, under penalty of perjury, attest to how the individual is related by blood to the designated person, or how the individual's association with the designated person is the equivalent of a family relationship.

AB 406 — Prohibition on Discrimination Against Victims of Violence Reinstated to Labor Code

The California Fair Employment and Housing Act (FEHA) prohibits employers from discriminating or retaliating against employees who take time off work due to jury service, court appearances, or circumstances related to qualifying acts of violence or crime. The FEHA currently authorizes the Civil Rights Department (CRD) to enforce these protections effective January 1, 2025, and provides rights related to leave, confidentiality, and reasonable accommodation for affected employees.

Until January 1, 2025, the Labor Code set forth the statutory prohibitions on discrimination or retaliation against an employee who took time off of work for the above purposes. During that time, the Division of Labor Standards Enforcement (DLSE) had authority to enforce these provisions. However, as of January 1, 2025, these Labor Code provisions were repealed and replaced by the provisions in the Government Code (under FEHA, as noted above) prohibiting discrimination or retaliation against an employee who is a victim or whose family member is a victim of qualifying acts of violence.

AB 406 reinstates the prior Labor Code provisions that governed employee rights to take leave or request accommodations as victims of crime, applying those provisions on a limited basis to alleged violations that occurred on or before December 31, 2024. AB 406 adds a sunset clause to the reinstated Labor Code provisions such that they are repealed January 1, 2035.

AB 406 also transfers enforcement responsibilities for the reinstated Labor Code provisions from the DLSE to the CRD to maintain consistency in enforcement.

AB 406 also updates the paid sick leave law in Labor Code Section 246.5 to reflect the transition from Labor Code to Government Code provisions, clarifying that victims of violence may use paid sick leave for qualifying absences.

AB 406 removes the requirement that an employee give reasonable notice before taking time off to serve on a jury, and prevents an employer from retaliating against an employee for doing so without giving reasonable notice. AB 406 took effect immediately on October 1, 2025, as urgency legislation.

SB 809 — Employment Status and Reimbursement Rules for Vehicle Use[1]

Courts apply the three-part "ABC" Test to determine whether a worker qualifies as an employee or an independent contractor in matters concerning wages and benefits. Under this test, a court evaluates whether the worker: (1) operates independently of the hiring entity's control; (2) performs work outside the usual course of the hiring entity's business; and (3) engages in an independently established trade, occupation, or business.

Additionally, the Labor Code requires employers to reimburse employees, but not independent contractors, for necessary expenditures incurred in the course of employment.

SB 809 clarifies that existing law does not consider ownership of a vehicle used to perform labor or services for compensation, whether personal or commercial, as determinative of a worker's status as an independent contractor.

[1] Labor Code Sections 2775 through 2787 set forth the criteria of whether a worker is an independent contractor or an employee. Currently, it is unclear if these sections apply to public agencies. Until a court decides this issue of whether these Labor Code sections apply to public agencies, all public agencies should conduct a careful analysis as to whether they should still abide by Labor Code Sections 2775 through 2787 including this new statute, Section 2775.5.

SB 809 further clarifies that the Labor Code provision requiring employers to reimburse employees for necessary work-related expenditures includes costs associated with the use of personal and commercial vehicles. In the context of construction trucking, SB 809 requires employers to reimburse employees who are commercial drivers and who own their trucks, tractors, or trailers for expenses related to use, maintenance, and depreciation.

Employers and employees who drive personal and commercial vehicles, or the labor union that represents such employees, must negotiate reimbursement rates. Such reimbursement rate may be established as either a flat rate or per-mile rate, but not less than either the actual expenses incurred by the employee or the standard mileage rate set by the Internal Revenue Service.

3. Brown Act

SB 707 — Overhaul of Meeting and Teleconferencing Requirements Under the Brown Act

The Ralph M. Brown Act (Brown Act) requires local legislative bodies to hold open and public meetings, with limited exceptions and that all persons be permitted to attend and participate in these meetings. Current law sets standards for teleconferencing, public notice, agenda posting, and public participation. SB 707 significantly overhauls and standardizes key provisions of the Brown Act.

SB 707 also imposes additional requirements on "eligible legislative bodies" that do not otherwise apply to all legislative bodies subject to the Brown Act. SB 707 defines "eligible legislative body" as "a city council of a city with a population of 30,000 or more," a "county board of supervisors of a county, or city and county, with a population of 30,000 or more," or a "city council of a city located in a county with a population of 600,000 or more." The definition of "eligible legislative body" also includes "the board of directors of a special district that has an internet website" for special districts that (1) include the entirety of a county with a population of 600,000 or more and the special district has over 200 full-time employees; (2) have over 1,000 full-time employees; or (3) have over 200 full-time employees and has annual revenues, based on the most recent Financial Transaction Report data published by the California State Controller, that exceed four hundred million dollars ($400,000,000), adjusted annually for inflation commencing January 1, 2027, as measured by the percentage change in the California Consumer Price Index from January 1 of the prior year to January 1 of the current year." The current definition of "special district" under Government Code section 53835 remains unchanged by SB 707.

Effective July 1, 2026, and continuing until January 1, 2030, SB 707 expands public access and participation in local government meetings. SB 707 requires eligible legislative bodies to provide two-way telephonic or audiovisual access for all open meetings and to take specific actions that encourage residents to participate. Additionally, each eligible legislative body will be required to adopt, in open session before July 1, 2026, a policy that addresses disruptions to telephonic or internet service during meetings. When a disruption occurs, the eligible legislative body must recess the meeting for at least one hour and make a good-faith effort to restore service before resuming.

SB 707 will make permanent the existing rule that allows members of legislative bodies to engage in separate social media communications, provided they do not collectively deliberate or act on items within the legislative body's jurisdiction.

SB 707 requires each legislative body to make oral reports in open session before taking final action on specific forms of compensation for local agency executives, department heads, and similar officers.

Starting July 1, 2026, and continuing until July 1, 2030, each eligible legislative body must translate required meeting agendas into every applicable language when it posts the agenda with the required 72-hour notice. The bill defines "applicable languages" as those spoken by at least 20 percent (20%) of the local population that speaks English less than "very well," according to the most recent American Community Survey.

SB 707 also expands public comment rights. The Brown Act requires agendas for regular meetings to let the public directly address the legislative body on any topic of public interest. It exempts items already reviewed by a committee unless the legislative body determines the item has substantially changed. SB 707 adds new exceptions to that exemption, excluding committees focused on elections, budgets, police oversight, privacy, limiting access to public library materials, or taxes and related spending, except as otherwise specified. SB 707 directs every local agency to provide copy of the Brown Act to all elected and appointed members of legislative bodies.

Key amongst SB 707's provisions are the standardization of audio and visual teleconferencing rules. Each legislative body that uses teleconferencing will need to provide two-way audiovisual or telephonic access and a live webcast that lets the public both see and hear the meeting. The legislative body must record in its minutes the names of members who participate remotely and the specific law that authorizes each member's remote participation. Each local agency must identify and make available meeting locations for use by legislative bodies. Members with disabilities will still be able to participate remotely as a reasonable accommodation as is the case under existing law.

SB 707 redefines "teleconference" to exclude situations where members only watch or listen through non-interactive media. SB 707 requires all legislative bodies to post special meeting notices on their websites and establishes uniform emergency meeting procedures across all local agencies. The bill applies these provisions to neighborhood councils, student body associations, student-run community college organizations, and certain subsidiary or multijurisdictional bodies. These bodies must maintain at least one (1) physical location where the public can attend, observe, and participate. Presiding officers will have the authority to remove disruptive individuals from both in-person and teleconferenced meetings.

4. Public Safety

AB 847, 1178, and 1388 — Expand and Clarify Access to Confidential Peace Officer Personnel Records

The Government and Penal Codes provide for confidentiality protections that apply to peace officer personnel records, and enumerate the exceptions to those protections, including under the California Public Records Act (CPRA) and investigations of a peace officer and their employing agency conducted by a grand jury, a district attorney's office, the Attorney General's Office, or Peace Officer Standards and Training Commission (POST).

AB 847 expands access to confidential peace officer personnel records to a civilian oversight board or commission for a law enforcement agency. In addition, under AB 847, the inspector general and members of a sheriff oversight board are authorized to access confidential peace officer personnel records required for performance of their oversight duties, but must maintain the confidentiality of these records. A sheriff oversight board may also review these records in closed session, if such sessions comply with applicable confidentiality laws.

AB 1178 requires a court in an action to compel disclosure of confidential peace officer personnel records under a CPRA request to consider whether an officer is working undercover and their duties demand anonymity in determining whether there is a specific, articulable, and particularized reason to believe that disclosure would pose a significant danger to the physical safety of a person, so as to allow a law enforcement agency to redact that record.

AB 1388 prohibits an employing agency from entering into an agreement with a peace officer that would require the agency to destroy, remove, or conceal a record of a misconduct investigation, to halt or make particular findings in a misconduct investigation, or to restrict the disclosure of information about an allegation or investigation of misconduct. AB 1388 also renders any provision of an agreement that is inconsistent with these requirements contrary to law and public policy, and void and unenforceable. In addition, any such prohibited agreement is subject to disclosure pursuant to a CPRA request.

SB 524 — Creates Recordkeeping Requirements for AI-Assisted Police Reports

Existing law requires local law enforcement agencies to conspicuously post on their websites all current standards, policies, practices, operating procedures, and education and training materials that would otherwise be available to the public under certain circumstances.

SB 524 addresses law enforcement agencies' use of artificial intelligence (AI) tools to create reports, such as AI software that analyzes camera footage or audio recordings to generate a report. SB 524 requires law enforcement agencies to adopt a policy governing the use of AI in preparing reports. The policy must include the following requirements.

If a law enforcement officer or agent uses AI, fully or in part, to draft a report, every page of the report must identify the specific AI program(s) used and prominently state: "This report was written either fully or in part using artificial intelligence."

The officer or agent who prepared the report must sign it to verify that they personally reviewed the report and the facts it states are true and correct. SB 524 requires that all drafts of the report (including earlier AI-generated versions) must be retained for as long as the final report is retained. Further, SB 524 prohibits drafts generated using AI from constituting an officer's statement for legal purposes.

SB 524 requires that the AI software program used to draft a report must maintain an audit trail that, at a minimum, identifies who used AI to create the report, who made edits or changes, and, where applicable, any video footage used to generate content (e.g., body cameras). A contracted vendor providing AI services to a law enforcement agency may not share, sell, or use the agency's data, except in limited circumstances. SB 524 requires that law enforcement agencies adopt the required policy by January 1, 2026.

SB 627 — Prohibits Law Enforcement Officers from Wearing Masks or Personal Disguises while Interacting with the Public in the Performance of Their Duties

The Penal Code makes it a misdemeanor for any person to wear a mask, false whiskers, or any complete or partial disguise for the purpose of evading or escaping discovery, recognition, or identification in the commission of any public offense, or for concealment, flight, evasion, or escape from arrest or conviction for any public offense.

SB 627 makes it a misdemeanor for a local, state, or federal law enforcement officer to wear a "facial covering", as that term is defined, that conceals or obscures that officer's facial identity in the performance of their duties.

The prohibition does not apply for certain narrowly tailored exemptions or when an officer is assigned to a Special Weapons and Tactics (SWAT) unit while actively performing SWAT duties.

SB 627 provides that any officer found to have committed certain enumerated torts while wearing a facial covering in knowing and willful violation of this prohibition is not entitled to assert any privilege or immunity in a civil action and is liable for the greater of actual damages or statutory damages of no less than $10,000.

SB 627 also requires law enforcement agencies operating in California to maintain and publicly post a written policy regarding the use of facial coverings by not later than July 1, 2026.

SB 627 enumerates the minimum requirements that must be included in the written policy, which shall be deemed consistent with Penal Code section 185.5, unless a verified written challenge to its legality is submitted by a member of the public. Upon receipt of the verified written challenge, the agency shall be afforded 90 days to correct any deficiencies, and if it fails to do so, the complaining party may challenge the written policy in a court of competent jurisdiction.

SB 627 requires that the written policy must remain in effect until the court rules that it is not in compliance with Penal Code section 185.5 and all potential appeals to higher courts have been exhausted.

SB 8 — Expands Labor Code Section 4850 Benefits to Qualifying Peace Officers

The Labor Code provides that certain enumerated persons who are employed on a regular, full-time basis and who become disabled by injury or illness arising out of and in the course of their duties, are entitled to a one year leave of absence without loss of salary. SB 8 expands the list of enumerated persons to include "peace officers," as the term is defined in Penal Code section 830.31, employed by a county containing a population of between 600,000 and 650,000.

SB 229 — Expands the Statutory Definition of "Peace Officer"

The Penal Code provides the statutory definition of "peace officer". SB 229 expands the statutory definition of "peace officer" to include deputy sheriffs in Amador and Nevada Counties, whose duties are primarily custodial. As a result, SB 229 provides that deputy sheriffs in Amador and Nevada Counties are now covered by and entitled to rights under the Public Safety Officers Procedural Bill of Rights Act.

SB 447 — Extends Health Benefits for Minor Dependents of Local Public Safety Personnel

The Labor Code provided that, if a local firefighter or peace officer, or Sheriff's Special Officer of the County of Orange, is killed in the line of duty or as a result of an accident or injury that occurred in the line of duty, the deceased employee's minor dependents continued receiving health benefits until the age of 21. SB 447 raises that minimum age for which a deceased employee's minor dependents continue receiving health benefits to 26.

SB 459 — Extends Confidentiality Protection to Confidential Communications during Group Peer Support Services

The Government Code provides for the Law Enforcement Peer Support and Crisis Referral Services Program, authorizing local and regional law enforcement agencies to create a peer support network. In addition, subject to certain enumerated exceptions, the Government Code permits law enforcement officers to keep communications with peer support team members confidential. SB 459 expands these rights.

SB 459 amends the term "confidential communications" to include any information transmitted between law enforcement personnel recipients of group peer support services while a peer support team member or mental health professional provides group peer support services. The term "group peer support services" is amended to mean peer support services comprised of at least one peer support team member or mental health professional and more than one recipient of group peer support services.

Subject to certain enumerated exceptions, which now include juvenile delinquency proceedings, a law enforcement officer has a right to refuse to disclose and to prevent another from disclosing a confidential communication between law enforcement personnel recipients of group peer support services made while a peer support team member or mental health professional provides group peer support services.

SB 487 — Apportions Recovery to Peace Officers and Firefighters who Pursue Civil Claims against Third Parties

The Labor Code authorizes an employer to make a claim or bring an action against a third-party who caused the injury or death of an employee that gave rise to the employer's obligations under California's Workers' Compensation system. The Labor Code also relieves the employer from an obligation to pay further compensation to or on behalf of the employee under circumstances, establishes certain requirements for a release or settlement agreement to be valid, authorizes certain credits to the employer, and authorizes the employer to enforce payment of a lien against a third-party or against the employee under certain circumstances.

Under SB 487, an employer of a peace officer or firefighter, as defined, may receive no more than one-third (1/3) of a third-party defendant's applicable liability insurance policy limits if the peace officer or firefighter establishes that their total damages exceed the net recovery available after satisfaction of the employer's claim and the total liability insurance limits available are insufficient to fully compensate the employer and peace officer or firefighter's proven damages.

SB 487 also limits the employer's right to reimbursement, subrogation, or lien to the one-third (1/3) recovery threshold, and the employer may not assert any credit or offset against future workers' compensation benefits owed to the employee.

The one-third (1/3) recovery allocated to an employer may not affect or diminish the employer's existing obligation to provide any compensation under existing law. In addition, a release or settlement is not valid or binding unless it provides that the employer may not receive more than one-third (1/3) of the third-party insurance limits, and the employer has no right to assert any credit or offset against future worker's compensation benefits.

AB 354 — Provides for Fingerprint-Based Background Checks of Certain POST Employees or Staff

Existing law requires any agency that employes peace officers to report certain information to the Peace Officer Standards and Training Commission (POST) and to complete investigations of any allegation of serious misconduct against an officer, regardless of that officer's employment status. Existing law also establishes the California Law Enforcement Telecommunications System (CLETS) to facilitate the exchange and dissemination of information between law enforcement agencies in California.

AB 354 requires POST employees or staff, including appointees, volunteers, contractors and subcontractors, whose job duties require access to criminal offender record information, state summary criminal history information, or information obtained from CLETS to undergo fingerprint-based state and national criminal history background checks.

In addition, AB 354 authorizes POST and POST employees or staff for whom fingerprint-based background checks have been completed and whose duties require such access to inspect or duplicate any information derived from CLETS.

AB 354 also authorizes POST to inspect and duplicate any criminal history, criminal offender record, or criminal justice information, or any other sensitive, confidential or privileged information if it determines that the information is needed in the course of its duties.

AB 992 and SB 385 — Update Education Criteria for Peace Officers

The Penal Code requires the Chancellor of the California Community Colleges, in consultation with specified entities, to develop a modern policing degree program and to prepare and submit a report to the Legislature outlining a plan to implement it. The Government Code enumerates the minimum standards that peace officers must meet, including minimum education standards.

AB 992 and SB 385 repeal the requirement that the Police Officer Standards and Training Commission (POST) approve and adopt the education criteria for peace officers based on the recommendations in the report. AB 992 and SB 385 thus impose higher education requirements directly, without POST approval and adoption.

AB 992 also authorizes specified credential evaluation services to evaluate the equivalency of a foreign college or university degree for purposes of attaining the minimum education standards that peace officers must meet.

Under AB 992, starting on January 1, 2031, each peace officer must attain at least one enumerated degree or certificate. This includes a modern policing degree or a professional policing certificate as described in AB 992. The degree or certificate must be attained no later than 36 months of the peace officer receiving their basic certificate from POST.

This requirement does not apply to any individual with at least eight years of experience as a sworn peace officer form another state and with a separation in good standing or with at least eight years of military service and with an honorable discharge if military service has concluded. An individual with less than eight years of the requisite experience as a sworn police officer from another state or the requisite military service must attain an enumerated degree or certificate no later than 48 months after receiving their basic certificate from POST.

AB 992 requires that a modern policing degree or professional policing certificate meet certain enumerated criteria. A modern policing degree must require at least 60 semester units or 90 quarter units, award credits for required POST-certified academy course instruction, and offer courses that include, without limitation, communications, psychology, writing, ethics and

criminal justice. A professional policing certificate must require at least 16 semester units or 24 quarter units, and include, without limitations, courses in the same list of subjects as a modern policing degree.

AB 992 does not apply to any person who, as of December 31, 2030, is currently enrolled in a basic academy or is employed as a peace officer by a public entity in California or the State Department of State Hospitals. SB 385 took effect immediately on October 1, 2025 as urgency legislation.

5. Retirement

AB 1067 — Public Employee Misconduct and PEPRA

The California Public Employees' Pension Reform Act of 2013 (PEPRA) defines how public retirement benefits are calculated, funded, and administered for state and local government employees who entered their respective retirement systems after January 1, 2013. It governs employee and employer contributions, benefit formulas, and other rules for participation in public retirement systems.

PEPRA requires any public employee convicted of a felony arising from the performance of their official duties, or in connection with obtaining salary, disability retirement, service retirement, or other benefits, to forfeit all accrued rights and benefits in any public retirement system. The forfeiture applies from the date the felony conduct began to the date of conviction, and the employee may not accrue additional benefits in that system. An elected public officer who is convicted, during or after holding office, of a felony involving bribery, embezzlement, extortion, theft of public money, perjury, or related conspiracy must also forfeit all rights, benefits, and membership in any public retirement system effective on the date of final conviction.

AB 1067 requires that, if a public employer's investigation of an employee for misconduct arising from their official duties, or in connection with obtaining salary, disability retirement, service retirement, or other benefits indicates the employee may have committed a crime, the public employer must continue investigating the employee, even if the employee retires while under investigation.

AB 1067 also requires that, if a public employer's investigation of an employee for misconduct arising from their official duties, or in connection with obtaining salary, disability retirement, service retirement, or other benefits indicates the employee may have committed a crime, the public employer refer the matter to the appropriate law enforcement agency. Thereafter, the public employer may close the investigation.

If a court later convicts the employee of a felony for the conduct under investigation, AB1067 requires that the employee must forfeit all accrued rights and benefits in any public retirement system, as provided under existing law under PEPRA.

SB 827 — Ethics and Fiscal and Financial Training for Local Agency Officials

The Government Code requires that specified local agency officials receive two hours of ethics training every two years, with the first training occurring within one year of the official commencing their service. The Government Code requires that local agencies maintain records of such trainings.

Effective January 1, 2026, SB 827 expands these requirements to include department heads or similar administrative officers of local agencies. Effective January 1, 2026, covered officials must complete an initial ethics training within six months of the official commencing their service.

SB 827 requires that local agencies maintain records of such trainings for at least five years and post to their websites clear instructions and contact information for members of the public to request copies of such training records.

SB 827 also creates a new requirement related to fiscal and financial training for the following officers, officials and executives: (1) elected officers; (2) members of a local agency's legislative body; (3) appointed officials who make decisions or recommendations regarding financial administration, budgeting, or the use of public resources; (4) local agency executives; and (5) employees designated by the local agency. Covered individuals must complete at least two hours of training on financial administration, budgeting, reporting, capital financing, debt management, pensions, cash management and investments, fiscal and financial planning, procurement and contracting, and related laws. Covered individuals must complete this training every two years.

SB 827 authorizes local agencies to contract with a qualified provider to offer the training or develop self-study materials with tests. SB 827 requires that providers develop the content in consultation with recognized experts in local government finance and provide participants with proof of participation. Local agencies must distribute to covered individual information on available trainings at least once annually.

II. LABOR AND EMPLOYMENT RELATED CASES

1. BROWN ACT

Berkeley People's Alliance v. City of Berkeley,* 114 Cal. App. 5th 984 (2025) - *Disruptive Attendees Did Not Justify City Council's Action To Reconvene In Different Room

Members of the public disrupted three meetings of the Berkeley City Council. The mayor determined that the disruptions made it impossible to continue business. The mayor stated order could not be restored by removing these individuals because of the level of the disruption and number of people involved. The mayor recessed the meetings and reconvened them in a smaller nearby room. Members of the press were allowed to attend in person, but the public could only observe by video. The City Council did not return to the original meeting room on these three occasions.

The Berkeley People's Alliance ("Alliance"), a civic group, sued the City for violating the Brown Act's open-meeting requirements. The Alliance argued that the City violated the Act by: 1) failing to attempt to remove those who were interrupting the meetings before determining that order could not be restored; and 2) recessing the meetings and moving to a different room rather than ordering the meeting room cleared and continuing in session in the original room pursuant to Government Code section 54957.9.

The City demurred, alleging that the Brown Act did not require those measures. The superior court sustained the City's demurrer, finding that section 54957.9 did not require the City Council to first attempt to remove disruptive individuals before determining that order could not be restored. The superior court also concluded that the City Council complied with the statute by recessing and reconvening the meetings in a different room with the press present.

The Alliance appealed. Its primary argument on appeal was that the City Council violated section 54957.9 by recessing the meetings and reconvening them in a different room rather than ordering the original meeting room cleared.

The Court of Appeal reversed the trial court's dismissal, ruling that the Alliance adequately stated a claim for violation of the Brown Act.

The California Court of Appeal noted the Brown Act's fundamental purpose is to ensure that the people's business is conducted openly and that members of the public can directly observe and participate in local government decision-making. Exceptions allowing closed sessions or restricted access are to be construed narrowly.

Section 54957.9 provides one such limited exception to the open meeting requirement if a group willfully interrupts a meeting and order "cannot be restored by the removal of individuals who are willfully interrupting the meeting." In that case, "the legislative body …may order the meeting room cleared and continue in session."

The Court of Appeal found that the phrase "order the meeting room cleared" meant that the City Council could empty the same room of its occupants, but not move the meeting elsewhere. The Court reasoned that the Legislature could have authorized relocation if it intended to, but it had not.

The Court emphasized that other sections of the Brown Act, such as section 54954, allow relocation if it is unsafe to meet in the designated location because of fire, flood, or other emergencies. Section 54957.9 contains no similar authorization to relocate.

The Court also rejected the City's argument that its approach promoted safety and efficiency. The justices noted that the Brown Act's primary goal is transparency, and public agencies may not prioritize convenience or control over public access unless explicitly permitted by statute.

Public agencies should be cautious when responding to disruptive public meeting attendees. If a meeting is interrupted and cannot continue, agencies should follow the statute's

express procedures and should not assume they may relocate the meeting to a different room unless the Brown Act specifically authorizes that step.

City of Vallejo v. Superior Court of Solano County,* 112 Cal.App.5th 565 (2025) - *City Must Release Some Peace Officer Records Regarding Badge Bending Investigation

In 2020, Open Vallejo, a local news outlet, published an article alleging a secretive group of officers within the Vallejo Police Department ("Department") were bending a point of their star-shaped badge after each time they used lethal force in the line of duty. The Department retained a third party to investigate. The investigator found that the practice had occurred, but that no officer had violated the Department's use of force policy.

The American Civil Liberties Union of Northern California ("ACLU") filed a request for records related to the investigation, including the written investigation report, under the California Public Records Act ("CPRA").

The Department released some records but maintained that the bulk of the materials sought—including the investigative report—were confidential peace officer personnel records that were exempt from public disclosure under *Pitchess* statutes. Pursuant to the parties' stipulation, the superior court heard and ruled on the ACLU's *Pitchess* motion that sought materials relevant to its CPRA arguments. Thereafter, the ACLU filed a petition for writ of mandate in the superior court challenging the sufficiency of the Department's CPRA response.

The superior court ordered disclosure of portions of the investigative report and related materials. The materials to be disclosed included the materials the court had ordered disclosed following the *Pitchess* hearing, with redactions to all identifying information pertaining to officers, witnesses and their families.

Both parties sought writ review by the California Court of Appeal. The ACLU argued that the records must be disclosed under amendments made to the *Pitchess* statutes in 2018 through the enactment of Senate Bill No. 1421 and, specifically, the amendment requiring the disclosure of records "relating to the report, investigation, or findings" of "[a]n incident involving the discharge of a firearm at a person by a peace officer." The City argued that the records at issue were confidential because they did not "necessarily and promptly" follow any specific police shooting.

The Court found that the crux of dispute was whether the investigative report and related documents on badge bending were subject to public disclosure as records "relating to" the report, investigation, or findings of an incident involving the discharge of a firearm by a peace officer. The Court considered the meaning of the phrase "relating to" and found that it should be interpreted broadly. The Court also found that the legislative history of the law was concerned with transparency regarding an officer's use of significant force. The Court held that any report, investigation, or finding of an incident involving an officer involved shooting is a public record that must be disclosed.

The Court sent the case back to the superior court to deal with the secondary issue of whether officer names should be redacted from the records. The Court noted that the superior court ruled that officer names must be redacted because the names were part and parcel of what it deemed were confidential officer personnel records. The Court rejected that part of the superior court's ruling as erroneous because the records sought were not confidential personnel records, but were instead publicly disclosable personnel records. But the Court determined it could not make any final pronouncement on the redaction issue because the parties had not addressed all the relevant facts and legal issues in the superior court. The Court provided a lengthy analysis of the relevant cases to guide the superior court and the parties on remand.

Public agencies should expect courts to interpret SB 1421's disclosure requirements broadly when records relate to officer-involved shootings. Agencies should also be prepared to justify any redactions, including officer names, with a developed factual and legal record rather than relying on blanket confidentiality arguments.

2. DISCRIMINATION, HARASSMENT, AND RETALIATION

Romero v. County of Kern,* 116 Cal. App. 5th 1189 (2025) - *Firefighter Did Not Have To Exhaust County Remedies To Pursue Whistleblower Lawsuit

A County firefighter with more than 20 years of service raised concerns about safety violations related to the maintenance of fire extinguishers on County fire engines. After reporting these issues to his supervisors in 2020, the Department removed him from fire prevention duties. The firefighter believed that action was retaliation for his whistleblowing. He filed internal complaints with the County's Office of Human Resources and the Civil Service Commission. But later withdrew his appeal after being assured that the issues would be addressed.

In 2022, the County investigated the firefighter for alleged misconduct and terminated his employment for violations of County rules. The firefighter submitted a claim under the Government Claims Act, which the County denied, and sued the County for retaliation for his whistleblower activities.

The superior court granted the County's motion for judgment on the pleadings. The court ruled that the firefighter could not pursue his whistleblower action because he did not exhaust available administrative remedies by first appealing his termination to the Civil Service Commission. The court also denied the firefighter leave to amend.

The California Court of Appeal reversed. No exhaustion of internal administrative remedies was required because the County's ordinances and rules did not establish a clear procedure for presenting, investigating, and resolving whistleblower retaliation claims. The Court distinguished general disciplinary appeal processes from administrative remedies for discrimination or harassment, and found that the County had no comparable remedy for whistleblower retaliation. The Court reversed the judgment and remanded the case to the superior court. The decision clarifies that if an internal administrative remedy does not specifically cover a particular claim, exhaustion of that remedy is not a prerequisite to filing suit.

Before asserting failure to exhaust administrative remedies as a defense, public employers should confirm that their internal rules actually provide a clear procedure for investigating and resolving the specific type of claim at issue.

Caldrone v. Circle K Stores Inc.* (9th Cir. 2025) 156 F.4th 952 - *Age Claim Was Viable Despite That Employees Had Not Applied For The Promotion

Three Dealer Business Managers (DBMs) were long term employees at Circle K: Brian Caldrone (54); Joseph Celusta (56); and Kathleen Staats (57). Each had a history of strong performance evaluations, awards, and wanted to advance to regional leadership roles.

In 2020, Circle K's West Coast Regional Director position became vacant. In the past, Circle K had posted position openings internally or circulated announcements by email or intranet to encourage qualified employees to apply. This time, the company did not post or open the position for applications. Instead, Circle K's senior management handpicked Miko Angeles, a younger employee aged 45 to fill the position. Angeles had previously served as the Southeast Regional Director, though he had a mixed performance record in that role.

When the three DBMs learned of the promotion, they believed that the company bypassed its normal process to promote a younger employee. They sued Circle K in California state court for age discrimination under both the ADEA and FEHA. Circle K removed the case to the U.S. district court.

The district court granted summary judgment for Circle K, holding that the DBMs could not establish age discrimination because they had not applied for the position. The court also found that, even if they could establish age discrimination, Circle K had provided a legitimate, nondiscriminatory reason for its decision, and the DBMs had not shown that this reason was pretextual.

The U.S. Court of Appeals for the Ninth Circuit reversed. The Ninth Circuit held that, when an employer does not announce a vacancy or solicit applications, employees are not required to show that they applied for the position to establish age discrimination. The Court also clarified that, although a ten-year age difference is the usual threshold for a "substantial" age gap, the DBMs could overcome a smaller gap by providing evidence that age was a significant factor in the employer's decision. The Court found that the DBMs had presented sufficient evidence to create a triable issue of pretext. This included evidence that the decisionmaker made ageist comments, expressed a preference for younger employees, and encouraged older employees to retire. Further, there was evidence undermining Circle K's stated rationale that Angeles was uniquely qualified, including testimony that his prior performance was poor and evidence that Circle K deviated from its usual practice of posting job openings, which a jury could view as an effort to prevent older employees from applying. The Court reasoned that taken together, this evidence could lead a reasonable jury to conclude that Circle K's proffered explanation was unworthy of credence and that age discrimination was the real motive, requiring reversal of summary judgment and remand for further proceedings.

This case is reminder that all employers including public agencies should use consistent hiring and promotion processes and be prepared to support selection decisions with credible, well-documented, nondiscriminatory reasons.

Carroll v. City & County of San Francisco,* 115 Cal. App. 5th 1192 (2025) - *City and County's Disability Retirement Formula Was Not Age Discrimination

A group of employees of the City and County of San Francisco (the City) filed a class action alleging that the City's disability retirement system benefits formula discriminated against older workers in violation of California's Fair Employment and Housing Act ("FEHA").

The employees challenged the San Francisco Employee's Retirement System ("SFERS") which calculated disability retirement benefits using two formulas and paid retirees the higher amount of either: Formula 1 (Regular Formula): based primarily on years of service and salary; or Formula 2 (Backup Formula): based on estimate of what the employee might have earned if they had continued working until age 60, subject to limitations.

The employees argued that Formula 2 disproportionately benefited younger workers and could result in lower disability retirement benefits for employees hired at age 40 or older. They claimed this was unlawful age discrimination. After a bench trial, the superior court ruled in part that pension status motivated the City's disability retirement system, and that age was not a substantial motivating factor. The employees appealed.

The California Court of Appeal ruled in favor of the City, holding that the SFERS disability retirement formulas did not violate FEHA because substantial evidence showed Formula 2 was based on pension status—credited years of service and retirement eligibility—not age. The Court emphasized that age and pension status are analytically distinct, that the formula was offered to all employees on equal terms, was not based on age-related stereotypes, and in some cases treated older and younger employees similarly.

The Court also rejected the disparate impact claim, finding plaintiffs' evidence insufficient because it relied on hypothetical calculations rather than actual data and failed to show a statistically significant adverse effect on older workers. As a result, the Court concluded plaintiffs did not establish age discrimination and affirmed the judgment.

Public employers defending age-discrimination challenges to retirement systems should focus on whether the governing formula is based on neutral factors such as service and earnings rather than age itself. Absent evidence of discriminatory intent or disparate impact, courts may uphold retirement formulas even if older hires fare less favorably in some applications.

Kruitbosch v. Bakersfield Recovery Services, Inc.,* 114 Cal.App.5th 200 (2025) - *Employer's Poor Responses To Employee's Complaint Could Support Claim For Hostile Work Environment

Bakersfield Recovery Service, Inc (BRS) provides substance abuse treatment. Steven Kruitbosch was an assistant corporate compliance officer. Lisa Sanders was Kruitbosch's coworker, though the two did not work together or in the same location often.

Like many BRS employees, Kruitbosch was in recovery from substance abuse, and many employees, including Sanders, knew that Kruitbosch was sober. After Kruitbosch's long term partner passed away, he took leave under the California Family Rights Act.

In the week leading up to Kruitbosch's return, Sanders began sending Kruitbosch multiple unsolicited nude pictures and propositioning him. Kruitbosch firmly rejected these advances. Sanders went to Kruitbosch's home uninvited, and again propositioned him. Kruitbosch told her to leave. Sanders eventually departed Kruitbosch's property, but left behind a cucumber with a condom attached in his driveway. Sanders texted Kruitbosch and invited him to a hotel room to have sex and drugs. She sent him multiple sexually explicit images.

Upon returning to work, Kruitbosch immediately complained about Sanders's conduct to acting program director Stephanie Carroll and HR representative Kimberly Giles. Carroll said there was not much she could do. Giles posted a video to social media depicting dogs whining that made a veiled reference to Kruitbosch's complaint.

Kruitbosch's employment became unbearable as he went to great lengths to avoid Sanders. He was fearful that he would be forced to see Sanders. He was overcome with anger and humiliation knowing Sanders was free to continue harassing him. Kruitbosch resigned because he felt that continuing to work at BRS would be detrimental to his mental health, grief recovery process and sobriety.

After resigning, Kruitbosch filed a complaint against BRS and Sanders under the Fair Employment and Housing Act (FEHA). He included a claim for hostile work environment sexual harassment. The superior court granted BRS's demurer, finding that Sanders's conduct was not attributable to BRS on the basis of their co-working relationship alone. The court found that although Kruitbosch was unhappy with BRS's response, the situation was not pervasive, and BRS took no adverse action. Kruitbosch appealed.

The California Court of Appeal reversed the superior court's ruling sustaining BRS's demurrer as to Kruitbosch's claim for sexual harassment hostile work environment. The Court held that Sanders's conduct was not sufficiently work-related to be imputed to the BRS. But, BRS's response to the Kruitbosch's complaint—specifically, Carroll and Giles's failure to act and Giles's comment and social media post mocking him—could support a claim for hostile work environment sexual harassment. Giles's comment, in conjunction with BRS's ratification of Sanders's conduct through inaction, materially altered his working conditions. There was no investigation of Kruitbosch's complaint, no admonition to Sanders to cease her conduct, and BRS took no steps to shield Kruitbosch from having to interact with Sanders.

This case illustrates that an employer's response to a harassment complaint can itself support a hostile work environment claim, even when the underlying misconduct is not sufficiently work-related to be attributed to the employer. Public agencies should promptly investigate complaints, instruct the alleged harasser to cease the conduct, and take concrete measures to protect the complainant from further harm.

Allos v. Poway Unified School District,* 112 Cal.App.5th 822 (2025) - *Employer's Interactive Process Efforts Help Defeat Lawsuit

Kheloud Allos worked for Poway Unified School District ("PUSD"). When the COVID-19 pandemic began in 2020 she began working remotely. After in-person operations resumed, Allos requested to continue working from home. Initially, she based her request on her desire to protect her elderly mother. Later, she claimed her own medical vulnerabilities made in-person work risky. She claimed that her past reaction to a vaccine meant she could not safely take the COVID-19 vaccine.

PUSD responded with a series of interactive meetings—six in total over nearly two years—to explore accommodations. The district offered Allos a private office and various hybrid work arrangements. Ultimately, Allos agreed to a hybrid schedule and later announced her retirement. She then filed a lawsuit against PUSD under California's Fair Employment and Housing Act ("FEHA") and various Labor Code provisions, claiming disability discrimination, failure to accommodate, retaliation, and associational discrimination (related to caring for her disabled mother), among others.

PUSD filed a motion for summary judgment asserting Allos's claims were barred by Government Code section 855.4, which provides immunity to public entitles for decisions related to preventing disease or controlling its spread. The superior court agreed, holding that PUSD's decision to end remote work and require in-person attendance was a discretionary act protected under § 855.4. The court also found that Allos's disability claims failed. The court noted that PUSD had multiple interactive meetings with Allos and provided various accommodations.

The California Court of Appeal affirmed the superior court's judgment. The Court agreed that section 855.4 provided immunity to PUSD for its decisions related to COVID-19.The court reasoned that these decisions were discretionary acts aimed at controlling the spread of disease and therefore fell squarely within statutory public health immunity, regardless of whether that discretion was abused.

The court further held that Allos failed to establish a qualifying disability under FEHA because the evidence showed only a past, minor reaction to a vaccine and a subjective fear of future vaccine reactions, neither of which constituted a condition limiting a major life activity. The court emphasized that an employee's subjective belief is insufficient and that the undisputed medical evidence showed she was not precluded from vaccination.

The Court also rejected Allos's argument that PUSD "regarded" her as disabled, explaining that the employer's participation in the interactive process is required by law and does not constitute an admission of disability. In addition, the court found that PUSD satisfied its

obligations by engaging in an extensive, multi-year interactive process and offering several reasonable accommodations, noting that an employer is not required to provide the employee's preferred accommodation.

The court further concluded that Allos could not establish essential elements of her remaining claims because there was no evidence of an adverse employment action—she voluntarily retired—and her retaliation and Labor Code claims were unsupported by specific facts or legal argument. Accordingly, the court held that no triable issues of material fact existed and affirmed summary judgment in PUSD's favor.

This case illustrates that public employers that engage in a thorough, documented interactive process and offer reasonable alternative accommodations place themselves in a stronger position to defeat disability-related FEHA claims.

3. FIRST AMENDMENT AND FREEDOM OF RELIGION

Detwiler v. Mid-Columbia Medical Center,* (9th Cir. 2025) 156 F.4th 886 - *No Religious Accommodations Required For Employee's Secular Judgments

Sherry Detwiler worked for the Mid-Columbia Medical Center in Oregon (MCMC). Detwiler is a Christian who believes her body is a temple of the Holy Spirit, and that she has a duty to avoid defiling her 'temple' with substances that the Bible explicitly condemns or which could potentially harm her.

Detwiler sought a religious exemption from MCMC's policy requiring healthcare workers to be vaccinated against COVID-19, absent an approved exemption. Detwiler, relying on sources she found online, believed that COVID-19 vaccines were created from fetal cell lines and contained potentially harmful substances. She informed MCMC that her religious beliefs against abortion and the use of harmful substances conflicted with the vaccine requirement.

MCMC approved Detwiler's request for a religious exemption from vaccination. As part of that accommodation, MCMC required Detwiler to wear personal protective equipment while in the office and to submit to weekly antigen testing for COVID-19 through a nasal swab. Detwiler informed MCMC that she believed that nasal swabs contained a carcinogenic substance and reasserted her religious beliefs.

Detwiler proposed MCMC allow her either to submit to saliva testing for COVID-19 or to work remotely full-time. MCMC's Chief Human Resources Officer (CHRO) responded that MCMC had granted her request for an exemption from the vaccine requirement, but denied her requested accommodations of saliva testing or full-time remote work. CHRO advised her that saliva testing would be impractical due to the delay for test results. In addition, MCMC might ask Detwiler to appear for same-day, in-person work because of dissatisfaction with Detwiler's work during her remote work periods. MCMC placed Detwiler on unpaid leave until she: complied with the vaccine mandate; the terms of her approved religious exemption; or accepted reassignment. Detwiler chose none of those options, and MCMC terminated her employment.

Detwiler sued MCMC for religious discrimination in violation of Title VII of the Civil Rights Act of 1964. MCMC filed a motion to dismiss the case for failure to state a claim. MCMC argued Detwiler's objection to antigen testing stemmed from her secular, medical judgment rather than a bona fide religious belief. The District Court dismissed the complaint, accepting Detwiler's bona fide religious beliefs but noting Detwiler's specific determination of what is harmful was not premised on her religion. Detwiler appealed.

The U.S. Court of Appeals for the Ninth Circuit, opined that it had not yet endorsed a test for determining the nature of a religious belief underlying a Title VII claim. The Court ultimately held that an employee seeking a religious exemption must plead a clear connection between her faith and the specific belief that conflicts with her work requirement.

The Court emphasized that an employee does not need to show that their belief is consistent, rational, or widely shared, but it must demonstrate that the requested accommodation flows from a truly religious principle rather than a personal or secular concern. The panel rejected the notion that generic references to broad religious tenets, such as treating one's body as a temple, can automatically transform a secular preference into a religious belief. The Court reasoned that allowing such assertions would permit employees to bypass workplace requirements by reciting "magic words." The Court concluded that judges must verify whether the asserted belief is religious in nature, as opposed to merely secular, but may not question the sincerity or reasonableness of the belief.

Applying that standard, the Court found that Detwiler's complaint was not sufficient. Although the Court accepted her general Christian conviction that her body is a temple, the Court determined that her actual objection—the belief that antigen test swabs were carcinogenic—rested on her personal interpretation of medical research. Because her belief arose from a secular judgment rather than a religious doctrine, the Court ruled it was not protected under Title VII. The Court stressed that Detwiler had no religious conflict with the testing policy apart from her secular opinion about chemicals she believed to be in the swab materials. The Court warned that adopting Detwiler's proposed lenient approach would create an unmanageable expansion of religious accommodation claims, and force employers and courts to treat ordinary personal preferences as matters of faith.

Employers evaluating Title VII religious accommodation requests may, with careful analysis, distinguish between a bona fide religious belief and an employee's personal or secular judgment about health risks. Agencies should focus on whether the employee identifies a clear religious basis for the specific conflict with the work rule at issue, while avoiding challenges to the sincerity or reasonableness of the asserted faith.

Burch v. City of Chubbuck*, 146 F.4th 822 (9th Cir 2025) - *PW Director Who Resigned After Criticizing The Mayor Could Not Prove First Amendment Retaliation

Kevin England, Mayor of Chubbuck, Idaho, appointed Rodney Burch to be the City's Public Works Director in 2015. For the first six years of Burch's tenure, he and Mayor England had a good working relationship. During that time, Burch communicated his concerns regarding

City management directly to England without issue, and ultimately developed a strategic plan to improve operations, which obtained the City Council's approval.

By 2021, England and Burch's relationship had soured. Burch, frustrated with England's policies and performance, proposed changing the City's management structure from a strong mayor system to a weak mayor system by creating a City administrator position. He criticized England for: failing to implement the strategic plan; mismanaging budgeting; reducing revenue through a utility credit program; and failing to support Public Works effectively. Burch argued that a City administrator would improve oversight and reduce waste. England ultimately rejected the proposal.

Councilmember Dan Heiner challenged England in the 2021 mayoral election. Burch placed a campaign sign for Heiner in his front yard. One of Burch's neighbors informed England of Burch's yard sign.

England won re-election. England spoke with the City's legal counsel and human resources director about removing Burch for cause, or requesting Burch's resignation. England said that he no longer trusted Burch because of his City administrator proposal and the "Options in Process" document Burch created that sharply criticized England.

England met with Burch and asked him to resign. Burch refused. England then scheduled an executive session of the City Council to argue for Burch's removal but the Council declined and instructed the two to continue working together. By 2022 Burch resigned, claiming that England had cut Burch out of decision-making and that many of his duties had been reassigned to his subordinates.

Burch then sued the City and England, claiming that England had retaliated against him based on his protected speech under the First Amendment. Burch alleged that his duties and decision-making were reduced and that he was constructively discharged due to his: protected speech, which included criticisms of England's policies and performance; advocacy for a City administrator position; and political yard sign supporting England's opponent. The district court granted summary judgment the City and England. Burch appealed.

The Ninth Circuit Court of Appeals affirmed. The Court found that Burch was not constructively discharged. Burch had complained that he was working 2.5 jobs, so the reduction in his duties and decision-making did not rise to the level of intolerable working conditions that would cause a reasonable person to resign.

As to the First Amendment issues, the Court held that Burch's criticisms of England's policies and performance and his advocacy for creating a city administrator position were made pursuant to his official duties as Public Works Director and therefore were not protected. In reaching this conclusion, the Court emphasized that Burch largely communicated these concerns within his chain of command (to the Mayor and City Council), that the subject matter of his speech—budgeting, operational efficiency, and long-range planning—fell squarely within his routine job responsibilities, and that he did not act in defiance of his supervisor's directives. In contrast, Burch's placement of a political yard sign supporting England's opponent was protected

speech because it was made as a private citizen, outside the workplace and chain of command, and was unrelated to his official duties.

The Court nevertheless concluded that Burch could not establish a First Amendment retaliation claim because, even assuming the yard sign was a substantial or motivating factor in certain adverse actions, the City satisfied its burden at the final steps of the analysis. The Court found there was no genuine dispute that the City had adequate justification for its actions—particularly England's loss of trust based on Burch's unprotected speech, including the "Options in Process" document criticizing England's leadership—and that the same employment decisions would have been made regardless of the protected activity.

Public employers should remember that not all employee criticism of management is protected citizen speech under the First Amendment; speech made pursuant to official duties may fall outside constitutional protection. Even where protected political speech is involved, agencies can still prevail if they can show legitimate operational reasons for their actions and that they would have made the same decision anyway.

Thompson v. Central Valley School District No. 365,* (9th Cir. 2025) 163 F.4th 654 – *Middle School Assistant Principal Disciplined For Off-Duty Social Media Posts

Randey Thompson, a middle school assistant principal in the Central Valley School District (CVSD), posted a message on his private Facebook account criticizing the Democratic National Convention. The post included derogatory language, including a disability-related slur ("demtard"), and violent rhetoric suggesting opponents should be taken "to the woodshed."

Within days, the district placed Thompson on paid administrative leave and launched an investigation. Interviews with staff and administrators revealed concerns not only about the Facebook post but also about prior comments Thompson had made at work that were viewed as insensitive toward students and staff. The district ultimately concluded that Thompson's conduct undermined his effectiveness as a leader and transferred him from an administrative role to a teaching position.

Thompson sued under 42 U.S.C. § 1983, alleging the district retaliated against him for protected speech in violation of the First Amendment. He argued that his Facebook post was private, political speech on a matter of public concern, made off-duty and on his personal device, and that the district took adverse action against him because of that speech. He further contended that the speech did not cause actual disruption sufficient to justify discipline.

The district responded that, even if the speech was protected, it was entitled to discipline Thompson under the *Pickering* balancing test. The *Pickering* test is a two-step framework used to evaluate public employee speech, asking first whether the employee spoke as a private citizen on a matter of public concern, and if so, whether the government employer's interests in workplace efficiency and avoiding disruption outweigh the employee's First Amendment rights.

CVSD argued that Thompson's use of slurs and violent language—combined with his public-facing leadership role—created a reasonable prediction of disruption, undermined staff

relationships, and conflicted with the district's mission to maintain a safe and inclusive educational environment.

The Ninth Circuit applied the two-step *Pickering* framework. At step one, the court agreed Thompson's Facebook post constituted private speech on a matter of public concern, and a reasonable jury could find that the post motivated the district's decision to place him on leave.

At step two, however, the court held that the district's interests outweighed Thompson's First Amendment interests. The court emphasized that not all speech on matters of public concern receives equal protection. Thompson's post, while political, was not tied to his professional expertise and included derogatory and violent language, which reduced its constitutional weight.

The district also produced evidence supporting a reasonable prediction of disruption. Administrators and staff expressed concern about Thompson's ability to lead, maintain professional relationships, and effectively discipline students if the comments became known. The court also gave weight to Thompson's role as a public-facing school administrator, noting that disruption concerns are heightened for employees in supervisory or leadership positions.

Balancing these considerations, the court concluded that the district's interest in maintaining a safe, inclusive, and effectively functioning school environment outweighed Thompson's interest in the speech. Because no First Amendment violation occurred, the court also held that the individual defendants were entitled to qualified immunity. Ultimately, the Ninth Circuit affirmed summary judgment in favor of the school district and its administrators.

Public employers may discipline employees for off-duty social media speech where the speech includes derogatory or violent language, and the employer can show a reasonable prediction of workplace disruption.

4. GOVERNMENT CLAIMS ACT

Black v. Los Angeles County Metropolitan Transportation Authority,* 116 Cal. App. 5th 677 (2025) - *Failure To Properly Register Public Entity Status Keeps Employee's Suit Alive

Andrew Black sued both the Los Angeles County Metropolitan Transportation Authority ("MTA") and Public Transportation Services Corporation ("PTSC") for wrongful termination, Labor Code violations, and breach of contract. The PTSC is a nonprofit public benefit corporation that MTA created. Black, however, did not file a prelitigation government claim prior to filing his lawsuit.

PTSC argued on demurrer that Black failed to comply with the claims presentation requirement under the Government Claims Act (GCA) (Gov. Code, § 810 et seq.), which mandates that plaintiffs present written claims for damages to public entities before initiating a lawsuit. PTSC contended that it is a public entity entitled to the protections of the GCA because it was created as an organizational unit of the MTA and functions as a nonprofit public benefit

corporation to manage and supply workers for MTA's operations. PTSC further argued that, as a public entity, it is immune from the plaintiff's wrongful termination and Labor Code claims.

In opposition, Black argued that PTSC is not a public entity and, therefore, the GCA's claims presentation requirement does not apply. Alternatively, Black asserted that even if PTSC were deemed a public entity, he was excused from complying with the GCA because PTSC failed to register with the Registry of Public Agencies as required under Government Code section 52051.

The superior court ultimately sustained PTSC's demurrer without leave to amend. The court concluded that both MTA and PTSC were public entities entitled to Government Claims Act (GCA) protections and that PTSC was not required to register separately because it functioned as an organizational unit of MTA.

On appeal, Black conceded MTA was a public entity but challenged PTSC's public entity status. The California Court of Appeal held that PTSC **is** a public entity for purposes of the GCA because: MTA used its statutory authority to create it; and that PTSC exists to further MTA's public transportation mission, operates subject to MTA's control, and functions as MTA's instrumentality in managing and supplying employees. The Court rejected the argument that nonprofit public benefit corporations can never be public entities and explained that public entity status depends on the entity's creation, governmental purpose, and relationship to government. Public entity status is not based only on traditional sovereign powers like taxation or eminent domain.

The Court agreed, however, that Black should be allowed to amend his complaint to allege an excuse from the claims presentation requirement based on PTSC's alleged failure to comply with statutory registration requirements. A public agency must register both with the Secretary of State (SOS) and the county clerk of each county in which it maintains an office, and failure to do so excuses a plaintiff from filing a government claim. (Gov. Code sections 946.4 and 53051.)

Although MTA submitted evidence that it registered PTSC with the SOS, it failed to demonstrate registration with the relevant county clerks. The Court rejected the trial court's conclusion that PTSC's relationship with MTA excused it from independent registration, holding that each public agency must comply with the statute on its own. The Court affirmed the judgment in favor of MTA, reversed the judgment in favor of PTSC, and remanded to allow Black to amend his complaint.

Public agencies and related entities should ensure they comply with Government Code registration requirements, including filing with the appropriate county clerks, not just the Secretary of State. Failure to do so may excuse a plaintiff's noncompliance with the Government Claims Act and keep litigation alive.

6. LABOR RELATIONS

City and County of San Francisco (2025)* PERB Dec. No. A532-M - *PERB Denies DSA's Improper And Untimely Severance Petition

The San Francisco Deputy Sheriffs' Association ("DSA") filed a severance petition that requested to remove four classifications out of the SEIU Local 1021-represented bargaining unit at the City and County of San Francisco (City), and to place them into the unit that DSA exclusively represents. Both the City and SEIU opposed the petition to the Public Employment Relations Board (PERB).

PERB's Office of the General Counsel ("OGC") tentatively concluded that DSA's petition could not go forward because severance petitions may not be used to add employees to an existing bargaining unit; a severance petition must propose a new unit consisting only of the severed employees. In response, DSA amended the petition to place the affected employees in a new bargaining unit consisting only of themselves. However, by this point, the City and SEIU had already entered into a successor MOU. OGC determined that the amended petition was untimely because PERB Regulation 61400(b) requires that severance petitions or amendments be filed during the narrow 29-day "window period" before an MOU's expiration. The amended petition was filed outside that window period and was barred. DSA appealed.

On appeal, DSA argued that its amendment was permissible under PERB Regulation 61260(a), which allows petitions for certification or recognition to be amended to correct technical errors or adjust classifications at any time before a hearing notice is issued. DSA claimed its change was a harmless, technical correction. PERB rejected this argument, holding that the more specific Regulation 61400(b) controlled in severance cases and contained the window period rules.

PERB also found that DSA's amendment was material rather than technical. PERB agreed with OGC that the original petition itself was invalid because it attempted to transfer employees into an already existing unit, which severance petitions cannot do. PERB reiterated that severance petitions must create a new bargaining unit "consisting of" only the employees to be severed, not reassign them to another established unit.

PERB concluded that both the initial and amended petitions failed to comply with governing regulations. PERB denied DSA's appeal, dismissed both petitions, and closed the case.

Public employers and labor organizations should pay close attention to PERB's procedural rules governing unit modification petitions. Severance petitions must be substantively proper at the outset and filed within the applicable window period; a later "amendment" that materially changes the unit sought may be treated as untimely.

7. PEACE OFFICER RECORDS

Schneider v. Superior Court (Los Angeles County Sheriff's Department)*, 111 Cal.App.5th 613 (2025) - *Sheriff Ordered to Disclose Brady Materials

A defendant charged with murder filed a *Pitchess* motion to get *Brady* information from the confidential personnel files of six Los Angeles County Sheriff's deputies. *Brady* refers to a 1963 U.S. Supreme Court case that found that a criminal defendant's right to due process requires a prosecutor to disclose evidence or information that would prove the innocence of the defendant or would enable the defense to more effectively impeach the credibility of government witnesses.

In this case, the superior court found the defendant's *Pitchess* motion established good cause for the court to review the peace officer records. The trial court determined the personnel files of four of the six deputies contained *Brady* material. The Los Angeles Sheriff's Department (LASD) contended that the initial disclosure in *Pitches*s is limited to the name and the contact information of the reporting parties and witnesses. The superior court agreed with LASD and denied the request for the *Brady* material itself. Instead, the superior court ordered disclosure of the names, addresses, and telephone numbers of the individuals who had witnessed or complained of the conduct of the officers that was at issue in the case.

The defendant then filed a *Brady* motion seeking *Brady* discovery. In the *Brady* motion, the defendant argued he was entitled to the actual *Brady* evidence, as opposed to a single document listing the name and contact information of each complainant as is commonly provided in response to a *Pitchess* motion. (Penal Code sections 832.7 and 832.8; and Evidence Code sections 1043 through 1045.)

The superior court still refused to give the defendant the actual *Brady* information. The trial court found that the case authorities did not specify the scope of the information to be turned over once a court determines that *Brady* material is present in an officer's file. The trial court concluded that it should not turn over any more than what is required by *Pitchess* -- the names and contact information for complainants and witnesses. The man then filed a petition for writ of mandate in the California Court of Appeal to order the trial court to provide the *Brady* material.

The California Court of Appeal found that the trial court should have ordered the LASD to disclose all *Brady* material in the four deputies' personnel files, including documents and any audio-video materials.

This case is a primer on the discovery of confidential peace officer records. Although the Court found that a party seeking *Brady* material must comply with the *Pitchess* motion procedures, this case defines the substantive differences between a *Pitchess* motion and a *Brady* motion, including: 1) what a party must show to justify an *in camera* review on each type of motion; and 2) what information the court must order disclosed on a successful motion.

First, the Court found that a criminal defendant must show good cause in order to allow a court to review peace officer files. This is a low burden on both motions. On a *Pitchess* motion,

the defendant must show that the information is material to the pending criminal case; and that the defendant has a reasonable belief that the agency has the type of information sought. *Pitchess* motions generally seek information about past complaints by third parties of excessive force, violence, dishonesty, or the filing of false police reports.

The criminal defendant's burden on a *Brady* motion is even lower. All a defendant must do is describe the *Brady*-tip or *Brady* bank alert that it received, together with some explanation of how the officer's credibility might be relevant to the proceeding. No allegations of officer misconduct in the defendant's case are required.

Second, once good cause has been shown, the scope of the disclosures for a classic *Pitchess* motion versus a *Brady* motion is also different. On a *Pitchess* motion, material that is potentially relevant includes records that touch on the type of misconduct that the defendant has alleged the officer committed in dealing with the defendant. This would include complaints that the police agency has deemed unfounded. Given this low bar and the potential to sweep in materials with only minimal relevance, limiting initial disclosures to names and contact information for complainants and witnesses makes sense in a classic *Pitchess* context.

Conversely, when a court determines that an officer's personnel file contains *Brady* information, by definition, the relevance of the material is not "minimal." Rather, the court has concluded that the information has the potential to affect the outcome of the trial. The limitations on disclosure in the *Pitchess* statute (Evidence Code section 1045(b) & (c)) do not apply to *Brady* information. Therefore, the practice of refusing to disclose the actual records is not applicable to *Brady* material.

Agencies responding to Brady-related Pitchess motions should be prepared for broader disclosure obligations than those that apply in a traditional Pitchess context. Once a court finds Brady material in an officer's file, the agency may be required to disclose the actual records, not merely names and contact information for complainants or witnesses.

8. RETIREMENT

Bishop v. San Diego County Employees Retirement Association,* 118 Cal.App.5th 694 (2026) - *Employee's Felony Conviction Caused A Pension Forfeiture Despite Its Later Reduction To A Misdemeanor

A former County employee pleaded guilty to a felony conflict-of-interest charge in May 2022. The Retirement Board informed him in August 2022 that under state pension law codified at Government Code section 7522.74, his felony conviction required a forfeiture of part of his pension benefits. The criminal court later reduced the felony to a misdemeanor under Penal Code section 17(b)(3). The former employee asked the pension board to reinstate his benefits.

The County Retirement Board denied his request and the trial court upheld that denial. The California Court of Appeal addressed whether a public employee is "convicted" under Government Code section 7522.74 when guilt is adjudicated (by plea), or only when a judgment is entered, and the effect of a subsequent reduction to a misdemeanor.

The Court agreed with published precedent that a guilty plea to a felony constitutes a "conviction" for purposes of the pension forfeiture statute, and that the subsequent reduction to a misdemeanor did not undo the earlier conviction for pension purposes. The Court noted that the forfeiture law only identifies one circumstance when pension benefits can be returned-- when the conviction is reversed. Thus, the former employee could not receive his forfeited pension benefits. Under the Public Employees' Pension Reform Act, statutory felony pension forfeiture is triggered by the adjudication of guilt and subsequent reductions of the underlying charge do not restore forfeited benefits.

Public retirement systems may treat a felony guilty plea as a conviction triggering pension forfeiture, even if the conviction is later reduced to a misdemeanor. Agencies and retirement boards should not assume post-conviction reductions restore benefits unless the conviction itself has been reversed.

Mendoza v. Board of Retirement of the Ventura County Employees' Retirement Association,* 117 Cal.App.5th 559 (2025) - *Deputy's Refusal To Undergo Treatment Doomed His Service-Connected Disability Retirement Application

Alberto Mendoza worked as a Deputy Sheriff for Ventura County. He injured his back at work in late 2014 and mid-2015. In 2015, three different doctors recommended the surgery, and the County authorized it. One doctor predicted Mendoza had a 90% chance of good to excellent results. Mendoza declined the surgery. A doctor reported that Mendoza was "simply scared" to complete the procedure based on "bad information" from his friends and the internet. Mendoza applied for a service-connected disability retirement in 2016. The County advised Mendoza that it was challenging his application.

Doctors continued to examine Mendoza's back from 2016 to 2019. In 2018, Mendoza reported constant pain, but he was still not interested in surgery. He did not continue a doctor-recommended home exercise program because he said the exercises hurt his back. In 2019, a doctor recommended Mendoza undergo a work hardening program to help him increase his ability to lift and potentially allow him to return to work.

The administrative hearing on Mendoza's service-connected disability retirement petition took place in December 2019. Mendoza called no witnesses, and testified that he declined the surgery because his incontinence symptoms had decreased and he felt he was getting better. He testified that he did not see any medical benefit to the work hardening program because the exercises increased his pain.

In October 2020, the hearing officer issued a recommended decision to deny Mendoza's application. The hearing officer determined that Mendoza: refused to undergo reasonable and appropriate medical treatment that had a high probability of success and would have allowed him to return to work; may have made his condition worse by refusing surgery; unilaterally decided to stop home exercise; and did not participate in the work hardening program the County had authorized. The County's retirement board adopted the hearing officer's recommended decision.

Next, Mendoza petitioned for a writ of administrative mandate in the superior court. The superior court denied Mendoza's petition based on the common law doctrine of avoidable consequences/ mitigation of damages. Under that doctrine, an application for service-connected disability retirement benefits is properly denied if the applicant's disability is caused, continued, or aggravated by their unreasonable refusal to undergo medical treatment for their injuries. Mendoza appealed.

In the California Court of Appeal, Mendoza argued that the doctrine could not be applied to him because: the initial surgery he refused to undergo would no longer be effective; and the subsequently recommended surgeries would not enable him to perform all of his job duties.

The Court disagreed. It found that the doctrine of avoidable consequences/ mitigation of damages applies not only if it is likely that the employee could still return to work with recommended medical treatment, but also if it is likely the employee could have returned to work but for their unreasonable refusal to timely submit to treatment that may no longer be effective due to the passage of time. A retirement board can find that the employee's inability to return to work is not a result of their work-related injury, but rather a result of their unreasonable refusal to submit to medical treatment.

The Court of Appeal also noted that the trial court was right to presume that the findings underlying the County board's decision were correct. Although the trial court focused on Mendoza's refusal to undergo the approved surgery, the County board also found Mendoza had: unreasonably refused to participate in the work hardening program; unreasonably stopped the home exercise program; and required further medical care and treatment. The Court decided that Mendoza failed to establish that his writ petition was erroneously denied.

Retirement boards and public employers may rely on the avoidable-consequences doctrine where an employee unreasonably refuses treatment that likely would have enabled a return to work or prevented deterioration. Agencies should document treatment recommendations, expected outcomes, and the employee's refusals when contesting service-connected disability claims.

Baker v. San Mateo County Employees Retirement Association, **114 Cal.App.5th 81 (2025) - *County Employee Unsuccessfully Challenged The Effective Date Of Her Retirement Benefit.***

Catherine Baker worked for San Mateo County as a Social Worker III. She reported back pain that prevented her from performing some essential job duties. She went on medical leave in 2009. In 2015, she returned to work in a different position as a Screener Trainee. The Screener Trainee job had the same pay rate as her original position. On January 21, 2016, Baker left County employment.

In 2017, Baker applied for a "service-connected" disability retirement. The County Employees Retirement Association ("SamCERA") recommended that, pursuant to the County Employees Retirement Law of 1937 at Government Code section 31724, the effective date of her retirement benefit was January 22, 2016, the day after her last receipt of "regular compensation."

After SamCERA's Board approved her application and set the effective date, Baker sought administrative review. She felt that her compensation as a Screener Trainee did not qualify as "regular compensation" because she had not returned to her Social Worker III job. She argued that her effective date of retirement should have in 2009 when she left her Social Worker III job. An administrative law judge recommended denial of her request to change the effective date, and the Board adopted this recommendation. Baker then filed a petition for writ of administrative mandamus in superior court, which denied the petition and confirmed the January 22, 2016 effective date.

The California Court of Appeal reviewed whether "regular compensation", as used in section 31724, included Baker's pay as a Screener Trainee. To make its decision, the Court looked at the ordinary meaning of the words "regular compensation" and to prior case law. The prior case law held that the term "regular compensation" includes compensation for sick leave taken as time off because, during such periods, employees receive their "regular salary" or "full wages." The Court held that "regular compensation" refers to regular salary or full wages, regardless of whether the position is the employee's original job.

Because Baker's Screener Trainee pay matched her original position's pay rate, it qualified as "regular compensation." The court affirmed the trial court's judgment, upholding the effective retirement date that SamCERA had set.

For disability retirement timing purposes, "regular compensation" may include pay earned in a different position, not just the employee's original classification. Public employers and retirement systems should focus on whether the employee continued receiving regular salary or wages, rather than on the job title alone.

9. WORKPLACE VIOLENCE

County of Los Angeles v. Niblett,* 116 Cal. App. 5th 454 (2025) - *Courts May Imply "Credible Threat Of Violence" By The Context

The County of Los Angeles sought a workplace violence restraining order (WVRO) against Senior Mechanic Neill Francis Niblett after a series of escalating incidents when he angrily confronted management officials and an Assistant Fire Chief over employment decisions. In October 2022, Niblett yelled profanities at the Assistant Fire Chief, advanced to within inches of the Assistant Fire Chief's face, and spit on him while shouting.

Several days later, Niblett told a secretary that if management did not "change things," they would have "another situation like they had with Tatone." That was a reference to a June 2021 incident in which one firefighter fatally shot another at a fire station. The County argued this statement constituted an implied credible threat of violence, particularly in light of: Niblett's angry demeanor; his history of confrontational conduct toward management; and evidence that he owned firearms.

Multiple witnesses testified during the hearing in the trial court. The trial court found by clear and convincing evidence that Niblett's reference to the prior shooting constituted a credible

threat of violence under California Code of Civil Procedure section 527.8, and that there was a reasonable probability of future harm. The trial court issued a WVRO prohibiting Niblett from harassing or contacting the Assistant Fire Chief or entering the Assistant Fire Chief's workplace. The WVRO also required Niblett to relinquish firearms and ammunition.

Niblett appealed. He argued that there was no evidence of an immediate threat or that he had any intent to harm. He claimed that his statement was protected speech related to union activity and workplace grievances. He said the WVRO violated his First and Second Amendment rights.

The California Court of Appeal rejected Niblett's arguments. The Court held that a "credible threat of violence" under section 527.8 need not be explicit or immediate or supported by an intent to harm, but may be implied when the context shows a reasonable person would fear for their safety. The statute defines "credible threat of violence" as a knowing and willful statement or course of conduct that would place a reasonable person in fear for their safety, or the safety of their immediate family, and that serves no legitimate purpose. The Court concluded that speech that meets this definition is not protected by the First Amendment. The Court further held that the firearm prohibition was lawful and consistent with historical restrictions on those who were found to pose a credible threat to others.

Public employers seeking workplace violence restraining orders do not need an express or immediate threat if the surrounding circumstances would cause a reasonable person to fear for safety. Agencies should carefully monitor and document threatening statements, context, prior confrontations, and other surrounding facts that show an implied credible threat of violence.

10. WAGE AND HOUR

Levy v. City and County of San Francisco,* 114 Cal.App.5th 997 (2025) - *Labor Code Section 512.1's Meal and Rest Breaks Do Not Apply To Charter Cities

In 2022, the California Legislature added Labor Code section 512.1 to extend the meal and rest break rights that private sector health care workers have to public sector health care employees who are directly employed by: the state, political subdivisions of the state, counties, municipalities, and the Regents of the University of California.

A group of nurses who worked for the City and County of San Francisco (City) sued on behalf of themselves and similarly situated City-employed nurses. The nurses alleged that the City has failed to comply with section 512.1 since it took effect. The City is a charter city.

The City demurred on two grounds. First, the City argued section 512.1 did not apply to charter cities. Second, the City argued that even if the Legislature had meant to apply section 512.1 to charter cities, the law would violate the constitutional home rule doctrine because the law "does not pertain to a matter of statewide concern" and "is not narrowly tailored to its purported goals." The trial court sustained the City's demurrer without leave to amend. The court found no clear indication that the Legislature intended section 512.1 to apply to charter cities. The nurses appealed.

The California Court of Appeal affirmed the sustaining of the City's demurrer. The nurses argued that charter cities came within section 512.1's broad definition of "employer". The Court disagreed. The Court of Appeal found that none of the other aids to statutory interpretation supported the nurses' argument. For example, the Court noted that in other statutes, the Legislature expressly stated both that a matter was of statewide concern and was not a "municipal affair" as that term is used in the "home rule" doctrine stated in Section 5 of Article XI of the California Constitution. The Court found that section 512.1 did not expressly apply this statute to charter cities.

The Court of Appeal concluded that the City's home rule authority gave it sovereignty over its employees' compensation. The Court declined to address constitutional home rule questions because the statutory grounds were available and dispositive. The Court declined to infer any legislative intent from section 512.1 to contravene the City's constitutional home rule authority.

Although this case involved a charter and county, this case illustrates that charter cities may be able to resist application of state employment statutes where the Legislature has not clearly stated an intent to override local home-rule authority. Charter cities should evaluate whether state labor requirements relating to wages expressly apply to them before assuming compliance obligations exist.

LEAGUE OF
CALIFORNIA
CITIES

Smile! You're On Camera Best Practices for Public Camera Footage

Smile! You're On Camera--Legal Developments and Best Practices for Disclosure and Retention of Public Camera Footage

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Introduction:

The use of video cameras has become an important tool for public safety. Most law enforcement agencies use some combination of dash-cam, body-worn cameras, and drone video. Camera footage is valuable both for the prosecution of crimes and for defending officers against claims of misconduct. The increased use of video creates opportunities for greater efficiencies for public safety and transparency in policing, but also raises significant privacy issues. The legislature and the courts have provided imprecise guidance in how to balance these competing interests. This paper will discuss best practices for the use and retention of police video, and will outline current law regarding video disclosure.

In addition to video footage, many agencies are using license plate readers to identify and locate stolen and suspect vehicles. The use of license plate readers raises unique privacy and law enforcement questions. While we do not take a position on the use of license plate readers, we will discuss some of the significant issues, and make recommendations on best practices for agencies that choose to use them.

Body-Worn Camera Policy and Retention:

Policies for the use, storage and retention of camera footage are important both to ensure consistency and transparency, but also because having a policy regarding the use of camera footage may be helpful in limiting the scope of footage that an agency needs to review in response to a CPRA request.

Agencies are required to have a policy for the use of body-worn cameras. Penal Code section 832.18 sets out the requirements for a body-worn camera policy. Under 832.18, the policy must:

- Identify who is responsible for downloading footage.
- Identify when data should be downloaded. The timing should, "ensure the data is entered into the system in a timely manner, the cameras are properly maintained and ready for the next use, and for purposes of tagging and categorizing the data."
- Include measures to prevent alteration or deletion of the camera data.
- Require that footage is categorized and tagged according to the type of event at the time of download.

- Identify means and location of storage (e.g. in-house server or third-party cloud database).[1]

Penal Code section 832.18 also requires agencies to specify how long recorded data is stored.[2] The minimum retention periods under the statute are:

- 60 days for non-evidentiary data.
- 2 years if the video:
    - "[I]s of an incident involving the use of force by a peace officer or an officer-involved shooting."[3]
    - "[I]s of an incident that [results in] the detention or arrest of an individual."[4]
    - Is relevant to a citizen complaint against an officer or the agency.[5]

In addition, if the video is relevant to a criminal prosecution, it should be retained for additional time, consistent with other evidence that may be relevant to the prosecution.[6] Access logs and deletion records should be kept permanently.[7]

There is legislation pending that would require policies to be updated to address the recording of individuals undergoing medical or psychological evaluations or treatments. If passed and approved by the governor, the provisions would go into effect July 1, 2027.[8]

Policies and Retention Requirements for Dash-Cam and Drones:

There is no statutory requirement to have a policy for the storage of dash-camera or drone footage.[9] However, the same policy considerations that apply to body-worn cameras apply to

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[1] If an agency decides to use a third-party vendor, it must consider the experience and reputation of the vendor, the use of contracts to protect the agency's data, inclusion of a built-in audit trail, having a reliable back-up, a system with includes technical assistance capabilities. The agency should consult with legal counsel "to ensure the method of data storage meets legal requirements for chain-of-custody concerns." Penal Code § 832.18(b)(7).

[2] Penal Code § 832.18(b)(5).

[3] Penal Code § 832.18(b)(5)(B)(i)

[4] Penal Code § 832.18(b)(5)(B)(ii)

[5] Penal Code § 832.18(b)(5)(B)(iii)

[6] Penal Code § 832.18(b)(5)(C)

[7] Penal Code § 832.18(b)(5)(E)

[8] California Senate Bill No. 691, California 2025-2026 Regular Session.

[9] Under California Assembly Bill No. 481 (2021) (Gov. Code § 7070 *et. seq*.), law enforcement agencies are required to have policies for the use of military equipment, including drones. The

other video recordings used by law enforcement. Penal Code section 832.18 sets a minimum standard. Agencies should consider expanding the required body-cam policy to include other types of video recording.

But note that there is no express authority to limit retention of video other than body-worn camera video to 60 days. Dash-cam footage may be considered "routine video monitoring" under Government Code section 34090.6, which defines video monitoring as including "mobile in-car video systems."[10] Under section 34090.6, recordings of routine video monitoring must be maintained for a period of one year. There is no specific retention requirement for drone video. Drone video footage may be subject to the default two-year retention requirement under Government Code section 34090(d).

There is very little legislative or judicial guidance regarding retention of dash-cam or drone footage that is not relevant for any public purpose. A conservative approach is to simply retain all dash-cam and other video footage for one or two years. However, this may not be practical for some smaller agencies. Some agencies have taken the position that only video that is retained for a public purpose must be retained for the statutory period.

Other Policy Considerations—Artificial Intelligence and Camera Footage

New technology allows artificial intelligence to assist with report-writing by creating summaries and transcripts from audio and video recordings. Under Penal Code section 13663, if artificial intelligence is used to summarize camera footage and prepare a report, the report must 1) disclose that artificial intelligence was used, and 2) include a signed statement from an officer that they reviewed the report and verified the facts. There are other procedural requirements in section 13663 for the use of artificial intelligence in police reports that should be incorporated into an agency policy.

Disclosure of Video Recordings Under the California Public Records Act

In general, records of investigations by police agencies are exempt from disclosure under the CPRA.[11] However, there are certain exceptions to this general rule. One exception, provided under California Senate Bill 1421 (2019), is for audio or video recordings that "relate to a critical incident."[12] A recording "relates to a critical incident if it depicts . . . (1) An incident involving the discharge of a firearm at a person by a peace officer or custodial officer," or "(2) An incident in which the use of force by a peace officer or custodial officer against a person resulted in death or in great bodily injury."

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policies are required to address how equipment is used and the purpose of its use. Agencies may want to consider including information about the storage and retention of camera footage in those policies. (see: Gov. Code § 7070 *et seq.*)

[10] Section 34090.6 applies to cities, but the same requirements are applied elsewhere to counties and special districts.

[11] Gov. Code § 7923.600.

[12] Gov. Code § 7923.625.

The term "great bodily injury" is not defined for purposes of disclosure under the CPRA. The only other use of the term in the code is as a Penal Code sentencing enhancement for felonies that do not have bodily harm as an element.[13] Under the Penal Code, "'great bodily injury' means a significant or substantial physical injury."[14] In *City of Fresno v. Superior Court* ((2026) __Cal. App 5th ___), the 5th District Court of Appeal held that the Penal Code definition applied to disclosure under the CPRA. However, the court did not discuss how this definition applies to specific injuries. While case law interpreting the sentencing enhancement may be helpful, whether the enhancement applies is a jury question. This leads to inconsistent definitions of the term.

California law also requires police agencies to report annually to the Department of Justice any use of force incidents that caused "serious bodily injury." "Serious bodily injury" is defined in the Government Code to mean "a bodily injury that involves a substantial risk of death, unconsciousness, protracted and obvious disfigurement, or protracted loss or impairment of the function of a bodily member or organ."[15] The disclosure to the Department of Justice may be a helpful tool in determining whether a specific incident should be disclosed.

Video That "Depicts" a Critical Incident

In *Sacramento Television Stations Inc. v. Superior Ct.*, ((2025) 111 Cal. App. 5th 984), the Third District Court of Appeal addressed the question of what constitutes a video that "depicts" a critical incident. The case involved an officer-involved shooting by officers from the Roseville Police Department.[16]

In *Sacramento Television Stations,* Roseville officers responded to a request for assistance from California Highway Patrol officers, who had come under fire while attempting to serve a warrant on a suspect in a local park. When Roseville officers arrived, they immediately opened fire on the suspect. The officer-involved shooting by Roseville lasted just seconds. Almost immediately after Roseville officers began shooting, the suspect fled into another part of the park. The Roseville officers stopped shooting, and instead sent drone up to search for the suspect. When the officers located the suspect with the drone, he had taken two hostages. The suspect shot both hostages, killing one. Roseville officers were able to negotiate the suspect's surrender without any more shooting.

In response to a request from a local CBS affiliate, Roseville police released four 39 second videos of the officer-involved shooting.[17] These were all of the videos that Roseville determined "depicted" the shooting. CBS later learned that there was a drone video that had not been

[13] See Penal Code § 12022.7.

[14] Penal Code §12022.7(f)(1)

[15] Gov. Code § 12525.

[16] The facts outlined here are from the trial court pleadings and briefing.

[17] The Highway Patrol officers did not have body-worn camera.

released, and requested a copy of that video. Roseville denied the request for the drone video for various reasons, including that the video did not depict the officer-involved shooting. CBS filed a writ, which the trial court denied. The trial court did not view the drone video in camera, and did not make a determination on whether the video depicted the officer-involved shooting, instead finding that release of the video would interfere with the criminal prosecution of the suspect.

The Court of Appeal overturned the trial court's basis for denying the writ, and instead focused on arguments over whether the drone video should be released as depicting the officer-involved shooting.

CBS argued for the broadest possible disclosure, claiming that Government Code section 7923.625 requires disclosure of footage "from the time that [Roseville PD] arrived on scene at the critical incident to the time the scene was secured."[18] The First Amendment Coalition's amicus argument was slightly narrower, claiming that the statute "requires disclosure of recordings that depict 'the totality of circumstances before and after a police shooting.'" Including "sufficient 'post-shooting' footage to confirm that law enforcement officers 'promptly rendered first aid, secured the scene, and refrained from contaminating or planting evidence.'"[19]

Roseville's position was that an "incident involving the discharge of a firearm" includes "the context leading up to the discharge, the discharge itself, and the officer's disengagement following the discharge—here no more than thirty-nine (39) seconds for each discharge."[20] CalCities filed an amicus brief in support of Roseville, arguing that the "occurrence encompassed 'a series of incidents,' of which the officer-involved shooting was just one. Under this view, [the suspect's] arrest was a distinct incident, as was the effort to render medical aid to the victims. As for the meaning of the words 'incident' and 'involving' in subdivision (e)(1), the amicus brief contends the word 'involving' is 'merely a modifier that identifies the type of incidents that are subject to disclosure,' while the word 'incident' —which one dictionary defines as a 'discr[ete] occurrence or happening'—is 'the operative term' in the phrase."[21]

The Court of Appeal found that "the construction of subdivision (e) proposed by amici for Sac TV to be too broad, and the construction proposed by the City and its amici, while perhaps acceptable in the abstract, to be too narrow as applied here."[22]

Instead, the Court held that CBS is entitled to receive "(a) *uninterrupted* copies of *all* Roseville PD recordings of the . . . occurrence that were captured during the three-minute window of time when, the City alleges, the entire incident involving firearm discharge by Roseville PD took place, along with (b) ***additional recordings that provide sufficient context to permit an understanding of why the first shot was fired and what happened in the immediate aftermath***

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[18] *Sacramento Television Stations Inc.* 111 Cal.App.5th at 1002.

[19] *Id.*

[20] *Id.*

[21] *Id.*

[22] *Id.*

of the final shot."[23]

The Scope of the Investigative Exemption

In addition to critical incidents, agencies may be required to disclose camera footage on the basis that it falls outside of the investigative exemption. *Castanares v. Superior Court* ((2023) 98 Cal.App.5th 295) was the first appellate decision to address the scope of the investigative exemption as applied to video footage. The case involved a request from a member of the public for footage from a pilot drone program in Chula Vista. At the time, Chula Vista was participating in a pilot program using "drones as first responders for certain 911 calls. Per this program, a police officer determines when sending a drone to examine a situation is an appropriate response to a public call for assistance. If the officer decides that the use of a drone is suitable, a remote pilot flies the drone to the area in question, streaming video to the officers to better inform them how to respond to the situation."[24] Chula Vista denied the request, citing the investigative exemption under Government Code section 7923.600. The requester filed a writ, which the trial court denied, finding that the footage was subject to the exemption.

The Fourth District Court of Appeal held that the trial court "erred in determining, as a matter of law, all video footage from the drone program is exempt under section 7923.600, subdivision (a) as records of investigations."[25] Instead, the Court of Appeal identified three categories of footage that should be evaluated independently.

The first category is footage that is "part of an investigatory file." That footage is categorically exempt from disclosure.[26]

The second category are "instances where officers used a drone to investigate whether a violation of law was occurring or had occurred but did not create a corresponding investigatory file." The Court identified specific examples, including "dispatching a drone to investigate a possible assault, a claim of someone causing a disturbance, or a suspected break-in; yet, the resultant video footage did not become part of an investigatory file."[27] These types of incidents are also subject to the investigatory exemption.

The third category include drone footage that does not fall within the first two categories. "Such footage would consist of using a drone to make a factual inquiry to determine what kind of assistance is required, not to investigate a suspected violation of law. For example, a 911 call about a mountain lion roaming a neighborhood, a water leak, or a stranded motorist on the freeway could warrant the use of a drone but do not suggest a crime might have been committed

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[23] *Id.* at p. 1005.

[24] *Castanares at p.* 300.

[25] *Id.*

[26] *Id. at p. 310.*

[27] *Id.*

or is in the process of being committed."[28] Under the Court of Appeal's analysis, this type of footage does not fall within the investigative exemption to the CPRA.

The Court of Appeal decision does not address other possibilities, where the type of call is unknown at the time the drone is deployed. For example, a drone may be deployed to a call of a person lying on the sidewalk, or a person acting erratically in public. The purpose of sending the drone would be to determine whether or not to send law enforcement, or whether it is a purely medical call. It is unclear from the opinion which category that type of call would fall into.

The *Castanares* court also addressed privacy and the burden of producing hours of drone video. Chula Vista argued that due to the time necessary to review and redact hours and hours of video footage, "the public interest in nondisclosure clearly outweighs the public interest in disclosure" under the CPRA balancing test.[29] The Fourth District acknowledged privacy interests in the drone videos, and the presumed need for redaction. The "need to redact the drone video footage is compelled by privacy concerns. As the trial court correctly noted, our state Constitution expressly grants all Californians the right of privacy. (Cal. Const., art. I, § 1.) And here, we agree that the drone video footage implicates serious privacy concerns."[30] However, the Court held that Chula Vista "did not carry its burden in showing the catchall [balancing test] provision applies here."[31]

While *Castanares* is one of several appellate opinions that have reaffirmed that there is a level of burden on public agencies that could theoretically tip the balance in favor of nondisclosure, no appellate case has yet defined the tipping point.

The *Gilroy* Case and Retention Requirements

One way to reduce the burden of video review is to follow the agency's retention schedule, and promptly destroy records as appropriate. In *City of Gilroy v. Superior Court* ((2026) 19 Cal.5th 38), the Supreme Court addressed whether the CPRA requires agencies to retain exempt records from the date the exemption is invoked until the requestor is able to obtain judicial review of the agency decision. The case involved a series of CPRA requests from the Law Foundation of Silicon Valley for records related to Gilroy's encampment cleanup efforts. In 2019, the Law Foundation expressly requested body-worn camera footage related to the encampment cleanups. Gilroy denied the request under the investigative privilege.[32] At the same time, they informed the Law Foundation that footage from before early 2018 had been destroyed under Gilroy's records retention schedule.

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[28] *Id.*

[29] Gov. Code § 7922.000.

[30] *Id.* at p. 314.

[31] *Id.* at p. 316.

[32] The City later voluntarily released some of the body-worn camera footage that was not related to enforcement efforts, without conceding their position that it was exempt.

The Law Foundation argued that Gilroy was on notice at the time of their request that they were seeking the records, so the City should have placed a litigation hold on the recordings at the time of request, even without a threat of litigation over the City's determination that they were exempt. The Law Foundation asserted that the hold should have remained for the full three-year statute of limitations.[33]

The Supreme Court reaffirmed that the CPRA is not a retention statute, holding "[w]e are unpersuaded that by providing for judicial oversight in the CPRA, the Legislature intended to require the retention of records for three years, commencing with the assertion of a statutory exemption. In essence, the Law Foundation's argument is that the CPRA imposes a records retention requirement because the CPRA allows for litigation. But if litigation is what justifies preservation, then it seems unlikely that the Legislature intended for broad preservation of potentially responsive public documents given that, as the parties here agree, public records requests rarely result in litigation."[34]

However, the Court also addressed the question of whether the scope of declaratory relief available under the CPRA extends to an agency's past actions. The Law Foundation argued that Gilroy conducted an inadequate search for records, asserted the investigatory exemption for body-worn camera footage without reviewing all of the footage before making a determination, and for responding to the request late.

The Supreme Court held "that the CPRA authorizes declaratory relief that a public agency has violated its provisions even in some circumstances when it is uncontested that there are no existing nonexempt records to disclose." Declaratory relief was permissible in the *Gilroy* case "because [the declarations] resolve an ongoing dispute about the parties' respective statutory rights and obligations and thus serve to guide their future conduct."[35]

Automated License Plate Readers

Automated License Plate Readers (ALPRs) are defined by statute as a searchable computerized database resulting from the operation of one or more mobile or fixed cameras combined with computer algorithms to read and convert images of registration plates and the characters they contain into computer-readable data.[36] In essence they are camera systems that automatically capture, analyze, and store vehicle license plate data using optical character recognition (OCR) to convert plate images into text, which are then automatically checked against databases for various information, such as stolen vehicles or missing persons lists (i.e., "hot lists").[37] The

[33] *City of Gilroy* at p. 63.

[34] *Id.* at p. 65.

[35] *Id.* at p. 63.

[36] Civ. Code § 1798.90.5, subd. (d)

[37] California State Auditors Report, 2019-118, "Automated License Plate Readers, To better Protect Individuals Privacy, Law Enforcement Must Increase its Safeguards for the Data it Collects (hereafter, "State Auditors Report")(February 2020), p. 7)

ALPR cameras are typically mounted either on a patrol vehicle which are able to scan license plates while in motion, or mounted on fixed locations, like light polls. This tool has been in existence since the 1970's, but widespread adoption began in the mid 2000's.[38]

Use of ALPRs can result in the creation of millions of images of license plates over a short period of time.[39] Although these images are collected while vehicles are in public where there is no reasonable expectation of privacy of a license plate, the use and retention of those images raises privacy concerns.[40]

In California the use ALPR technology is permitted, but its implementation, use, sharing, and disseminating of information derived from such technology is regulated primarily by Civil Code section 1798.90.5 *et seq*. The regulations are intended to balance the technology's investigative benefits against privacy concerns and misuse.[41] The statute sets forth the most significant requirements for the use of ALPR technology in California. In addition, the California Department of Justice issued an information bulletin to state and local law enforcement agencies in October 2023 to provide further guidance regarding how ALPR information is to be stored, collected, shared, and used.[42]

Below is an overview of the statutory requirements for operating, using, accessing, and sharing information from an ALPR system:

- Privacy and Usage Policy.

The statute requires an agency to implement a publicly available, written usage and privacy policy on the agency web site that contains certain minimum requirements for an "ALPR operator"[43] and similar requirements that apply to an "end-user."[44] While most agencies will use ALPR technology as both operators and end-users, the differences between the policy requirements denote different obligations and considerations that must be addressed in the policy.

The requirements that apply to both operator and an end-user policies are that it must include:

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[38] *Id.*

[39] *American Civil Liberties Union Foundation v. Superior Court* (2017) 3 Cal.5th 1032, 1037

[40] *Id. at* 3 Cal.5th 1032, 1044

[41] State Auditors Report, *supra*, at p. 2

[42] California Department of Justice, Information bulletin 2023-DLE-06, "California Automated License Plate Reader Data Guidance" (hereafter, "DOJ Guidance").

[43] Civ. Code 1798.90.51. ALPR Operator defined as "a person that operates an ALPR system . . . ." (Civ. Code § 1798.90.5, subd., (c).)

[44] Civ. Code § 1798.90.53. ALPR end user defined as "a person that accesses or uses an ALPR system . . . ." (1798.90.5, subd., (a).)

- The **purposes** of, process for, and restrictions on, the sale, sharing, or transfer of ALPR information to other persons.
- The title of the official custodian, or owner, of the ALPR system **responsible** for implementing this section.
- A description of the reasonable measures that will be used to **ensure the accuracy** of ALPR information and correct data errors.
- The length of time ALPR information will be **retained**, and the process the ALPR operator will utilize to determine if and when to destroy retained ALPR information.[45]

The remaining minimum requirements while closely aligned, impose slightly different substantive considerations whether operating an ALPR system or for accessing the data as an end-user. Below is a comparison of the similar but different remaining minimum policy requirements:

ALPR operator	**ALPR end-user**
The authorized purposes ***for using the ALPR system and collecting ALPR information*.**	The authorized purposes ***for accessing and using ALPR information.***
A description of the job title or other designation of the employees and independent contractors who are authorized to ***use or access the ALPR system, or to collect ALPR information***. The policy shall identify the training requirements necessary for those authorized employees and independent contractors.	A description of the job title or other designation of the employees and independent contractors who are authorized ***to access and use ALPR information***. The policy shall identify the training requirements necessary for those authorized employees and independent contractors.
A description of how the ALPR system will be monitored to ensure the security of the information ***and compliance with applicable privacy laws***.	A description of how the ALPR system will be monitored to ensure the security of the information ***accessed or used, and compliance with all applicable privacy laws and a process for periodic system audits.***[46]

An agency should be sure to carefully craft clear policies that define the purposes and procedures to meet these minimum requirements. The more detailed the policy, the more effective it will be and the better chance the agency can avoid misuse and avoid surprises. Further, a policy should be periodically revisited to ensure the policy meets the real world application of the ALPR system. As the use of ALPR systems evolve, the purposes and values for its use may also evolve, and that should be reflected in the policy. In addition, vendors frequently update their systems and provide new ways of navigating or accessing the ALPR information that may not reflect how the policy was originally written. For example, many ALPR systems allow for sharing access with another

[45] Civ. Code § 1798.90.51, subd. (b); Gov. Code § 1798.90.53, subd. (b).

[46] *Id.*

agency to occur through a simply toggle of a button, but the original policy may require a written request and determination be made. As such, an agency should ensure that their real world use both complies and is reflected in their policy.

- Data Security.

ALPR operators and end users are required to maintain reasonable security procedures and practices, including operational, administrative, technical, and physical safeguards, to protect ALPR information from unauthorized access, destruction, use, modification, or disclosure.[47]

In addition to completing training, the types of safeguards noted above may include, supervisor approval for account access, individual log in credentials, two-step authentication, require access only through specific workstations, restrict access to staff who perform certain functions, or require periodic re-training. Imposing clear guidelines or limitations on a valid reason for accessing and conducting a search and how to document the reason clearly will aid in meeting the data security requirements. In addition, a strong auditing process that both ferrets out misuse and creates a framework for implementing changes in the policy will further support meeting this data security obligation.

Another point of data security is the contract with the vendor for the ALPR system. The contract should include provisions to ensure the sufficient safeguards to protect ALPR data. Contract provisions may include clearly identifying that the agency owns the data it uploads into the system, that data will not be stored outside of the United States, and that employees of the vendor will undergo training and background checks. Taking care to ensure the contract also protects the data is a part of providing sufficient data security.

- Access Logging and Auditing.

Systems must log all access to ALPR data, including the (1) date and time the information is accessed, (2) the license plate number (and other data elements), (3) the user name of the person who accesses the information and the organization with whom the person is affiliated, and (4) the purpose of the query.[48]

While access logging functions are typically automated, ensuring that automated process gathers all the required information, as well as any other details, can assist the agency in completing a more effective audit.[49]

Auditing the ALPR system is the most effective tool in ensuring overall compliance with the regulations. However, neither the statute or any cases provide information on what qualifies as a "periodic system audit." Each agency therefore must consider the expectations of their community

[47] Civ. Code § 1798.90.51, subd. (a); 1798.90.53, subd. (a)

[48] Civ. Code § 1798.90.52, subd. (a)

[49] Civ. Code § 1798.90.53, subd. (b)(2)(C)

and council and craft audit procedures that will help identify and correct misuse. For some agencies that may mean an annual or quarterly audit, and for other agencies that may be monthly, or more.

The audit procedures should provide sufficient detail to help ensure an effective audit. Such procedures should identify who will complete the audit, how often an audit is conducted, what type of report or summary will be prepared, who will review and approve the audit. The policy may also want to include some general guidelines on how to conduct the audit, including guidance on random spot checks, or reviewing who is accessing the ALPR information both internally and externally. An agency should be sure the audit includes a sufficient review of the reasons for accessing the data match applicable policy, that security procedures are both being followed and are effective, that records are properly being destroyed, and that training is being effectively conducted. A report summarizing the audit is a good tool to ensure accountability. Such a report may include details regarding any identified misuse or policy violations and corrective actions taken, as well as potential suggestions on updating the policy, and may provide guidance on future audit reviews.

- Public Comment.

Public agencies that operate an ALPR system are required to provide an opportunity for public comment *before* implementing an ALPR system.[50] It should be noted that this requirement for public comment must occur at a regularly scheduled public meeting.

- Sharing.

The ALPR statute restricts a public agency from selling, sharing, or transferring ALPR information, except to another "public agency, and only as otherwise permitted by law."[51] the Term "ALPR Information" means information or data collected through the use of an ALPR system.[52] This would include the license plate data collected. The term "public agency" is defined as agencies within the state of California.[53] Or to put it another way, a public agency under the statute *does not* include the federal government or an agency or law enforcement department from another state. Any effective audit must include a step to ensure that the data is *only* shared with a public agency as defined in the statute.

- Retention of ALPR records.

The ALPR statutes do not specify retention period for ALPR data. As such an agency should follow its retention schedule. The agency may want to consider a specific retention period that reflects the utility of retaining such data and that is specific to certain types of records (e.g., audit reports

[50] Civ. Code § 1798.90.55, subd. (a)

[51] Civ. Code § 1798.90.55, subd. (b)

[52] Civ. Code § 1798.90.5, sub. (b)

[53] Civ. Code § 1798.90.5, subd. (f): "Public agency" means the state, any city, county, or city and county, or any agency or political subdivision of the state or a city, county, or city and county, including, but not limited to, a law enforcement agency.

v. bulk data), and balance that against privacy concerns. Having a process to purge the data at the time it is no longer useful will help to protect individual privacy. An agency can review the search parameters being used to help inform itself of the useful period of the data.

- Violations and enforcement.

The ALPR statute authorizes individuals who have been harmed by a violation of the ALPR statute to bring a civil action against a person who knowingly caused the harm.[54] A court can award a combination of damages, which may include, (1) actual damages, not less than liquidated damages in the amount of two thousand five hundred dollars ($2,500), (2) punitive damages upon proof of willful or reckless disregard of the law, (3) reasonable attorney fees and litigation costs, and (4) other preliminary or equitable relief.[55]

There is one case construing this cause of action, *Bartholomew v. Parking Concepts, Inc*. (2026) 118 Cal.App.5th 438. In that case, a private parking garage operator was alleged to be automatically collecting license plate information in violation of the statute by failing to implement and make publicly available a policy governing the collection and use of this data.[56] The trial court sustained the operators demurrer without leave to amend and the owner appealed. The appellate court construed whether the lack of the publicly available policy constituted the "harm" envisioned. The court noted that the statute does not require a plaintiff to suffer measurable monetary damages in order to establish harm, as there is a provision for a set amount of liquidated damages.[57] However the court declined to extend the meaning of "harm" to equate to *any* violation of the ALPR law.[58] The court reasoned that the legislatures inclusion of two examples of harm causing violation indicated that more than just a violation is required, "as there would be no need to provide examples if *any* violation was sufficient.[59]

Nevertheless, the court considered whether the lack of the publicly available policy constituted a cause of action to sustain a demurrer. The court determined that the failure to create a publicly available policy in compliance with the statute *does* constitute "harm" within the meaning of the ALPR law. The court found that the lack of the policy deprives an individual of the "right to know" that their data is being tracked and inform them of whether they want to avoid the location.

As such, agencies using ALPR systems must establish a policy and make it publicly available to allow individuals the right to know that their information is being tracked.

Additional potential repercussions for violations of the ALPR statutes include enforcement efforts from the California Department of Justice. In October of 2025 the California Attorney General

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[54] Civ. Code 1798.90.54, subd., (a)

[55] Civ. Code § 1798.90.54, subd. (b)

[56] *Bartholomew v. Parking Concepts, Inc*. (2026) 118 Cal.App.5th 438, 442-443.

[57] *Bartholomew v. Parking Concepts, Inc*. (2026) 118 Cal.App.5th 438, 447

[58] *Ibid.*

[59] *Ibid.*

filed a lawsuit against the City of El Cajon over its refusal to comply with state law prohibiting the sharing of license plate data with federal and out-of-state law enforcement agencies.[60] The state's petition seeks a writ of mandate, injunctive and declaratory relief directing the city to cease sharing and barring the sharing of ALPR data with out-of-state agencies. The case is currently pending in Superior Court in San Diego County.

The bottom line is that there are real enforcement consequences for violations of the statute. In particular in today's climate sharing with federal and out-of-state agencies has become a hot topic due to the threat it may be used to conduct extreme immigration enforcement, or may track persons seeking to conduct abortions. If an agency allows misuse of its ALPR system, regardless of any legal liability, the department and personnel may face significant public scrutiny. This may include news coverage, or facing a city council and angry constituents who demand answers regarding any alleged misuse.

ALPRs and the Public Records Act.

Given the immense amount of images that ALPRs create, agencies should expect that information related to ALPRs will be requested through a Public Records Act request or through a subpoena in litigation. The remaining portion of this article will discuss the law related to requests for such data and related public records.

Bulk ALPR Data

While exemptions in the public records act specific to law enforcement records protect "records of investigation"[61] case law has restricted that specific exemption in relation to bulk ALPR data. In *American Civil Liberties Union Foundation v. Superior Court,*[62]the California Supreme Court considered a request on the Los Angeles Police Department and the Los Angeles Sheriff's Department, for all ALPR data collected during a one-week period. The law enforcement agencies withheld the records under the records of investigation exemption.[63] In conducting its analysis the court noted the stark differences between the types of records of investigation considered in a previous case, *Haynie v. Superior Court*,[64] where the records sought concerned an individual deputy stopping an individual driver based on a single close in time tip from a neighbor, juxtaposed again the collection of bulk data of ALPR information.[65] The court recognized that the concerns in *Haynie* included that a record of investigation reveals certain choices that should be kept confidential, including in informant's choice to come forward, or an

[60] *The People of the State of California v. City of El Cajon* (Super. Ct. San Diego County, pending, filed Oct. 3, 2025, Case No. 25CU053437C)

[61] Gov. Code 7923.600

[62] *American Civil Liberties Union Foundation v. Superior Court* (2017) 3 Cal.5th 1032

[63] *Id.* at 3 Cal.5th 1032, 1038.

[64] *Haynie v. Superior Court* (2001) 26 Cal.4th 1061

[65] *American Civil Liberties Union Foundation v. Superior Court* (2017) 3 Cal.5th 1032, 1041

investigator's choice to focus on particular individuals or use certain investigation methods.[66] Whereas ALPR scan are conducted with an expectation that the vast majority of the data collected will prove irrelevant for law enforcement purposes.[67] The court thus held that the process of ALPR scanning does not produce records of investigation because the *scans* are not conducted as part of a targeted inquiry into any particular crime or crimes.[68] Thus, ALPR scans and the bulk information are not exempt as records of investigation pursuant to Government Code section 7923.600.

However, the unaltered bulk ALPR data was determined to be exempt under the public interest balancing test, as the court upheld the trial court's determination that that the balance of interests "weighed clearly against disclosure of raw ALPR scan data."[69] The court reasoned that disclosing unaltered plate scan data to the public threatens individual privacy and could potentially reveal where a person lives, works, or frequently visit.[70]

The court, also considered the trial courts finding that even anonymized ALPR data was exempt under the public interest balancing test. The court could not agree with the court's reasoning, suggesting that the trial court was too speculative, and therefore, there did not appear to be a clear overbalance on the side of confidentiality.[71] Ultimately, the court declined to determine whether the "catchall" exemption would apply to anonymized data, suggesting greater consideration be provided to the feasibility of anonymization and the public interests implicated thereby.

As such, if an agency can demonstrate that on the facts of a particular case the public interest in nondisclosure *clearly* outweighs the public interest in disclosure, such data may nevertheless be withheld as exempt.

Another exemption may also provide additional protection of disclosure of ALPR bulk data. Section 7927.705 of the Government Code provides that the disclosure of records which are exempted or prohibited pursuant to federal or state law is not required. As noted by the DOJ guidelines, the ALPR statute prohibits an end-user or operator from selling, sharing, or transferring ALPR information, except to another public agency, and only as otherwise permitted by law, and implores agencies to consider all applicable relevant exemptions when responding to a request.[72] As such, sharing or transferring ALPR information, which is defined as information or data collected through the use of an ALPR system, in response to a public records act request is prohibited by Civil Code section 1798.90.55, subdivision (b).

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[66] *Id.*

[67] *Id.* at 3 Cal.5th 1032, 1042

[68] *Id.*

[69] *American Civil Liberties Union Foundation v. Superior Court* (2017) 3 Cal.5th 1032, 1044

[70] *Ibid.*

[71] *Id.* 3 Cal.5th 1032, 1045-46

[72] Civ. Code § 1798.90.55, subd. (b)

Audit Records.

Another common request agencies may receive are related to records of audits of the ALPR system. As a starting matter, the Public Records Act imposes no duty to create any records. The act requires that "upon a request for a copy of records that reasonably describes an identifiable record or records, [the agency] shall make the records promptly available."[73] An identifiable record must therefore already exist. It should also be noted that a "public record" is defined to include writing relating to the conduct of the public's business "prepared, owned, used, or retained by any state or local agency.[74] Therefore, a public record must already exist to be retained by an agency. And given the requirement to complete periodic audits, where such audits exist, they would appear disclosable, subject to some potential exemptions requiring redactions as discussed below.

In addition, in the author's experience, requests have been made that essentially seek an audit on demand, requesting the agency produce audit results for a specific period of time (e.g. January 1, 2025 – December 31, 2025), and demanding the agency run an audit function within the ALPR vendor's software for the requested time period. Unless the Agency has run this audit already, an agency may be able to conclude that no such record exists. However, the agency should be mindful of its duty to assist members of the public related to their request.[75]

While there may be no duty to create a record and run an audit on demand, periodic audits are required. Analysis must be conducted on whether the audit, or portions thereof, are exempt. The following are considerations that may exempt portions of audits:

- Privacy related information included within the audit records (e.g. license plate numbers). An agency would have to articulate that disclosure is unwarranted under the public interest balancing test.[76]
- Records of investigatory information may be included in audit records.[77] Agencies may need to review audit details and redact investigation details captured in a report, such as suspect names or suspect license plates. These details may be included in the "reasons" section within the system. However, an effective policy that details how to craft the reasons may assist the agency in avoiding having to make such redactions.
- To the extent ALPR information is contained in the audit results it may be able to be redacted given the prohibition on sharing or transferring ALPR information to only certain authorized persons.[78] The Agency may have to provide certain information such

[73] Gov. Code § 7922.530

[74] Gov. Code § 7920.530, subd. (b)

[75] Gov. Code § 7922.600

[76] Gov. Code § 7922.000

[77] Gov. Code § 7923.600

[78] Civ. Code 1798.90.55, subd. (b); Gov. Code § 7927.705

as the agencies making the queries, but may be able to redact other data, such as license plates and other data.

- Any other information where the public interest in non-disclosure clearly outweighs the public interest in disclosure.[79]

Having routine audits and reports that detail findings and actions taken may prove to provide an effective balance of providing summary information about the ALPR system audit negating challenges to redactions to certain data points.

Locations of ALPR cameras.

The location of ALPR cameras is another item the author sees frequently requested. Whether to disclose the locations is treated differently among jurisdictions. Some agencies simply provide the locations. While other agencies take the position that the location of the cameras are exempt under the public interest balancing test. While there is public interest in knowing the locations to ensure law enforcement surveillance systems operate effectively and promote public safety, the disclosure of such information can undermine the effectiveness of the technology, and negatively impacting the utility of this law enforcement tool. Disclosing the location may enable individuals engaging in unlawful activity to deliberately avoid detection by altering routes, timing, and behaviors, severely undermining the effectiveness of the system, and also undermining public safety. Further, ALPRs can be moved from one location to another, so providing the location may be stale in a matter of time.

ALPRs and Subpoenas

ALPR data is information that can be useful in civil litigation and is sought from time to time via civil subpoena. However, producing the records in response to a subpoena would involve sharing or transferring ALPR information, which is not allowed unless to another public agency, and only as otherwise permitted by law.[80] The DOJ guidelines implore agencies to consider all applicable privileges in such situations.[81] To the extent such "ALPR information" is requested through a subpoena an agency may want to consider whether the person requesting is authorized to receive such data, and if not, objecting with reference to the prohibition pursuant to Civil Code section 1798.90.55, subdivision (b). A litigant *may* be able to obtain a court order that could conceivably equate to sufficient authority permitting some limited release. However, In such a case, care must be taken that sufficient redactions have been made to protect privacy unrelated to the litigation. In addition, depending on an agencies retention schedule, before objecting, the agency should confirm whether the record continues to exist, as if the data has been destroyed according to policy it may make the request moot.

[79] Gov. Code § 7922.000

[80] Civ. Code § 1798.90.55, subd. (b)

[81] DOJ Guidelines, p. 3

The Future of Impact Fees and Tiered Rates

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Water Ratemaking Challenges Under Proposition 218: Tiered Water Rates and Other Puzzles

By

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I. Introduction and Summary

Water rates are a frequent target of challenges under 1996's Proposition 218 (Cal. Const., art. XIII C and XIII D). Since the 2015 decision in *Capistrano Taxpayers Assn., Inc. v. City of San Juan Capistrano* (2015) 235 Cal.App.4th 1493 striking that city's tiered water rates for insufficient record evidence to support the costs allocated to each rate tier, such challenges have proliferated. Until recently, cases upholding such rates were few and unpublished and the published authorities generally struck down rates. Recently, the City of Los Angeles successfully defended its tiered rates in *Dreher v. Los Angeles Dept. of Water & Power* (2025) 116 Cal.App.5th 977, review granted. However, the California Supreme Court's grant of review in that case, after declining review of other cases invalidated tiered rates, has maintained uncertainty in this area of the law.

This paper provides an overview of the key cases, describing the state of the law, and concludes with advice on how to set water rates while we await decision in *Dreher*, which may not be filed until 2028.

A. The Background: Propositions 218 and "Property-Related Fees"

In 1996, California voters adopted Proposition 218, "The Right to Vote on Taxes Act," adding articles XIII C and XIII D to our Constitution. Article XIII C placed in our Constitution relatively familiar rules for general and special taxes. Article XIII D imposed new restrictions on assessments on real property and a new class of property-related fees, defined as:

> any levy other than an ad valorem tax, a special tax, or an assessment, imposed by an agency upon a parcel or upon a person as an incident of property ownership, including a user fee or charge for a property related service.

(Cal. Const., art. XIII D, § 2, subd. (e).) "Property-related service" is defined, somewhat unhelpfully, as "a public service having a direct relationship to property ownership." (*Id*., subd. (h).)

In 2004, the California Supreme Court suggested in dicta in *Richmond v. Shasta Community Services Dist*. (2002) 32 Cal.4th 409 that:

> A fee for ongoing water service through an existing connection is imposed "as an incident of property ownership" [and therefore a property-related fee under Prop. 218] because it requires nothing other than normal ownership and use of property.

In 2006, the Court made this a holding in *Bighorn-Desert View Water Agency v. Verjil* (2006) 39 Cal.4th 205 and ordinary water rates were now subject to Proposition 218's procedural and substantive requirements. Of interest now is article XIII D, section 6, subdivision (b), which provides:

> (b) Requirements for Existing, New or Increased Fees and Charges. A fee or charge shall not be extended, imposed, or increased by any agency unless it meets all of the following requirements:
>
> (1) Revenues derived from the fee or charge shall not exceed the funds required to provide the property related service.

> (2) Revenues derived from the fee or charge shall not be used for any purpose other than that for which the fee or charge was imposed.
>
> (3) The amount of a fee or charge imposed upon any parcel or person as an incident of property ownership shall not exceed the proportional cost of the service attributable to the parcel.
>
> (4) No fee or charge may be imposed for a service unless that service is actually used by, or immediately available to, the owner of the property in question. Fees or charges based on potential or future use of a service are not permitted. Standby charges, whether characterized as charges or assessments, shall be classified as assessments and shall not be imposed without compliance with Section 4.
>
> (5) No fee or charge may be imposed for general governmental services including, but not limited to, police, fire, ambulance or library services, where the service is available to the public at large in substantially the same manner as it is to property owners.
>
> Reliance by an agency on any parcel map, including, but not limited to, an assessor's parcel map, may be considered a significant factor in determining whether a fee or charge is imposed as an incident of property ownership for purposes of this article. In any legal action contesting the validity of a fee or charge, the burden shall be on the agency to demonstrate compliance with this article.

(Cal. Const., art. XIII D, § 6, subd. (b).)

Compliance with the first, total-cost limitation has not been problematic as few agencies make rates without demonstrating they are needed to cover service costs. The second and fifth requirements, that fees funded only water service, have led to a number of cases involving transfers of utility rate proceeds to other agency funds (including agency general funds), but those are not our present topic. The fourth requirement, limiting standby fees, has made those fees historical relics which can be maintained, but not adopted anew or increased; it has generated few cases. The third requirement — that

rates be apportioned among customers in proportion to the cost of service — has been the subject of most of the litigation and is our topic today.

II. *Capistrano* and Tiered Water Rates

The first published case to address tiered water rates was *City of Palmdale v. Palmdale Water Dist.* (2011) 198 Cal.App.4th 926, which held that the district's tiered rates for irrigation water violated Proposition 218 because the District had not allocated costs between domestic and irrigation customers appropriately. The District transferred substantial costs away from domestic ratepayers (i.e., voters) to irrigators (i.e., non-voter institutions like the city) at the ratemaking hearing despite contrary advice of its staff and ratemaking consultant. The court had little difficulty concluding the District had not borne its burden to prove its rates were proportional to the cost of service and concluded that rate tiers must be cost-justified, too, not just rates in total.

Next came *Capistrano* in 2015. *Palmdale* had ruled tiered water rates comply with Proposition 218 if supported by a record demonstrating the tiered prices reflect service costs. *Capistrano* states the same rule but makes clear that judicial review of cost justifications can be very demanding.

The *Capistrano* plaintiffs originally had four concerns: they thought the City's groundwater recovery plant was wastefully inefficient; its failure to issue a bond to cover capital costs that had been predicted by its cost of service study meant rates were too high; the proceeds of potable water rates should not be used to develop recycled water service; and the City had not sufficiently cost-justified its price tiers. The plaintiffs abandoned their attack on groundwater recovery in the trial court and did not appeal the trial court's ruling against them on what they called the "phantom bond."

The Court of Appeal found use of potable water rates to fund new recycled water services is permissible because the new service displaced demand for potable water and thus made more water available for all customers. (*Capistrano, supra*, 235 Cal.App.4th at pp. 1503–1504.) As a result, properly allocated recycled water costs can be recovered from domestic water rates if recycled water service offsets demand for potable water use, effectively increasing potable water supply. Curiously, though, the Court also remanded for proof in the trial court that no recycled water costs were covered by the Tier 1 water rate on most efficient uses of water. Logically, if recycled water benefits all, all can be

asked to pay for it — even Tier 1 users. The then-conservative City Council accepted the loss and settled the case for full refunds, obviating the need for the remand trial.

The Court also found the city had not attempted to cost-justify its upper tiers, a concession compelled by the absence of record support for the ratemaking consultant's approach to tiers, which relied (in form) on the different cost of the District's water sources without confronting the fact that nearly all its water supplies in every tier came from a single source — the Metropolitan Water District of Southern California.

Capistrano contradicted *Griffith v. Pajaro Valley Water Management Agency* (2013) 220 Cal.App.4th 586 and the *Morgan v. Imperial Irrigation Dist.* (2014) 223 Cal.App.4th 892 which had reviewed water rates far more leniently. *Moore v. City of Lemon Grove* (2015) 237 Cal.App.4th 363 similarly applied deferential review of that city's sewer rates and the allocation of costs between its sewer and other services.

So, *Capistrano* and these competing cases provided trial courts with alternative approaches to Proposition 218 challenges — one that afforded some flexibility to ratemakers and one that allowed very exacting judicial review of ratemaking judgments. The division in the cases continues to date.

III. *Patz & Coziahr* — Recent Cases Invalidating Tiered Rates

A class action challenged tiered water rates imposed by the Otay Water District (which serves an area along the Mexican border south and east of San Diego) and the City of San Diego in a single case. The case was severed and produced two adverse rulings for water ratemakers.

Coziahr v. Otay Water Dist. (2024) 103 Cal.App.5th 785 affirmed a trial court ruling invalidating the District's tiered rates. The Court applied deferential, substantial-evidence review and found the trial court properly accepted an after-the-fact expert's report to invalidate the rates.

The District raised on appeal many open issues in Proposition 218 cases. This Court addressed all of them — ruling against government on nearly all. The Court's many unwelcome conclusions include: refunds are available in Proposition 218 cases (since addressed by Government Code, section 53758.5), water rates require firm justification in

historical cost data, not reasonable projections and estimates (to be addressed by the pending AB 2180 (Ward, D-San Diego)), policy goals like ensuring water affordability and encouraging conservation cannot justify rates, Otay's record showed that tiering rates for residential but not commercial and irrigation customers was discriminatory, refunds could not be based on estimates and projections because historic data could be made available, evidence can be submitted to a court that was not submitted in agency hearings (since addressed by Gov. Code, § 53759.2), ratemaking decisions are not "quasi-judicial" such that some judicial deference is appropriate, the issues are not primarily legal so as to allow more searching appellate review, reasonableness of ratemaking judgments is not sufficient to comply with Proposition 218 — firm rooting in "relevant, verifiable data" is needed (disagreeing with the earlier cases noted above), refunds can be established using expert evidence, and a remedy based on average cost (i.e., after-the-fact uniform rates) could not be justified without obtaining customer payment data and historical cost information. Whew! The Court remanded for retrial of damages.

The Supreme Court denied review and depublication and the case was remanded to retry the refund amount, but the parties settled, obviating need for that trial.

Much the same was *Patz v. City of San Diego* (2025) 113 Cal.App.5th 225. There, another panel of the Fourth District affirmed the ruling against the City, but vacated the remedy and remanded for application of Government Code, section 53758.5's rule that any monetary relief to burdened upper-tier water users should come via an offset in a future ratemaking. A lengthy and articulate dissent by Justice Frank Menetrez argued that *Coziahr* and *Patz* had micromanaged legislative ratemaking and invalidated rates without providing any guidance to ratemakers. He noted that the trial court had adopted without substantive change an overreaching statement of decision drafted by plaintiffs' counsel. His dissent noted the tension between the approach of *Patz* and *Coziahr* with the more flexible approach of earlier cases and *Great Oaks Water Co*. v. *Santa Clara Valley Water Dist*. (2025) 110 Cal.App.5th 260 (applying Prop. 26 to groundwater augmentation charges). His dissent is a joy to read for a ratemaker's lawyer. He began with these words:

> This is an appeal from a $79 million judgment that is based on nothing. Plaintiffs' briefing in the trial court and on appeal relentlessly misrepresents the record and the law, and the trial court's statement of decision — drafted by plaintiffs' counsel and adopted virtually without alteration by the court — does as well."

(*Patz*, *supra*, 113 Cal.App.5th at p. 311 [Menetrez, J., dissenting].) His conclusion begins:

> Defendant used the only known methodology for constructing a tiered cost calculation and allocation and setting tiered rates, and it applied that methodology to all of the appropriate data and the only data that defendant had, which is the only data that anyone has (with the possible exception of any utilities that use smart meters). Holding defendant liable for that is like holding an accountant liable for using generally accepted accounting principles.

(*Id*. at p. 346.) Rehearing and review were denied and the Court of Appeal remanded for application of Government Code, section 53758.5's alternative to refunds. The parties are in settlement discussions as this paper is written, so that remand trial may not occur.

IV. *Dreher*: A Win for Local Ratemakers.

Dreher, *supra*, 116 Cal.App.5th at p. 997 was a rare and welcome win for tiered water rates and, despite the grant of review, remains persuasive, but not binding authority. The trial judge (a former Santa Monica Deputy City Attorney) had addressed two central issues: Whether Health and Safety Code, section 5472's payment-under-protest requirement applies to municipal water rates, and whether Los Angeles's four-tiered residential water rates comply with Proposition 218's proportionality requirements. The Second District ruled for the City on both points.

A. The City's Tiered Water Rates Comply with Proposition 218.

Los Angeles has four primary sources of water supply and in 2016 developed a rate study to support four rate tiers, with Tier 1 allotted 800 cubic feet of water per month for basic, indoor water needs, and increasing allotments for Tiers 2, 3 and 4. The rates allocate local groundwater, the cheapest source, to Tier 1's forecast demand until the supply is exhausted, and then allocate the next-lowest-cost water until Tier 1's remaining demand is satisfied, before allocating that source to Tier 2's forecast demand, supplementing that tier's forecast demand with the third-cheapest source, and so on until each tier's forecast demand is satisfied. In short, Los Angeles did what San Juan Capistrano had claimed to do, but did not. The *Dreher* plaintiffs argued this rate structure could not meet Proposition

218's proportionality requirement without tracking which parcels used which sources of supply.

The Court of Appeal disagreed: "The Constitution does not require the City to trace the flow of water from each source of supply to each parcel, molecule by molecule." (116 Cal.App.5th at p. 1028.) Citing *Capistrano*, the Court found Proposition 218 does not require an exact measure of the cost to serve each parcel. Departing from *Patz*, *Dreher* concluded: "We read nothing in [art. XIII D,] section 6(b)(3) that would require a water agency to trace drops of water from source of supply to parcel … ." (*Id*. at p. 1029.) It departed from *Patz* further, finding that using water budgets to establish tier breakpoints [i.e., the volume sold in each tier] is not, in and of itself, unconstitutional provided the agency calculates the proportional costs of service within each tier. The Court also held the City could consider conservation goals and parcel characteristics in setting water budgets, so long as rates remain proportional to service cost.

Finally, *Dreher* found the City's allocation of peak pumping and storage costs across tiers complied with Proposition 218. Los Angeles allocated to all four tiers base pumping and storage costs that did not vary with demand. It allocated to Tiers 3 and 4 the incremental costs of pumping and storage linked to peak demand. Again citing *Capistrano*, the Court noted that Proposition 218 protects lower water users from paying rates higher than the cost to serve them because those rates cover capital costs their consumption does not make necessary. That rationale supports the trial court's ruling, which the Court of Appeal affirmed.

In short, the Court found the City had met its burden to justify its rates under Proposition 218 by calculating the unit cost of each water source, forecasting demand within each tier, and allocating costs proportionally as customers use more water. The record supported the City's methodology, including its allocation of portions of peak pumping and storage costs to higher tiers.

B. Health & Safety Code, Section 5472 Applies to Water Rate Refund Claims.

At trial, the *Dreher* plaintiffs also challenged the City's low-income subsidy adjustment (LISA), which covered the City's cost to provide rate assistance to low-income customers. The trial court found the LISA violated Proposition 218, but ruled that Health & Safety

Code, section 5472's payment-under-protest requirement barred plaintiffs from recovering refunds of the LISA individually or for all customers. The plaintiffs argued on appeal that section 5472 applies to sanitation and sewer charges but not to water charges.

The Court of Appeal applied section 5472's plain language to reject the claim. Section 5472 applies by its terms to water service, the challenged water charges were approved by the required two-thirds vote of the City Council, and the City is a "covered entity" under the statute. Analyzing its legislative history, the Court found nothing showing a purpose contrary to that indicated in the statute's language.

The Court also rejected arguments that section 5472 provides a constitutionally inadequate remedy and that Government Claims Act compliance should make payment under protest under the Health and Safety Code unnecessary. The Court found no support for either claim, concluding section 5472 provides an adequate remedy but Plaintiffs failed to satisfy its requirements by stating their legal objections when paying the fees.

Dreher helpfully clarifies that municipal ratepayers seeking refunds must comply with section 5472's payment-under-protest requirement, and that cities may use tiered rates that allocate costs, including peak pumping and storage costs, based on use and parcel characteristics, provided they are supported by data demonstrating proportionality. The ruling affirms the City's compliance with Proposition 218 and provides meaningful guidance for other agencies designing tiered rates.

The Supreme Court granted review but provided that *Dreher* may continue to be cited as persuasive (but not binding) authority pending Supreme Court review, which typically takes from 12 to 24 months. A decision can be expected in the first half of 2028. "The issue to be briefed and argued is limited to the following: Do the methods adopted by the City of Los Angeles to set water budgets and allocate water supply costs result in tiered water rates that violate the proportionality requirement of article XIII D, section 6, subdivision (b)(3) of the California Constitution?" (Mar. 1, 2026 order granting review.)

Thus, the Court of Appeal's affirmance of the trial court's application of Health and Safety Code, section 5472 remains good law and is not at risk of being overturned.

V. Pending Cases.

The litigation boom set off by *Capistrano* was not limited to *Coziahr*, *Patz*, and *Dreher*. Other cases remain pending in lower courts, including:

A. *Toy v. City and County of San Francisco*, First DCA Case No. A173560

This is an appeal from the City's trial court win in a case challenging inclusion in domestic water rates of the cost to provide water in the volumes and at the pressures needed for firefighting. These "fire flows" are a legal requirement of water service and, in the trial court's view, a proper cost of water service. The case was fully briefed as of February 9, 2026 and can be expected to be argued and decided later this year. The case is a remnant of an earlier cast which sought to bring some 80 water agencies' rates into a single court, on behalf of some 80 customer classes. The case was defeated in the trial court in grounds on inappropriate venue and misjoinder, so the plaintiff persisted against San Francisco alone.

B. *Hiller v. Marin Municipal Water District*, First DCA Case No. A171271

This is an appeal from that agency's successful defense of its tiered water rates following settlement of an earlier challenge. It is to be argued May 1, 2026.

VI. Making Rates While We Await Guidance in *Dreher*

The law governing ratemaking under Proposition 218 is uncertain and all agencies which impose water, sewer, trash, stormwater, and other property-related fees face substantial uncertainty. What advice can I offer while we await guidance from the Supreme Court in *Dreher*? A bit:

First, avoid controversy. Plaintiffs' counsel find clients on the internet.

Second, do not make rates more often than necessary so you can maximize the protection of short statutes of limitation, such as Government Code, section 53759 which, for rates adopted after January 1, 2022, provides:

> Any judicial action or proceeding to attack, review, set aside, void, validate, or annul an ordinance, resolution, or motion adopting a fee or charge for water or sewer service, or modifying or amending an existing fee or charge for water or sewer service, shall be commenced within 120 days of the effective date or of the date of the final passage, adoption, or approval of the ordinance, resolution, or motion, whichever is later.

Subdivision (c) requires notice of this short statute in the notice of a ratemaking hearing under Article XIII D, section 6 for water and sewer fees. But it does not state that failure to give that notice denies an agency the protection of the short statute.

Third, take the steps needed to invoke the duty to exhaust administrative remedies and to litigate on the ratemaking record under Government Code, sections 53759.1 and 53759.2. These can be used by complying with their requirements for a prominent statement in the notice of a ratemaking hearing that the exhaustion requirement will apply and that protest requirements be prominently stated there, too. They also require written responses to substantive objections to proposed rates before the agency adopts new rates. (Gov. Code, § 53758.1, subd. (c)(5).) I recommend that agencies adopt a local ordinance or resolution invoking these statutes to (i) clarify their requirements and broaden their application to other fees, (ii) give your client and the public notice of these rules and (iii) put them where they are likely to be implemented , and where your client will notice them, like in the Municipal Code.

Fourth, prepare an adequate record to justify the rates. This typically means a cost-of-service analysis prepared by outside consultants, although some agencies have ratemaking staff who are up to the task. An attorney must review the study to ensure it can withstand litigation. If you had a good study done recently, an update to budgeted costs can be justified with less work. The record should be accessible to judges, lawyers, and members of the public with antipathy to math — include a slide show in plain English and graphical information to present the math — like bar and pie charts. If you rely on peaking factors, it may be especially important to depict technical concepts graphically.

Fifth, consider whether to adopt uniform or relatively simple rates. Advise your client of risks arising from more complex rates, including tiered rates. Someone may have to

persuade a judge exercising independent judgment review of the fairness and rationality of your approach.

Sixth, argue recent statutes stating support for tiered water rates like Government Code, section 53750.6 and Water Code section 366, subdivision (b)(1).

Seventh, assert defenses to liability such as the duty to pay under protest under Health and Safety Code, section 5472, the duty to claim under the Government Claims Act, and the duty to pay first and litigate later under California Constitution, article XIII, section 32 and related caselaw. *Plata v. City of San Jose* (2022) 74 Cal.App.5th 736 ruled it was an abuse of discretion for a trial court to allow a plaintiff class to raise a challenge to rates which was not covered by the pre-suit claim under the Government Claims Act. *Mojave Pistachios, LLC v. Superior Court* (2024) 99 Cal.App.5th 605 is a recent case enforcing the duty to pay first and litigate later. Like *Dreher*, *Padilla v. City of San Jose* (2022) 78 Cal.App.5th enforced Health and Safety Code, section 5472; it was a Proposition 218 challenge to refuse rates.

Eighth and lastly, assert Government Code, section 53758.8's ban on refunds, but note that the plaintiffs' bar is challenging that statute as improperly retroactive and a violation of due process. *Patz* rejects both claims, but litigation continues, and the Supreme Court has, so far, refused to grant review of these issues.

VII. Conclusion

Proposition 218 requires independent judgement review of water rates. (*Coziahr, supra*, 103 Cal.App.5th at p. 798.) But as the Supreme Court notes: " '[t]he economic judgments required in rate proceedings are often hopelessly complex and do not admit of a single correct result.' " (*20th Century Ins. Co. v. Garamendi* (1994) 8 Cal.4th 216, 293.) And many lawyers and judges avoid mathematic analysis. (E.g., D. Faigman, "Overcoming Judicial Innumeracy," Science and Technology Law Review, May 23, 2025 available at < https://journals.library.columbia.edu/index.php/stlr/article/view/13889 > (as of Apr. 19, 2026). The result is unpredictability in ratemaking litigation. Outcomes seem to depend on judicial assignment. Therefore, significant risk will remain until the Supreme Court, or an elusive consensus of appellate justices, establishes standards that trial courts can predictably apply.

In the meantime, water service is essential, and therefore ratemaking is, too. Clients may be unwilling to accept the policy consequences of uniform or other relatively simple rates. (E.g., D. Garrick, San Diego Union Tribune, "Conserve water? Your bill is about to go up — while your water-guzzling neighbor's goes down. Here's why," March 13, 2026 available at < https://www.sandiegouniontribune.com/2026/03/13/conserve-water-your-bill-is-about-to-go-up-while-your-water-guzzling-neighbors-goes-down-heres-why/ > (as of Apr. 19, 2026). Therefore, their counsel must prepare for suit as best they can. My current best thinking about how to do so is summarized above.

Developments will continue. Stay tuned; we will keep you posted!

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What *Sheetz v. County Of El Dorado* Means For Development Fees And Other Regulatory Programs

By

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I. Introduction And Summary.

In *Sheetz v. County Of El Dorado* (2024) 601 U.S. 267 ("*Sheetz*"), the United States Supreme Court held that the Takings Clause in the Fifth Amendment to the U.S. Constitution "prohibits legislatures and agencies alike from imposing unconstitutional conditions on land-use permits." (*Id*. at p. 279.) Thus, such conditions are not exempt from hightened scrutiny under *Nollan v. California Coastal Comm'n* (1987) 483 U.S. 825 ("*Nollan*"), and *Dolan v. City of Tigard* (1994) 512 U.S. 374 ("*Dolan*"), just because a legislature imposed them. (*Id*. at pp. 276-280.) However, the Court did not resolve a number of other issues regarding the application of "essential nexus" in *Nollan* and "rough proportionality" test in *Dolan* (collectively, the "*Nollan/Dolan*" test) to development impact fees.

In its Opinion on remand, the California Court of Appeal initially found for petitioner George Sheetz on the "predicate" or "antecedent" question of whether the *Nollan/Dolan* test governs impact fees that are imposed on classes of development based on general fee schedules. The Court of Appeal then held that the County of El Dorado's Traffic Impact Mitigation ("TIM") fee satisfied the *Nollan/Dolan* test. The California Supreme Court denied review, but ordered the Opinion by the Court of Appeal not to be published. Sheetz filed a new Petition For Writ Of Certiorari on February 9, 2026, which is still being briefed as of this City Attorneys Department Annual Conference.

Since the Opinion is no longer published, litigants in the California courts may still raise the "predicate" question of whether *Nollan/Dolan* governs generally-applied development impact fees. It is anticipated that the application of the "essential nexus" test regulatory fees and programs will be increasingly contested. Also, there is still uncertainty as to how to apply the "rough proportionality" test in *Dolan* to general fee schedules that are legislatively imposed on classes of development. And litigants may continue to dispute whether compliance with the California Mitigation Fee Act's "reasonable relationship" test (Govt. Code § 66001, subd. (a)) will satisfy the "rough proportionality" test in *Dolan*. This paper recommends strategies as to how local agencies should formulate and impose impact fees that satisfy the *Nollan/Dolan* test.

II. Background And Procedural History Of *Sheetz v. County Of El Dorado*.

A. The County of El Dorado adopted a transportation impact fee on new development, which George Sheetz paid and then challenged.

In recent decades, the County of El Dorado has experienced significant population growth, and with it an increase in new development. To account for the new demand on public services, the County's Board of Supervisors adopted a General Plan, which is a legislative act. To address traffic congestion, the General Plan requires developers to pay a traffic impact fee as a condition of receiving a building permit. The County uses proceeds from these fees to fund improvements to its road system. The fee amount is determined by a rate schedule, which takes into account the type of development (commercial, residential, and so on) and its location within the County. The amount is not based on the cost specifically attributable to the particular project on which the fee is imposed.

George Sheetz owns property in the center of the County near Highway 50, which the General Plan classifies as "Low Density Residential." Sheetz and his wife applied for a permit to build a modest prefabricated house on the parcel, with plans to raise their grandson there. As a condition of receiving the permit, the County required Sheetz to pay a traffic impact fee of $23,420, as dictated by the General Plan's rate schedule. Sheetz paid the fee under protest and obtained the permit.

B. Sheetz presented writ of mandamus claims under the Fifth Amendment to the U.S. Constitution and the Mitigation Fee Act in the California state courts.

Sheetz brought a petition for writ of mandamus in the Superior Court of El Dorado County. He claimed that conditioning the building permit on the payment of a traffic impact fee constituted an unlawful "exaction" of money in violation of the Takings Clause of the Fifth Amendment to the United States Constitution. In Sheetz's view, the U.S. Supreme Court decisions in *Nollan* and *Dolan* required the County to make an individualized determination that the fee amount was necessary to offset traffic congestion attributable to his specific development. The County's predetermined fee schedule, Sheetz argued, failed to meet that requirement. Sheetz also brought a claim under California's Mitigation Fee Act (Gov. Code §66000 et seq.) ("MFA"), arguing that the TIM fee failed to satisfy both of the "reasonable relationship" tests in subdivisions (a) and (b) of section 66001 of the Government Code.

The Superior Court rejected Sheetz's claims under Fifth Amendment and under the MFA, and the California Court of Appeal, Third Appellate District, affirmed. On the Fifth Amendment claim, the Court of Appeal relied on precedent from the California Supreme Court and asserted that the *Nollan/Dolan* test applies only to permit conditions imposed " 'on an individual and discretionary basis.' " (*Sheetz v. County of El Dorado* (2022) 84 Cal.App.5th 394, 406 (quoting *San Remo Hotel L. P. v. City and Cty. of San Francisco* (2002) 27 Cal.4th 643, 666-670).) Fees imposed on "a broad class of property owners through legislative action," it said, need not satisfy the *Nollan/Dolan* test. (*Id*. at p. 407.) Sheetz's petition for rehearing was denied and the California Supreme Court denied review.

C. The United States Supreme Court granted certiorari and reversed as to the application of *Nollan/Dolan* to legislative exactions.

Because state courts reached different conclusions on the question whether the Takings Clause recognizes a distinction between legislative and administrative conditions on land-use permits, the United States Supreme Court granted Sheetz's petition for writ of certiorari in order to resolve the split. (*Sheetz v. County of El Dorado, California* (2024) 601 U.S. 267, 273 & fn. 3 ("*Sheetz*") [collecting cases].) The Supreme Court reversed the Court of Appeal opinion, holding that the *Nollan/Dolan* test applies to legislative and administrative conditions on building permits. In other words, the Court determined that permit conditions are not exempt from scrutiny under *Nollan* and *Dolan* just because a legislature imposed them. (*Id.* at pp. 276-280.) The Supreme Court vacated the federal takings portion of the prior Court of Appeal opinion and remanded the matter for further proceedings not inconsistent with its opinion. (*Id.* at p. 280.)

In its decision, the Supreme Court in *Sheetz* explicitly did not resolve several key issues that were extensively argued by the parties and numerous amicus curiae. First, the Court did not address the "important threshold question to any application of *Nollan/Dolan* scrutiny: whether the permit condition would be a compensable taking if imposed outside the permitting context." (*Sheetz, supra.* 601 U.S. at pp. 280-281 (conc. opn. of Sotomayor, J.).) As explained by Justice Sotomayor:

> "A predicate for any unconstitutional conditions claim is that the government could not have constitutionally ordered the person asserting the claim to do what it attempted to pressure that person into doing." [Citation.] In the takings context, *Nollan/Dolan* scrutiny therefore applies only when the condition at issue would have been a compensable taking if imposed outside the permitting process. [*Id*. at p. 281 (conc. opn. of Sotomayor, J.).]

Second, the Supreme Court 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.' " (*Sheetz, supra,* at p. 284 (conc. opn. of Kavanaugh, J.).) As noted by Justice Kavanaugh:

> [T]oday's decision does not address or prohibit the common government practice of imposing permit conditions, such as impact fees, on new developments through reasonable formulas or schedules that assess the impact of classes of development rather than the impact of specific parcels of property. Moreover, as is apparent from the fact that today's decision expressly leaves the question open, no prior decision of this Court has addressed or prohibited that longstanding government practice. Both Nollan and Dolan considered permit conditions tailored to specific parcels of property. [Citations.] Those decisions had no occasion to address permit conditions, such as impact fees, that are imposed on permit applicants based on reasonable formulas or schedules that assess the impact of classes of development. [*Ibid*.]

Third, the Supreme Court did not decide whether compliance with the "reasonable relationship" test in the MFA (Govt. Code §66001, subd. (a)) satisfied the *Nollan/Dolan* test. Fourth the Court did not answer the ultimate issue of whether the County's TIM fee survived the heightened scrutiny of the *Nollan/Dolan* test.

D. The California Court Of Appeal's Opinion (no longer published) held that the County's TIM fee satisfied the *Nollan/Dolan* test.

After the Supreme Court issued the remittitur and remanded the case back to the Court of Appeal, the parties submitted supplemental briefing on the remaining issues in the case, and the court granted various private and public entities permission to file amicus briefing. Briefing was completed in November 2024, and the Court of Appeal issued its Opinion on the remaining issues on July 29, 2025 ("Opinion"). (*See Sheetz v. County of El Dorado* (No. C093682, July 29, 2025) *previously published at* 113 Cal.App.5th 113, 335 Cal.Rptr.3d 316, 2025 Daily Journal D.A.R. 7085, *ordered not to be published*, 2025 Cal.LEXIS 7549 (Nov. 12, 2025).)[1] The Court of Appeal affirmatively held for Sheetz on the predicate question – that is, the heightened scrutiny of the *Nollan/Dolan* test did apply to the TIM fee. (Opinion, at 17-19.) Applying the *Nollan/Dolan* test, the Court of Appeal then concluded that "the TIM fee does not constitute an unlawful taking without just compensation in violation of the Fifth Amendment. Under the circumstances presented, the impact fee withstands the heightened scrutiny of the *Nollan/Dolan* test." (Opinion, at 20-21 (335 Cal.Rptr.3d at p. 333.) The Court of Appeal denied rehearing on August 18, 2025.

The California Supreme Court denied review and, pursuant to California Rules of Court, rule 8.1125(c)(2), ordered the Opinion by the Court of Appeal not to be published.

E. Sheetz files a new (and still pending) Petition for Writ of Certiorari.

On February 9, 2026, Sheetz filed a Petition for a Writ of Certiorari with the United States Supreme Court that challenged only the "rough proportionality" holding by the Court of Appeal in the Opinion. Briefing on that Petition is ongoing as of this City Attorneys Department Annual Conference.

III. What *Sheetz* Means For Development Fees And Other Regulatory Programs.

A. The takings analysis under *Nollan/Dolan* no longer distinguishes between fees imposed by the legislative body and those imposed *ad hoc* by administrative agencies.

In *Sheetz,* the United States Supreme Court unanimously held that permit conditions are not exempt from scrutiny under *Nollan* and *Dolan* just because a legislature imposed them. (601 U.S. at pp. 276-280.) In so concluding, the Court found that the Takings Clause applies equally to legislators

[1] In the Opinion, the Court of Appeal provided an extensive primer on federal takings law, including the *Nollan/Dolan* decisions. (Opinion, at 9-14 (335 Cal.Rptr.3d at pp. 326-329).)

and administrators, which means that it "prohibits legislatures and agencies alike from imposing unconstitutional conditions on land-use permits." (*Id*. at p. 279.)

B. The Opinion By the Court Of Appeal (on remand from the U.S. Supreme Court) may not be cited or relied on.

Because the California Supreme Court ordered the Opinion by the Court of Appeal not to be published, the Opinion "must not be cited or relied on by a court or a party in any other action." (Cal. Rules of Court, rule 8.1115(a).)[2] Indeed, attorneys could be sanctioned for citing the Opinion in court pleadings. (*See e.g., Alicia T. v. County of Los Angeles* (1990) 222 Cal.App.3d 869, 884-886.) Even though no reason was provided by the California Supreme Court for that order, it constituted an exercise of the Court's role in deciding "the evolution and scope of this state's decisional law," and it means that the Opinion is not "entitled to the precedential value of the stare decisis doctrine." (*Schmier v. Supreme Court* (2000) 78 Cal.App.4th 703, 709-710.)

Nevertheless, both the Opinion, as well as the arguments in the pending Petition for Writ of Certiorari filed by Sheetz in the United States Supreme Court challenging that Opinion, discussed below, are instructive for City staffs, officials and counsel regarding the adoption of development impact fees and other regulatory programs going forward.

C. The antecedent / predicate question – i.e., whether *Nollan/Dolan* applies to development impact fees – is unsettled and may still be argued.

In the Opinion, the Court of Appeal directly addressed "the threshold or antecedent question Justice Sotomayor identified in her concurring opinion in this case." (Opinion, at 15 (335 Cal.Rptr.3d at 330).) The Court of Appeal explained:

> In the land-use regulation context, the requirements of *Nollan* and *Dolan* apply only when the permit condition at issue (e.g., easement, impact fee) would have been a compensable taking if imposed by the government outside the permitting process. (*See Sheetz, supra,* 601 U.S. at pp. 280-281 (conc. opn. of Sotomayor, J.), *citing Koontz, supra,* 570 U.S. at p. 612; *see also California Building* [*Industry Assn. v. City of San Jose* (2015)] 61 Cal.4th [435,] 459-460.) As recognized by the Supreme Court in *Koontz*: "A predicate for any unconstitutional conditions claim is that the

[2] Those rules also restrict the ability of courts in other states to rely on the depublished Opinion by the Court of Appeal. For example, a recent majority opinion of the Court of Appeals for New York in *Coalition for Fairness in SoHo and NoHo, Inc. v. City of New York* (N.Y., No. 112, Jan. 13, 2026) ___ N.E.3d ___, 2026 WL 88133, following the example of other New York cases, rejected the dissent's reliance on the analysis of the predicate question in the Opinion because "[t]he California Rules of Court expressly prohibit courts or parties, in other actions, from relying on or citing to an unpublished opinion," and because the authority cited by the dissent "does not provide support for this Court to disregard California's rules." (Id. at ___ & fn. 5, 2026 WL 88133 at *7 & fn. 5.) Other courts have held the same. (*See e.g., Liberty Surplus Ins. Corp. v. Ledesma and Meyer Const. Co., Inc*., 834 F.3d 998, 1002 (9th Cir. 2016)[recognizing that a California decision that was ordered not to be published is not "controlling" and does not provide "clear guidance" on the issue considered]; *Moseley v. Metropolitan Life Inc. Co.* (N.D. Cal. 1989) No. C-88-0905 RFP, 1989 WL 211203 at *3 & fn. 6 [defendant citing California case that was ordered not to be published could be "an attempt by defendant to mislead the court."])

> government could not have constitutionally ordered the person asserting the claim to do what it attempted to pressure that person into doing." (*Koontz*, at p. 612.) [Opinion, at 15 (335 Cal.Rptr.3d at p. 330).]

In its briefing on the predicate question, the County argued that *Nollan/Dolan* should not apply to the TIM fee because the TIM fee is similar to, and functionally equivalent to, taxes and assessments, which the Supreme Court has held "are not takings." (*Koontz, supra,* 570 U.S. at 615.) That argument tracked the position of Justice Mosk that "[m]any development fees bear a close resemblance to the excise taxes, assessment fees and user fees discussed above. They are perhaps best characterized as a special assessment placed on developing property, calculated according to preestablished legislative formulae based on square footage or per unit of development." (*Ehrlich v. City of Culver City* (1996) 12 Cal.4th 854*,* 896 (conc. opn. of Mosk, J.) ("*Ehrlich*").) The County also pointed to the comments by the Chief Justice during Oral Argument in *Sheetz* that the County is "not taking any particular property interest," and that

> It's just use to which the land is --is being put. You can argue it's the value of the land, but, you know --and even in the other cases where we're talking about money, it's usually money in a particular pot, whether it's, you know, in the legal fees case or those sorts of situations. I don't think there's another case under *Nollan* and *Dolan* and *Koontz* where what's involved is simply value as opposed to a concrete, identifiable property interest. [Transcript of Oral Argument, *Sheetz v. County of El Dorado* (U.S. Supreme Ct., No. 22-1074, Jan. 9, 2024) 2024 WL 250550, https://www.supremecourt.gov/oral_arguments/argument_transcripts/2023/22-1074_n758.pdf. ("Tr. Oral Arg.") at 6:25-7:12.]

Justice Jackson similarly stated: "We have very clear, very well-established legal principles as to what qualifies as a taking. And whatever this is, I think we can say that since it isn't the kind of dedicated property appropriation that occurs in *Nollan*, *Dolan*, and *Koontz*, that it's not a taking, so this particular formula doesn't apply." (*Id.* at 70:13-20.)

The Court of Appeal ruled against the County on that issue and held that "that *Koontz* 'controls' the 'predicate taking question.'" (Opinion, at 17 (335 Cal.Rptr.3d at p. 331).) The Court of Appeal concluded that "the TIM fee is a monetary exaction that must satisfy the 'essential nexus' and 'rough proportionality' requirements of *Nollan* and *Dolan* to withstand a constitutional challenge under the takings clause." (Opinion, at 18 (335 Cal.Rptr.3d at p. 331).) The court explained: "[U]under *Koontz*, the challenged fee (monetary exaction) implicates the 'unconstitutional-conditions' test the Supreme Court established in *Nollan* and *Dolan*, which governs the validity of land-use conditions (e.g., impact fees) the government imposes for the approval of a building permit." (Opinion, at 19 (335 Cal.Rptr.3d at p. 332).)

However, by ordering the Opinion not to be published, the California Supreme Court removed the only precedential case in California that expressly addressed that predicate question, which had been left unresolved by the United States Supreme Court in *Sheetz*. For example, the majority on the Court of Appeals of New York explicitly refused to follow the Opinion regarding the predicate question because the Opinion was ordered not to be published (see footnote 1, *supra*).

Thus, going forward, the predicate question is still unresolved. The Court of Appeal held that, "while *Koontz* involved an 'in lieu of' fee –i.,e., an impact fee instead of a dedication of real property—the majority's holding was clearly not limited to those precise fees or monetary exactions." (Opinion, at 18 (335 Cal.Rptr.3d at p. 331).) Several courts in other states have concluded, like the Court of Appeal in the Opinion, that *Koontz* was not limited to "in lieu of" fees. (*See e.g., Anderson Creek Partners, LP v. County of Harnett* (2022) 876 S.E.2d 476, 495-497; *Charter Township of Canton v. 44650, Inc.* (2023) 12 N.W.3d 56, 75.) However, litigants in California may currently still attempt to persuade the courts in California to take an approach on the predicate question that is contrary to the Opinion and the decisions in those other state courts. For example, citation may be made to the very recent decision by the Court of Appeals for New York in *Coalition For Fairness, supra,* ___ N.E.2d at ___, 2026 WL 88133, which held that the unconstitutional conditions doctrine under *Nollan/Dolan* did not apply to a one-time arts fund fee charged to occupants of certain buildings designated as "Joint Living-Work Quarters for Artists" who sought to convert their units to unrestricted residential use. There, the court "[did] not read *Koontz* to imply that the simple condition of paying money in relation to a land-use permit requires application of *Nollan/Dolan* scrutiny." (*Id*., ___ N.E.2d at ___, 2026 WL 88133 at *7.) The New York court concluded that "the [United States] Supreme Court's holding in *Koontz* applies only to monetary conditions which are offered as an alternative to, or "in lieu of," a condition that would be a per se taking if imposed directly." (*Ibid*.) In an analysis that contradicts the Opinion in the *Sheetz* case, the New York high court rejected the arguments in a dissenting opinion (which followed the Opinion by the California Court of Appeal), and explicitly limited the application of *Nollan/Dolan* to "in lieu of" fees. (*Id*., ___ at ____, 2026 WL 88133 at *8-*9.)

In short, the "predicate question" is presently unresolved. Since the Opinion is no longer published, litigants may still seek to persuade the California courts that *Nollan/Dolan* does not apply to development impact fees.

D. Application of the "essential nexus" test to regulatory fees and programs will likely become more contested.

In the Opinion, the Court of Appeal held that the TIM fee satisfied the "essential nexus" test in *Nollan*, such that there is "logical connection between the TIM fee and the County's land-use interest (reducing traffic congestion from new development)," and that the "required relationship or link between the challenged permit condition (TIM fee) and the County's legitimate government interest (reducing traffic congestion) is present here." (Opinion, at 19-28 (335 Cal.Rptr.3d at pp. 333-338).) The Court of Appeal explained:

> It is clear to us that the required nexus exists between the County's legitimate interest/regulatory goal of minimizing traffic congestion and the TIM fee, which is imposed on all new development to finance roadway improvements to meet increased traffic needs caused by such development. This case presents a quintessential or classic instance of a government's legitimate exercise of the police power in the land-use context. [Opinion, at 27 (335 Cal.Rptr.3d at pp. 337).)

> [W]e find that the required relationship or link between the challenged permit condition (TIM fee) and the County's legitimate government interest (reducing traffic congestion) is present here. Stated differently, we conclude the *Nollan* component of the *Nollan/Dolan* test has been satisfied because there is an "essential nexus," or logical connection, between the County's regulatory goal or police-power purpose and the challenged impact fee. [Opinion, at 28 (335 Cal.Rptr.3d at 338).]

Sheetz does not contest that finding in his pending Petition for Writ of Certiorari.

However, counsel for property owners have indicated an intent to use the "essential nexus" test to challenge fee programs designed to address public problems, such as the lack of new below-market-rate homes, increasing rents, the high cost of moving, the desire to beautify public spaces, on the ground that such problems are preexisting and not readily attributable to the impacts of new development. (*See e.g.,* Brian Hodges [counsel for Sheetz], "Emerging Issues: Land Use Exactions After *Sheetz v. County Of El Dorado*," 41 No. 3 Prac. Real Est. Law. 48 (May 2025).) Cities need to be aware of the potential of such challenges in the future.

E. The present uncertainly regarding how to apply the "rough proportionality" test in *Dolan* to general fee schedules legislatively imposed on classes of development.

In the Opinion, the Court of Appeal held that the County's TIM fee satisfied the "rough proportionality" test in *Dolan*. (Opinion, at 20, 28-52 (335 Cal.Rptr.3d at pp. 333, 338-353).) In so doing, the Court of Appeal addressed several issues that remain highly disputed between the property bar and counsel for local agencies regarding the application of *Nollan/Dolan* to development fees, as well as other regulations.

One of those issues is whether a local agency may impose a development impact fee on reasonable formulas or schedules that assess the impact of entire class of development rather than the impact of specific parcels of property. The Court of Appeal recognized in the Opinion that within the "rough proportionality" inquiry "is the additional question of whether a permit condition imposed on a class (i.e., type) of development (here single-family residential), must be tailored with the same degree of specificity as a permit condition that only targets a particular development project." (Opinion, at 20 (335 Cal.Rptr.3d at p. 333.) "More specifically, we must decide the question the Supreme Court explicitly declined to answer in this case: whether the takings clause prohibits the longstanding government practice of imposing permit conditions, such as impact fees, on permit applicants based on reasonable formulas or schedules that assess the impact of entire classes of development rather than the impact of specific parcels of property." (Opinion, at 20 (335 Cal.Rptr.3d at p. 333 (citing *Sheetz, supra,* 601 U.S. at p. 284 (conc. opn. of Kavanaugh, J.)).) The Court of Appeal noted that "nothing inherent in the standards articulated in *Nollan* and *Dolan* precludes the government from making the required showing in this matter." (Opinion, at 36 (335 Cal.Rptr.3d at p. 343).) Therefore,

> In the context of a generally applicable impact fee imposed by a legislative body on specific types of new development (e.g., single-family residential, commercial) through formulas or schedules (as here), the *Dolan* standard logically requires a

> reviewing court to determine whether the amount of the fee is sufficiently tailored--i.e., roughly proportional (or proportionally related) in nature and extent--to the overall impact the *specific type of development* has on the government's land-use interest. [Opinion, at 36-3720 (335 Cal.Rptr.3d at p. 343) (emphasis added).]

The Court of Appeal did not accept Sheetz's argument that the challenged TIM fee violates the Takings Clause because it was imposed without regard to the costs specifically attributable to "his particular project." (Opinion, at 37 & fn. 8 (335 Cal.Rptr.3d at p. 343 & fn. 8).)

The Court of Appeal's conclusion is consistent with other state cases that applied *Nollan*/*Dolan* scrutiny to generally imposed impact fee schedules at a programmatic level, and *not* on a parcel-specific, individualized determination. (*See Anderson Creek Partners, L.P. v. County of Harnett* (2022) 876 S.E.2d 476, 500 [assumed that *Nollan*/*Dolan* scrutiny of a generally applicable water and sewage fee would not be individualized]; *Homebuilders Ass'n of Dayton and the Miami Valley v. City of Beavercreek* (2000) 729 N. E. 2d 349, 356-358 ("*Beavercreek*") [examined only the programmatic features of a traffic impact fee and the methodology the city used in enacting it, before holding that the fee complied with *Nollan/Dolan*]. *See also, e.g.*, *Puce v. City of Burnsville* (Minn. 2023) 997 N.W.2d 49, 59 ("[a] city can justify its imposition of a percentage-based formula on a particular class of properties if it can show" that the fee "reflects, or is roughly proportional, to the amount necessary to counter the impact of the expected developments" in the aggregate, not at the "individual property" level); *Zander v. Orange County* (2023) 890 S.E.2d 793, 800-801 [county was permitted to "estimate the total cost of improvements by category" without any property-specific analysis (alteration omitted)]; N. Ill. *Home Builders Ass'n v. County of Du Page* (1995) 649 N.E.2d 384, 391 [upholding ordinance, even though the ordinance did not "consider[] the particular characteristics of a specific development," because "[o]ur review shows that testimony presented at trial established that the fee calculation method used by Du Page County complies with generally accepted traffic engineering practices and that a majority of impact fee ordinances nationwide use averages to predetermine impact fees."])

For his part, Sheetz argued contradictory positions at the U.S. Supreme Court in *Sheetz*. (See Tr. Oral Arg.36:11-24.) On remand, the Court of Appeal explained that Sheetz argued that " 'a fee based on classes of development can survive *Nollan/Dolan* review if … the government establishes (1) the *proposed project's* impacts on the public facility at issue is roughly within the range of impacts ascribed to the class to which the project belongs; and (2) the imposed fee mitigates the identified impacts—and not … impacts attributable to other class of development or other sources.' " (Opinion, at 37 & fn. 8 (335 Cal.Rptr.3d at p. 343 & fn. 8) (emphasis added).) Then the Court of Appeal noted that Sheetz's supplemental brief "also includes a contradictory argument; namely, that the challenges impact fee violates the taking clause because it was imposed without regard to the costs specifically attributable to *his particular project*." (Opinion, at 37 & fn. 8 (335 Cal.Rptr.3d at p. 343 & fn. 8) (emphasis in original).) Amicus curiae briefs submitted in support of Sheetz on remand similarly argued that the amount of the TIM Fee must be "at least roughly proportional to those impacts or needs caused by the *Sheetz home*," that the TIM Fee must be "at least 'roughly proportional' to alleged *development project* [singular] impacts," and that courts should consider "[t]he measure of '*the owner's loss.*'" (Brief of Amici Curiae National Association of Home Builders And California Building Industry Association In Support Of Appellant George Sheetz at

37, 47 & fn. 9 (emphasis added).) Sheetz's pending Petition to the U.S. Supreme Court appears to similarly insist on some degree of parcel-specific analysis in the process of imposing development impact fees.

Another issue that is still disputed is the degree of specificity that is required for standardized fee formulas or schedules. For example, Justice Barrett said:

> [I]t seems kind of like a nightmare to figure out where the lines should be drawn in these categories, and you're trying to -- you're trying to mitigate the potential consequences of that. I mean, when you're deciding how reticulated it has to be, would the lines drawn between various categories be judged on a rational basis level? Because it seems like you're saying, well, you look at whether the category is roughly proportional, but, as Justice Kavanaugh's pointing out, individual parcels within that category may have varying impacts on the traffic. So how do you decide where the lines should be drawn? [Tr. Oral Arg., at 40:16-41:6.]

Where those lines should be drawn is not clear, and appears to be a case-by-case analysis.

F. Litigants may continue to dispute whether the Mitigation Fee Act's "reasonable relationship" test satisfies the "rough proportionality" test in *Dolan*.

The Court of Appeal discussed the "intermediate position" adopted by the Court in *Dolan*, and how that required that the County "show that the challenged permit condition (TIM fee) is roughly proportional to the projected impacts of Sheetz's proposed development project on traffic congestion." (Opinion, at 28-35 (335 Cal.Rptr.3d at pp. 338-342).) To make that showing, the Court of Appeal held that " '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.' " (Opinion, at 35-36 (335 Cal.Rptr.3d at p. 342) (quoting *Sheetz*, 601 U.S. at p. 280).) The court concluded that "the same constitutional rules apply whenever the government seeks to offset the public costs of new development through land-use exactions, regardless of whether the exaction (e.g., impact fee) is generally applicable to a class of permit applicants (as here) or is imposed on an individual basis in connection with a specific development project." (Opinion, at 36 (335 Cal.Rptr.3d at p. 343).)

Then, the Court of Appeal explained that that "it appears that the *Dolan* court essentially adopted a version of the reasonable relationship test" because

> the "rough proportionality" standard established in that case does not mandate a "precise mathematical calculation," but instead requires the government to make "some sort of individualized determination," including "some effort to quantify its findings," showing that the required land-use exaction is "related both in nature and extent to the impact of the proposed development." ([Dolan, 512 U.S.] at pp. 391, 395-396, italics added [the land-use exaction " 'should have some *reasonable relationship* to the needs created by the [development]' "]; *see id.* at pp. 394-395 [concluding that a recreational floodplain easement violated the takings clause

> because the findings upon which the city relied to justify the exaction did not show the required *reasonable relationship* between the easement and the landowner's proposed new development].) [Opinion, at 38 (335 Cal.Rptr.3d at p. 344) (emphasis added).]

Based on that observation, the Court of Appeal explained:

> As we understand it, the *Nollan/Dolan* test is similar to the reasonable relationship standard employed in California to assess the validity of land-use exactions (e.g., impact fees) in the context of individualized (i.e., project-specific) conditions imposed on an ad hoc basis thorough administrative action. (*San Remo* [*Hotel L.P. v. City and County of San Francisco* (2002) 27 Cal.4th [643,] 668 ["individualized development fees warrant a type of review akin to the conditional conveyances at issue in *Nollan* and *Dolan*"]; *see Ehrlich, supra,* 12 Cal.4th at p. 865 (plur. opn. of Arabian, J.) [describing California law as requiring the government to determine how there is a reasonable relationship between: (1) " 'the proposed use of a given exaction and both 'the type of development project' and 'the need for the public facility and the type of development project on which the fee is imposed' "; and (2) " 'the amount of the fee and the cost of the public facility or portion of the public facility attributable to the development on which the fee is imposed' "]; [*Home Builders Assn. of Tulare/Kings Counties, Inc. v.*] *City of Lemoore* [(2010)] 185 Cal.App.4th [554,] 561 [local governments in California have the burden to demonstrate that they used a valid method for imposing the fee in question, one that established a reasonable relationship between the fee charged and the burden posed by the development].) [Opinion, at 38-39 (335 Cal.Rptr.3d at p. 344) (emphasis added).]

The Court of Appeal also noted that the California Supreme Court reached the same conclusion nearly three decades ago in *Ehrlich*. (Opinion, at 39 (335 Cal.Rptr.3d at p. 344) (citing *Ehrlich, supra*, 12 Cal.4th at pp. 859-860, 865-868 (plur. opn. of Arabian, J.) [equating California's reasonable relationship test with *Nollan/Dolan* scrutiny].)

Sheetz disagrees with that position in his pending Petition in the U.S. Supreme Court. He argues that the MFA "reasonable relationship" test for legislative exactions in Government Code section 66001(a) is not the same as "rough proportionality" test, and is too much like the "rational basis" standard that was rejected in *Dolan*.

However, federal courts have applied the "rough proportionality" test in Dolan in essentially the same manner as the California courts have applied the "reasonable relationship" test under the MFA. The Court of Appeals for the Sixth Circuit held that, "[i]n other state court cases, like those the Supreme Court cited positively in *Koontz*, the government generally satisfies the nexus and rough proportionality test with ease by introducing *some evidence* relating to the 'methodology and functioning' of its exactions." (*F.P. Development, LLC v. Charter Township of Canton,* 16 F.4th 198, 207 (6th Cir. 2021) (emphasis added).) In support of that approach, the Sixth Circuit cited *Homebuilders Ass'n of Dayton and the Miami Valley v. City of Beavercreek* (2000) 729 N. E. 2d

349, 357-358 ("*Beavercreek*"), because *Koontz* referred to *Beavercreek* as an example of a court that "applied the standard from *Nollan* and *Dolan* or something like it." *Koontz v. St. Johns River Water Mgmt. Dist*., 570 U.S. 595, 618 (2013). In *Beavercreek*, the city did not conduct any individualized determination of the specific project, but instead established that "the methodology used to determine the need for roadway improvements funded by the impact fee is based on generally accepted traffic engineering practices" based on evidence "that described the methodology used by the City of Beavercreek in enacting the impact fee ordinance," including "a comprehensive plan for creating impact fee districts and addressing the needs within those districts," "a provision that provides for a review and update of its terms on a regular basis to accommodate changes in, *inter alia*, traffic engineering standards, changes in the need for roadway developments, and receipt of additional revenues by the city," "an inventory of existing roadway facilities to determine whether these facilities meet the standards set forth by the ordinance for addressing traffic needs," "the cost of new facilities needed to accommodate new development," and reductions in the cost to be paid by impact fees "by the amount of credits the municipality will receive, and by roadway use not associated with new development." *Beavercreek, supra*, 729 N.E.2d at 357-359. The Sixth Circuit in *F. P. Development* also supported its approach by citing *Hallmark Inns & Resorts, Inc. v. City of Lake Oswego* (2004) 88 P.3d 284, 291 (city's findings "were anything but 'conclusory'" and "were presented in considerable detail, were based on particularized projections, and included attempts to quantify the impact of the development on the city's transportation infrastructure"); and *Sparks v. Douglas Cnty.* (1995) 904 P.2d 738, 745 ("the findings made by the County were more than mere conclusory statements of general impact."]) The Sixth Circuit then discussed case law where the rough proportionality test was *not* met because there was "no evidence" of the fee's impact and how the fee was calculated. (*F.P. Development, supra,* 16 F.4th at 207 (citing *Mira Mar Development Corp. v. City of Coppell* (2013) 421 S.W.3d 74, 94-96, and "*Town of Flower Mound v. Stafford Estates Ltd. P'ship,* 135 S.W.3d 620, 644-45 (Tex. 2004) (holding that the Town's monetary exaction was not roughly proportional because the rationale for it was too abstract and because the town provided no real evidence of impact).")))

In the Opinion, the Court of Appeal explicitly relied on the Sixth Circuit's application of *Dolan*'s "rough proportionality" test and held: "Applying the relevant principles here, we conclude the administrative record includes sufficient evidence establishing that the challenged permit condition (TIM fee) satisfies the *Dolan* standard." (Opinion, at 44 (335 Cal.Rptr.3d at 347-348) (citing *F.P. Dev., supra, 1*6 F.4th at p. 207).)

A similar causation analysis is required by California courts in applying the MFA's reasonable relationship test for legislatively imposed exactions under Government Code section 66001(a). For example, in *Boatworks, LLC v. City of Alameda* (2019) 35 Cal.App.5th 290 (2019), the court stated: 'The [public agency] imposing the fee must therefore show that a valid method was used for arriving at the fee in question, "one which established a reasonable relationship between the fee charged and *the burden posed by the development*." ' " (*Id.* at p. 298 (citation omitted) (emphasis added). In *Boatworks*, the trial and appellate courts held that the City of Alameda failed to show "a reasonable relationship between the fee's use and the burden posed by new development," because "[a] calculation that is based on the cost of buying new land—untethered from whether the City actually plans to do so—is not reasonably related to the *burden*

posed by anticipated new development." (*Id*. at 300 (emphasis added).) The court required a causal link between the fee and the actual impacts of the development:

> The Development Fee Act allows the City to impose fees that have a reasonable relationship to the *burden* posed by the development. [Citation.] But a fee based in significant part on costs the City will not incur, because it has already acquired ample land at no cost, does not have a "reasonable relationship to the cost of the public facility attributable to the development." [*Id*. at 301(quoting *Home Builders Assn. of Tulare/Kings Counties, Inc. v. City of Lemoore* (2010) 185 Cal.App.4th 554, 562 ("*Lemoore*")) (emphasis in original).

In *Lemoore*, the court similarly held that a fee for fire protection facilities imposed on new development in a certain part of the city was invalid because the evidence in the record demonstrated that "the new development will not burden the current facilities." (185 Cal.App.4th at 571-572.)

Also like the federal courts applying *Dolan*, California courts applying the MFA "reasonable relationship" standard review the sufficiency of the government's data regarding the causation link between the fee imposed and the impacts of the development to be addressed by the fee. In the Opinion, the Court of Appeal relied on *Cresta Bella, LP v. Poway Unified Sch. Dist*. (2013) 218 Cal.App.4th 438. (Opinion, at 43 (335 Cal.Rptr.3d at p. 347).) In *Cresta Bella*, the court invalidated school impact fees because the data before the local agency did not establish "the connection between new construction and an increase in student population." 218 Cal. App. 4th at 451-454. Similarly in *Warmington Old Town Associates v. Tustin Unified School Dist*., 101 Cal. App. 4th 840, 857-867 (2002), the court held that a school district's fee study was insufficient under the reasonable relationship standard in the MFA because the study failed to prove the connection between new construction activity upon which the fee was imposed and an increase in student population. The school district's fee study had concluded: " '[T]he amount of fees to be paid by new residential development in the District is reasonably related to the needs of the community for school facilities generated by that development, and does not exceed that development's share of the cost of the facilities.' " *Id*. at 858-859. The court disagreed because the study did not estimate "the impact of new construction in the redevelopment context," and gave "no consideration to whether those newly constructed replacement homes in fact generate additional numbers of students over and above those who occupied the previous homes at the site." *Id*. at 859.

Federal courts applying the "rough proportionality" standard in *Dolan* have even cited to California cases that were applying the "reasonably related" test under the MFA. For example, in *Tap House Real Est., LLC v. City of Rochester* (D. Minn. July 19, 2024) No. 22-cv-492 (ECT/DTS), 2024 WL 3470824 at *8, 2024 U.S. Dist. LEXIS 127318, the District Court relied on the Sixth Circuit's approach in *F.P. Development*, and then reinforced that approach by citing the California case of *City of San Marcos v. Loma San Marcos*, LLC (2015) 234 Cal.App.4th 1045, 1063-1064, for the premise: "[W]e see no impropriety in the methodology that was used to generate traffic projections, which by their nature are approximations." The court in *City of San Marcos* applied the

same standard in determining compliance with both the MFA and the takings clause in the Fifth Amendment to the United States Constitution, namely, that a fee must be based on the local agency's "'reasoned analysis designed to establish the *requisite connection* between the amount of the fee imposed and the burden created.'" *Id.* at 1064 (quoting *Shapell Industries, Inc. v. Governing Board* (1991) 1 Cal.App.4th 218, 235). Notably, the court in *Cresta Bella,* discussed above, also cited that same analysis in *Shapell*. (218 Cal.App.4th at p. 447.)

G. Both The methodology and evidence supporting the causal link between a fee and the impacts of the new development should be included in the record before the legislative body adopts a fee.

Like in *Beavercreek*, discussed above, the Court of Appeal on remand from the Supreme Court in *Sheetz* outlined the evidence in the record that supported its holding that the TIM fee imposed by the County of El Dorado satisfied the "rough proportionality" test in *Dolan*. The Court of Appeal explained:

> In establishing the fee schedules for each class (i.e., type) of new development in a particular geographic zone, the County identified the existing level of traffic flow on public roadway segments, assessed the degree to which projected population and employment growth from new development would impact that flow of traffic on those roadway segments over a 20-year period, and estimated the resources needed to complete infrastructure projects that would accommodate the new traffic patterns from new development to ensure compliance with the traffic flow standards set forth in the General Plan. The amount of the fee imposed on a specific type of development was based on a travel demand forecasting model, which determined the traffic contribution (vehicle trips) from each type of new development in a particular geographical zone as to each roadway segment that was projected to have a traffic flow that did not meet the standards established in the General Plan. The administrative record reflects that the County considered the relevant factors and demonstrated a rational connection between those factors and the TIM fee. The record contains detailed analyses in the form of expert technical reports (e.g., traffic studies) quantifying the traffic impacts from each type of new development in the County's eight geographical zones. In other words, the record establishes a factually sustainable proportionality between the effects of new development on traffic congestion and the amount of the challenged impact fee. [Opinion at 46 (335 Cal. Rptr.3d at p. 349).]

The Court of Appeal concluded: "[T]he County met its initial burden to demonstrate that it used a valid method for imposing the TIM fee, one that established a reasonable relationship between the fee charged and the projected burdens (i.e., social costs or public impacts) of Sheetz's development of a single-family home in geographic Zone 6. [Opinion, at 45 (335 Cal.Rptr.3d at 348-349).]

In light of that analysis in the Opinion, as well as the holdings in *Boatworks, Lemoore*, *Cresta Bella*, *City of San Marcos*, *F.P. Development* and *Beavercreek*, discussed above, local

agencies should do the following in the context of generally-applied fees and programs imposed as conditions on land-use permits:

- Determine the legitimate interest/regulatory goal for the fee or program that is necessitated by the impacts of the new development;

- Determine the reasonable relationship between the proposed use of a given fee or program and both the type of development project and the need for the public facility and the type of development project on which the fee is imposed;

- Utilize a methodology based on technical and expert reports that establishes the causal link between the amount of the development fee or program imposed on a class or type of new development and the impacts of that development (i.e., the cost of the public facility or portion of the public facility attributable to the development, or the burden posed by the development), which impacts the fee or program was designed to address;

- Have such a methodology and supporting evidence well documented in a robust record before the legislative body that is adopting the fee or program;

- Determine that the factual findings made by the legislative body establish that the condition on the land-use permit is proportional, in both nature and scope, to the public impact of the particular classes of development upon which the fee or program is imposed.

IV. Conclusion.

In *Sheetz*, the Supreme Court held that the Takings Clause in the Fifth Amendment to the U.S. Constitution "prohibits legislatures and agencies alike from imposing unconstitutional conditions on land-use permits." But *Sheetz* did not address several issues regarding the application of the *Nollan/Dolan* test to development impact fees. While the "predicate" question was addressed by the Court of Appeal on remand, the Opinion of that court was ordered not to be published and so that issue is still unsettled in California. There is still uncertainty as to how to apply the "rough proportionality" test in *Dolan* to general fee schedules that are legislatively imposed on classes of development. In California, litigants may continue to dispute whether compliance with the MFA's "reasonable relationship" test will satisfy the "rough proportionality" test in *Dolan*. Local agencies are encouraged to utilize methodologies and make factual findings that establish the causal link between the amount of the development fee or program imposed on a class or type of new development and the impacts of that development that the fee or program was designed to address. Such methodologies and evidence in support of such findings should be well documented in the record before the legislative body that is adopting the impact fee or program.

2026 Municipal Tort and Civil Rights Litigation Update

Municipal Tort and Civil Rights Litigation Update
May 14, 2026

I. POLICE LIABILITY

A. *Animal Protection League v. County of Riverside*, 111 Cal. App. 5th 914 (2025)

- **Sheriff deputy's threat to arrest protestor does not give rise to negligence unless there is a physical injury or breach of duty of care; similarly, threats to arrest do not violate Ralph Act or Bane Act as they do not amount to violence, coercion, or intimidation**

Plaintiff Davies and volunteers from the Animal Protection League protested against a pet store in a Temecula shopping mall claiming the store sourced dogs from puppy mills. The protestors were first asked by mall officials to move their protest due to a table reservation conflict. When they refused to leave, a deputy threatened a protestor with arrest if she did not comply. The protestor requested a citation instead, but the deputy insisted on arresting her. The protestors then voluntarily left the area. The protestor filed a suit against the County of Riverside and the Deputy. Following successive demurrers and motions, the court sustained demurrers without leave to amend for several causes of action, including negligence, Bane Act, and Ralph Act claims.

The California Court of Appeal, Fourt District, affirmed the demurrer. It held the individual negligence claim failed because Plaintiff did not allege physical injury or any breach of duty of care. Although a police officer owes a duty to the public at large, the officer owes a duty to a specific individual only if the officer acts in a way that places the person in danger or acts protectively to induce the person's reliance on the officer. Plaintiff's argument that the deputy had a duty not to threaten her did not establish the duty necessary to support a negligence cause of action based upon emotional distress. Here, Plaintiff did not allege that she suffered any physical injury, nor did she allege that the officer did anything that placed her in danger or that caused her to rely upon him for her safety.

The Ralph Act claim was dismissed as the threat of arrest did not constitute violence. The question becomes whether the officer's stated intention to arrest constitutes an expression of intent to injure her. It does not.

The Bane Act claim was also dismissed because the threat of arrest alone did not amount to coercion or intimidation. Thus, the question becomes whether the officer's statement that he would arrest her if she did not leave "itself threatens violence" under Civ. Code §52.1. Further, Plaintiff's allegations that the deputy's threats to arrest her interfered with her rights to free speech were insufficient to survive a demurrer as to her Bane Act cause of action.

Significance: Threats of arrest alone by law enforcement, without actual violence or any additional coercion, do not constitute a violation of the California civil rights statutes.

B. *A.B. v. County of San Diego*, 112 Cal. App. 5th 404 (2025)

- **Motion for summary judgment reversed because there is a triable issue of fact regarding whether deputies used excessive force during a prone (face down) restraint with bodyweight pressure on decedent's back**

A Hobby Lobby manager called for mental health assistance because decedent was staggering, had no shoes on, and was disoriented. Other than being on drugs and shuffling back and forth, decedent did not threaten anyone and was unarmed. Deputies arrived and restrained decedent with full body weight and strapped his hands behind his back and held him prone. Decedent gasped "can't breathe," and yelled "help" and "get off me." When decedent finally stopped moving, the deputies kept him in a prone position for another 50 seconds before turning him on his side, then later returned him to a prone position and resumed pressing down on his back.

Within 25 minutes of the first deputy's arrival at the scene, decedent was no longer breathing. By the time paramedics arrived and placed him on a gurney, he was dead from asphyxiation and sudden cardiac arrest.

On summary judgment, the trial court found no triable issues of material fact on plaintiff's theory that holding decedent in restraints in a prone position and applying bodyweight pressure to his back constituted excessive force. The court concluded that decedent's restraint was "by the book" and "as it should be."

The trial court's grant of summary judgment was reversed. The court of appeal discussed a number of cases holding that "creating asphyxiating conditions by putting substantial or significant pressure, such as body weight, on the back of an incapacitated and bound suspect constitutes objectively unreasonable excessive force." The court of appeal found, based on the totality of the plaintiff's evidence, ample case law supports the conclusion that a jury could find putting decedent in restraints in a prone position, and holding him in that position forcefully using bodyweight for an extended period, constituted excessive force.

Significance: This case highlights the increasing judicial scrutiny of the use of "prone restraint" by law enforcement.

II. CIVIL RIGHTS – TAKINGS CLAUSE

A. *Pena v. City of Los Angeles*, 158 F. 4th 1033 (9th Cir. 2025)

- **Police destruction of private property and shop inventory in course of pursuit of armed fugitive comes within "necessity exception" to compensable taking under Takings Clause**

LAPD officers, while engaged in a 13-hour standoff with an armed fugitive, fired tear gas canisters through the walls, doors, roof, and windows of a store owned by plaintiff, causing $60,000 in damage to inventory and equipment.

Plaintiff brought an action under 42 U.S.C. §1983 against the city alleging a violation of the Fifth Amendment Takings Clause, then moved for summary judgment, arguing that when the government intentionally destroys private property for public purposes, it is automatically a Fifth Amendment taking. The district court denied the motion, finding the destruction of property was both: (1) a valid use of police power, and (2) did not constitute a taking under the Fifth Amendment.

The Ninth Circuit panel first discussed two centuries of Supreme Court history affirming that government destruction of private property in the "necessary defense of public safety does not give rise to a compensable taking." However, the panel explicitly declined to address whether a broad, categorical police power exception to the Takings Clause exists because plaintiff admitted the law enforcement action was reasonable and necessary.

"No taking occurs for the purposes of the Takings Clause when law enforcement officers destroy private property while acting reasonably in the necessary defense of public safety. That, Pena admits, is what occurred here. The 'necessity exception' applies to Pena's claim."

III. CALIFORNIA MUNICIPAL TORT LIABILITY

A. *Whitehead v. City of Oakland*, 17 Cal. 5th 735 (2025)

- **A release cannot exculpate a City from future negligent violation of a statutory duty to protect public safety (such as Government Code section 835) as a matter of public policy under Civil Code § 1668**

In *Whitehead*, a cyclist riding through Oakland during a charity bike ride struck a pothole, sustaining a traumatic brain injury. Prior to the ride, the cyclist had signed a waiver for the benefit of the City and other entities waiving liability for "broken pavement and road debris including the negligence of public entities." The trial court granted the City's motion for summary judgment on the grounds that the release was valid and enforceable and barred Whitehead's claim against the City for liability arising from an allegedly dangerous condition of public property, as the release did not affect the public interest.

The trial court relied exclusively on the public interest test of *Tunkl v. Regents of University of California* (1963) 60 Cal. 2d 92 (*Tunkl*), which evaluated the validity of a release of common law negligence claims. The Court of Appeal affirmed in reliance on the *Tunkl* framework.

The California Supreme Court reversed, finding that the case does not involve a claim for future ordinary or gross negligence under the common law. The complaint asserted a negligent violation of the City's *statutory duty* under Gov. Code section 835 to maintain its streets in a reasonably safe condition for travel by the public. The Court clarified that the *Tunkl* public interest test applies to claims for future ordinary or gross negligence under common law, but does not apply to statutory violations governed by Civil Code section 1668.

The Court stated: "consistent with our precedent (and with the law of other jurisdictions), an agreement to exculpate a party for future violations of a statutory duty designed to protect public safety is against the policy of the law under Civil Code section 1668 and is not enforceable."

Significance: Pre-event releases and liability waivers are still valid for common law or ordinary negligence claims, but cannot exculpate a public entity from liability for a breach of a statutory violation.

B. *Hu v. City of San Jose*, 114 Cal. App. 5th 149 (2025)

- **Class II bike lane is not a trail under Government Code section 831.4; City remains liable for dangerous condition of public property under Government Code section 835**

Plaintiff was riding a bicycle in a Class II bike lane (indicated only visually by a white pavement stripe) when he encountered debris and gravel covering the bike lane. Plaintiff went through a buffer zone, rode into the vehicle travel lane and veered left, where he encountered potholes and fell. During his deposition, he was unable to pinpoint the exact place of the fall because the accident "happened so fast" and he lost consciousness.

The trial court granted the City of San Jose's motion for summary judgment finding Hu could not establish causation, and furthermore, found the bike lane was covered by trail immunity under Govt. Code 831.4. (The accident causation and dangerous conditions sections of the opinion are unpublished.)

The court of appeal reversed. The bike lane is not a "trail" within the meaning of section 831.4, subdivision (b), even if the bike lane is used for both recreational and nonrecreational purposes. Because Section 831.4 by its terms unambiguously exempts City streets from the definition of a "trail," the bike lane within it is not a trail.

Turning to the statute itself, Section 831.4 subdivisions (a) and (b) protect the city from liability arising from certain unpaved roads and (paved or unpaved) trails, while making clear that this protection does not extend to city streets, where the city remains liable for dangerous conditions under section 835. The court found nothing in the text of the statute that permits a city to limit its liability for dangerous conditions on its streets by painting a lane marker and deeming one lane a trail.

Significance: trail immunity under Government Code section 831.4 will not be expanded to include a bike lane on a city street or highway.

C. *Maksimow v. City of South Lake Tahoe*, 106 Cal. App. 5th 514 (2024)

- **Plaintiff failed to raise a triable issue of fact in opposition to summary judgment as to whether snow was present in the parking lot long enough for the city to discover and remedy it**

In March 2020, Plaintiff slipped on ice in a public parking lot and brought suit, alleging the ice patch was a dangerous condition of public property under Government Code §835. The city moved for summary judgment, arguing Plaintiff could not establish the

existence of a dangerous condition or actual or constructive knowledge of any such condition. The motion was supported by evidence that the city had received no liability claims concerning dangerous conditions in the parking lot, including from snow or ice, from 2017 to 2020. The city also offered the declaration of a community service officer supervisor that photos taken of the area two weeks before plaintiff's fall showed no snow or ice on the ground.

Plaintiff opposed the motion with a declaration from a certified snow professional that, based on National Weather Service data, stating that several inches of snow fell the morning plaintiff fell, that the expert believed the city employees were aware of fall risks posed by snow and ice in the parking lot and that city employees failed to comply with the city's snow and ice removal plan.

The trial court granted the city's motion, finding plaintiff failed to raise a genuine issue of material fact as to whether the city had actual or constructive knowledge of the alleged dangerous condition. On appeal, the Third District Court of Appeal affirmed the summary judgment, based on the following:

- **No Actual Notice**: "A public entity has 'actual notice of a dangerous condition' if it has (1) 'actual knowledge of the existence of the condition' and (2) 'knew or should have known of its dangerous character. (*Martinez v. City of Beverly Hills* (2021) 71 Cal. App. 5th 508, 519.)

  While city employees were aware of snowfall, there was no evidence they had actual knowledge of the *specific ice patch* that caused the fall. In *Rodenhuis v. State of California*, the court explained: "To establish 'actual notice,' it is not enough to show that the state employees had a general knowledge that people do leave hot coals on public beaches. There must be some evidence that the employees had knowledge of the particular dangerous condition in question." And, though city employees may have had a "general knowledge" that snow turns to ice, which may be hazardous to pedestrians, nothing suggests they had actual notice of the "particular dangerous condition or conditions in question" specifically the ice patch near the car that caused Plaintiff's injuries. The trial court correctly found no triable issue as to actual notice.

- **No Constructive Notice:** To establish constructive notice under section 835.2, subdivision (b), a plaintiff must show the dangerous condition "existed for such a period of time and was of such an obvious nature that the public entity, in the exercise of due care, should have discovered the condition and its dangerous character." Put another way, "a claim for constructive notice has two threshold elements. A plaintiff must establish that the dangerous condition has existed for a sufficient period of time and that the dangerous condition was obvious." (*Heskel v. City of San Diego* (2014) 227 Cal. App. 4th 313, 320.)

  The court found no evidence that the ice patch had existed for a long enough period for the city to be reasonably expected to discover and fix it. The court stated: "Here, as in the cases just discussed, we are concerned with transitory conditions of public property. See *Rodenhuis*, *Kotronakis*, and *Burnett*. Like hot coals (*Rodenhuis*), vomit (*Kotronakis*), or falling leaves (*Burnett v. San Diego*), the ice patch could have been present in the parking lot for 11 days or 11 hours.

"The evidence supports only a speculative inference that this was the case. As we have suggested, a jury would be left to guess whether the dangerous conditions were present for "such a period of time" that the City could have discovered them in the exercise of due care. (§ 835.2, subd. (b).) Such an invitation to guesswork falls short of raising a triable issue of material fact."

The appellate court concluded Plaintiff failed to raise a triable issue as to whether the allegedly dangerous conditions were present in the parking lot long enough for the City to discover and remedy them.

Significance: This case has an excellent analysis of actual and constructive notice in a transitory conditions case. The evidence must support an inference that the condition existed for a long enough time to impute notice to the city through reasonable inspection.

D. *Tindall v. County of Nevada*, 112 Cal. App. 5th 78 (2025)

- **County was entitled to weather immunity under Government Code § 831 for the presence of ice in the county jail parking lot; the Vehicle Code definition of street or highway includes a parking lot**

Plaintiff slipped and fell in a county jail parking lot and brought suit for dangerous condition of public property. The trial court granted the County's motion for summary judgment, ruling it was entitled to weather immunity under Government Code section 831, which provides in part that "Neither a public entity nor a public employee is liable for an injury *caused by the effect on the use of streets and highways of weather conditions as such*."

On appeal, Plaintiff argued that section 831 does not apply to parking lots, and even if it did apply, it would not apply where the condition resulted from weather conditions as well as other factors. The Third District Court of Appeal held that the parking lot was a "street" under § 831, because Vehicle Code section 590 defines the word "street" as "a way or place *of whatever nature*, publicly maintained and open to the use of the public for purposes of vehicular travel." It was undisputed that the parking lot was open for public use and owned and maintained by the County. The Court held, it "follows that the parking lot here was a place . . . publicly maintained and open to the use of the public for purposes of vehicular travel." (Veh. Code, § 590.) Accordingly, the County was not liable for Plaintiff's "injury caused by the effect on the use of" the County parking lot "of weather conditions as such."

In the opposition to the motion for summary judgment, Plaintiff advanced a theory about the solar panels being part of the dangerous condition, however, the opposition to the County's motion was the first time Plaintiff raised the theory about the physical characteristic of the solar panels.

The Court of Appeal stated that "if evidence of the party opposing summary judgment would show some factual assertion, legal theory, defense or claim not yet pleaded, that party should seek leave to amend the pleadings before the hearing on the summary judgment motion." Plaintiff cannot successfully argue on appeal that summary judgment should be reversed because of a theory not pled. *Johnson v. The Raytheon Co., Inc.* (2019) 33 Cal. App. 5th 617, 626, 636. If evidence of the party opposing summary judgment "would show some

factual assertion, legal theory, defense or claim not yet pleaded, that party should seek leave to amend the pleadings before the hearing on the summary judgment motion." *Hi-Desert Medical Center v. Douglas* (2015) 239 Cal.App.4th 717, 720, 726, 729, 731.

***Significance*:** Parking lots are subject to a weather immunity defense; review opposition papers closely for new factual and legal theories not previously advanced.

E. *Kabat v. California Department of Transportation*, 107 Cal. App. 5th 651 (2024)

- **Caltrans database showed in the decade before and including up to the day of the accident, there were no accidents involving a bicyclist during the same time of day as the accident and 13 million vehicles had passed through the onramp**

In *Kabat v. California Dept of Transportation*, a bicyclist was struck and killed by a car while crossing an unsignalized crosswalk at an onramp to the I-405 freeway in Irvine, California. The location had two pedestrian crossing signs, one at the crosswalk and one 150 feet in front of it.

Plaintiffs' complaint had a single cause of action for dangerous condition of public property. Plaintiffs claimed the location was dangerous because it was unsignalized, did not provide adequate signage, and the speed limit was set too high to allow for safe crossing.

The trial court granted Caltrans summary judgment because Caltrans established design immunity (section 830.6) and plaintiffs could not overcome the signage immunities (sections 830.4, 830.8), The trial court also ruled that plaintiffs had failed to raise a triable issue of fact on a failure-to-warn claim based on a concealed trap, which claim would be actionable despite design immunity. The Court of Appeal affirmed the trial court ruling

This case is notable because of the positions Caltrans used in its motion for summary judgment. First, as to Plaintiffs' argument that Caltrans failed to establish the discretionary-approval element of design immunity, Caltrans presented evidence through declarations of Caltrans' employees and a traffic engineer declaration that Caltrans design engineers approved the various plans before construction. The plan signatures reasonably supported the uncontradicted inference that the plans had received Caltrans's discretionary approval.

As for the failure-to-warn claim, public entities are entitled to sign immunity unless the plaintiff establishes: 1) the dangerous condition at issue was a concealed trap and 2) the public entity had notice of the dangerous condition. (*Tansavatdi v. City of Rancho Palos Verdes* (2023) 14 Cal. 5th 639, 653).

Caltrans offered undisputed evidence that it maintains a database tracking the number and type of collisions on its onramps, and in the decade before and including up to the day of the accident, there were no accidents involving a bicyclist during the same time of day as the accident and 13 million vehicles had passed through the onramp. This evidence established Caltrans had no notice of the alleged dangerous condition.

Lastly, the declaration by plaintiffs' expert that the crosswalk created a false sense of security, the lack of a signal constituted a trap because it rendered the area deceptive, and Caltrans database was inadequate to provide constructive notice, these arguments did not raise a triable issue of fact on notice because the opinions were conclusory. "A party cannot avoid summary judgment by asserting facts based on mere speculation and conjecture, but instead must produce admissible evidence raising a triable issue of fact." (*Menges v. Department of Transportation* (2020) 59 Cal. App. 5th 13, 23.)

Finally, as to plaintiff's argument that there was no evidence the public entities actually used the databases prior to the accident, the public entities did not have to provide evidence that it used the databases before the accident occurred to establish lack of notice. The relevant fact was there were no similar accidents in the last decade.

Significance: A database can establish absence of notice of alleged dangerous condition.

F. *Restivo v. City of Petaluma*, 111 Cal. App. 5th 267 (2025)

- **Motion for summary judgment granted on notice where city submitted evidence it was unaware of any other accidents on the street at the location where plaintiff fell and it maintained records of complaints for more than 10 years**

Plaintiff was skateboarding on a city street when her skateboard caught in a large crack in the street. She did not take any photos of the condition at the time. Two months later, she returned and took a number of photos showing cracks with sealant placed in them. Plaintiff brought suit against the city, alleging causes of action for negligence and for dangerous condition of public property (Government Code § 835).

The city's summary judgment on grounds of no actual or constructive notice was granted. In its motion, the city submitted a declaration that it was unaware of any other accidents at the location and that the city maintained records for more than 10 years, and during that time, there were no complaints about the location. The city also submitted a declaration from an engineer that it had resurfaced the road with slurry sealant pursuant to a Pavement Management Report, and that the report was done at a very high level and not in reference on specific cracks. The city also showed the report recommendations were not meant to identify actual street conditions but for high level citywide and budgeting purposes.

In opposition, Plaintiff submitted a declaration from an expert, stating that the city "knew or should have known of the unsafe condition" because the city "was out there doing a pavement condition index in 2019."

On appeal, the First District Court of Appeal rejected that the 2019 report was notice to the city, stating "Plaintiff's argument remains devoid of reference to any *evidence* that the city had actual or constructive notice of the dangerous condition." Plaintiff's "sweeping assertion that the city 'was generally aware' of cracks in the street does not begin to establish that it had notice of the large crack/pothole on Noriel Lane plaintiff claims caused her to

fall." (*Kabat,* 107 Cal.App.5th at p. 665.) The city's evidence that the bi-annual pavement reports provide an *overall* assessment of city streets and do not, for any street, identify specific problems, was uncontradicted.

Lastly, the court found plaintiff's expert's argument that the city knew or should have known of the unsafe condition was argument. "A party cannot avoid summary judgment by asserting facts based on mere speculation and conjecture, but instead must produce admissible evidence raising a triable issue of fact." (*Menges v. Department of Transportation* (2020) 59 Cal. App. 5th 13, 23. Nor can it "manufacture a triable issue of fact through use of an expert opinion with self-serving conclusions, devoid of any basis, explanation, or reasoning." (*Id*.)

Significance: Overall pavement management reporting scores are not evidence of notice and a party cannot defeat a motion for summary judgment by asserting facts based on an expert's conjecture.

G. *Bean v. City of Thousand Oaks*, 114 Cal. App. 775 (2025)

- **When sidewalk damage is caused by a parkway tree, control dominates over ownership; any adverse party may oppose a motion for summary judgment**

Plaintiff tripped and fell on a sidewalk uplift caused by a parkway tree and sued the City of Thousand Oaks and a nearby homeowner for negligence and dangerous condition of public property. Plaintiff's claim against the homeowner was based on the theory that the damage to the sidewalk was caused by a tree in the parkway (the area between the curb and sidewalk) located in front of the house, and the roots extended below the sidewalk in front of the adjacent property where Plaintiff fell.

According to a memorandum from the city's public works department, "in the parkway is a privately-owned, City-maintained White Mulberry street tree" whose "roots may have caused or contributed to the sidewalk." The city's memorandum also stated "the city inspects, maintains, and repairs the sidewalks." The property owner moved for summary judgment on the grounds it did not create the condition nor own or control the sidewalk damage. The city opposed the motion, but the Plaintiff did not.

The trial court granted the property owner's motion for summary judgment, and in so doing, held the city lacked standing to oppose the motion because it had not filed a cross-complaint. The city's cross-complaint was filed on the same day as the motion for summary judgment hearing , but was rejected by the court for not obtaining leave of court in advance.

The Second Appellate District affirmed the trial court's ruling, however, it held that any co-defendant with an adverse interest has standing to oppose a motion for summary judgment irrespective of whether it has filed a cross-complaint. (See *RND Contractors v. Superior Court* (2025) 112 Cal. App. 5th 697.) The Court of Appeal found the trial court's rejection of the City's cross-complaint under §428.50(b) was error as there was no trial date set at the time of filing so leave of court was not necessary. However, because any adverse party may oppose a motion for summary judgment, a cross-complaint was not necessary:

"the City and [property owner] were adverse parties 'even if there [were] no cross-claims between them.'" (See *RND*, *supra*.)

Turning to the *de novo* review of the merits of the ruling, the court stated: "Streets and Highways Code section 5610 imposes a duty of repair on the abutting property owners for defects in sidewalks, regardless of who created the defects, but does not of itself create *tort liability* to injured pedestrians or a *duty to indemnify* municipalities, except where a property owner created the defect or exercised dominion or control over the abutting sidewalk. This limitation on tort liability to third parties is often referred to as the 'Sidewalk Accident Decisions Doctrine." The duty to maintain the sidewalk established by Streets and Highways Code section 5610 is not "owed to members of the public in the absence of clear and unambiguous legislative language."

There was no evidence the property owner "created the defect" by merely owning the home adjacent to the tree. Although the city stated that the homeowner owned the parkway and the tree, ownership of the parkway and the tree was not dispositive. To impose "potential liability for injuries caused by a dangerous condition of property . . . 'control dominates over title. "The crucial element is control." (*Alcaraz v. Vece* (1997) 14 Cal. 4th 1149, 1159.)

And, although the city did not own the tree, under its municipal ordinances it trimmed, inspected, and otherwise maintained the tree, establishing the city exercised the "crucial element of control" in the court's opinion. See *Alcaraz*, 14 Cal. 4th 1149 – "to impose potential liability for injuries caused by a dangerous condition of property 'control dominates over title.'"

Significance: Courts have held that the dispositive element is control of the tree, shown through activities like trimming, inspection, and maintenance. Control dominates over title.

H. *Gilliland v. City of Pleasanton*, 116 Cal. App. 5th 138 (2025)

- **Pursuit Immunity under Government Code 17004.7 turns on the definition of pursuit in the city's written policy**

In *Gilliland v. City of Pleasanton*, a Pleasanton police officer was following a burglary suspect, however, the officer elected not to initiate a formal vehicle pursuit under the city's pursuit policy as traffic conditions were crowded and a pursuit could not be safely initiated. The suspect saw he was being followed, rapidly accelerated through an intersection and hit plaintiff, who suffered serious injuries.

Plaintiff sued the city based on the officer's negligent vehicle operation. The city raised Government Code section 17004.7 as an affirmative defense. Generally, section 17004.7 immunizes public entities from liability for collisions caused by fleeing suspects when the entity has a written policy on vehicular pursuits and provides regular training on the policy.

Following a bench trial, the court found the city immune under section 17004.7, applying the dictionary definitions of "pursuit," rather than the definition in the city's pursuit policy. The trial court also disregarded that the suspect testified he did not believe he was

being pursued, instead relying on the dictionary definition of "pursue," which includes "follow" or "investigate."

The court of appeal held that whether a suspect was actually pursued and whether the suspect had a perception of being pursued both depend on the definition of "pursuit" in the city's pursuit policy. "It is uncontested that an individual policy's definition of 'pursuit' governs whether a suspect was being pursued in a motor vehicle by a peace officer, i.e., whether there was an actual pursuit."

Here, the Policy's definition of "pursuit" required both that a police officer be "attempting to apprehend a suspect" and that the suspect be "attempting to avoid arrest." Simply put, 17004.7 immunity will not be stretched further than intended by the legislature, and the immunity does not apply, where, as here, the suspect did not believe he was being pursued.

Significance: Police pursuit immunity under 17004.7 depends strictly on whether the incident fits the specific internal definitions and standards required by state law.

Emails to Algorithms Public Records Challenges in the AI Era

From Emails to Algorithms: Emerging Public Records Challenges in the AI Era

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I. Introduction

The expansion of the internet and proliferation of electronic applications, messaging platforms, tools, and data have fundamentally altered the public records landscape. As technologies have advanced, public entities and officials across the country have started to integrate messaging applications such as Microsoft Teams, Signal, and WhatsApp to aid in efficient communication in the course of their duties. In recent years, artificial intelligence tools, such as ChatGPT, have also rapidly expanded their capabilities and become widely available to the public. Some public entities and employees have started using this technology to assist with the everyday functions of government. Chat and AI tools are thus starting to impact public entities in many of the same ways that email did in the early 2000s – namely, increasing the amount of data affiliated with public business and creating new categories of records potentially subject to disclosure under the California Public Records Act ("CPRA").

While public entities have become accustomed to maintaining and producing electronic records like emails, the rapid development of Artificial Intelligence ("AI") and increased use of encrypted messaging applications pose a variety of new challenges. On the one hand, AI, messaging applications, and workflow technologies present the opportunity for public agencies to increase efficiency and boost their overall operations. On other hand, these technologies can burden public entities by increasing the number of public records subject to disclosure under the CPRA, the amount of data that must be retained by an entity, and the frequency at which public officials must search their personal devices and accounts for public records

This paper explores the novel issues that public entities can expect to face under the CPRA in this new technological era, from determining whether AI prompts constitute public records to best practices with messaging apps like Signal. First, we examine whether and when records generated with AI or other technologies are public records. Second, we analyze the CPRA exemptions that may apply to public records created with AI or other types of applications, including the potential waiver of privileges when utilizing those technologies. Finally, we will discuss the potential benefits of AI technologies for reducing the burden of CPRA requests and give guidance on best practices and policies for managing the potential pitfalls of AI and other applications.

II. Understanding What Constitutes a Public Record

Public entities are subject to the CPRA. Its purpose is to ensure transparency in governance by granting members of the public the right to copy and inspect public records. Thus, any introduction of new technology into operations requires public entities to ask whether that technology creates a new kind of public record subject to disclosure and, if so, how can the public entity revise its retention policies to ensure documents are being properly preserved? With AI transcripts in particular, the volume of data can be substantial which raises serious issues of storage capacity and cost. This makes data storage an increasingly important consideration for public entities and highlights the need for clear, technology-use and deletion policies targeted at

reducing the retention of unnecessary data. Such policies are critical to ensure that public entities are not overwhelmed by the cost of retaining and reviewing vast amounts of data.

While record retention and disclosure of public records are separate issues[1], the interplay between record preservation and the policy goals of the CPRA mean that both are important considerations when developing use and retention policies for messaging apps and AI. The amount of data retained and the length of time data is retained determines the pool of potential public records because the content of the record, not its format determines whether something is a public record under the CPRA. This section therefore analyzes the extent to which chat and AI records may be "public records" for purposes of the CPRA. It also discusses appropriate retention practices for those records to ensure adherence with applicable laws while managing data volume.

A. Public Records Under the CPRA

1. AI Interactions as Public Records

AI applications, such as ChatGPT, Microsoft Copilot, Gemini, and Claude, are relatively new tools with rapidly growing capabilities. These AI assistants typically involve a human user: (1) inputting requests for information; (2) requesting a synthesis of information; (3) asking for guidance for how to address a particular issue; or (4) requesting help with complex tasks such as translating or coding (collectively "AI Interactions"). Given the infancy of these technologies and their use in public governance, California courts have not yet addressed whether public employees' AI Interactions constitute public records under the CPRA. The CPRA broadly defines public records as "any writing containing information relating to the conduct of the public's business prepared, owned, used, or retained by any state or local agency regardless of physical form or characteristics."[2] In light of this definition and the CPRA's general preference for transparency, it is advisable to consider AI Interactions, which are created and used by an entity, as public records if and when those exchanges relate to public entity business. Further, notes or transcripts from meetings related to public entity business created by AI assistants (such as the automatic note-taker in Zoom or other apps) would also likely qualify as public records.[3]

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[1] Indeed, the California Supreme Court recently confirmed that the CPRA does not impose any standalone retention requirements, as it is solely a law regulating disclosure and access to public records. (*City of Gilroy v. Superior Court of Santa Clara County* (Cal., Jan. 15, 2026, No. S282937) 2026 WL 111709.)

[2] Gov. Code § 7920.530(a).

[3] Public agencies have started to generate policies and guidance for use of AI applications which appropriately categorize information inputs and outputs from AI tools as public records. *See* City of San Jose Generative AI Guidelines, last updated April 24, 2025, https://www.sanjoseca.gov/home/showpublisheddocument/100095/638255600904303329; City of Long Beach Generative AI Guidance, https://longbeach.gov/globalassets/smart-city/media-library/documents/generative-ai-guidance-v1-1, p. 2.

Several factors can inform whether AI Interactions relate to the public's business, including: (1) the subject matter of the exchange; (2) the context and purpose of the interaction; and (3) whether an employee was acting in the course of their employment when utilizing the AI (e.g., an employee utilizing ChatGPT to brainstorm policy ideas or create a meeting agenda). These inquiries shed light on whether an AI Interaction falls within the definition of "public record" under the CPRA as they assist with understanding whether a record relates to public business in a "substantive way," which is a fundamental requirement for something to be deemed a public record.[4] Thus, AI Interactions should be considered public records when the content relates substantively to public business. This is particularly true when AI is used to assist with the creation of other important public documents such as memorandums, staff reports, or contract documents. While an AI Interaction is often not the final product, the CPRA's expansive scope and the public's interest in how important government decisions are made both warrant treating AI Interactions as public records unless the circumstances make clear that a particular AI Interaction is not public (e.g., when AI is clearly used for some personal purpose) or until California courts hold otherwise.

2. Chat Messages as Public Records

California courts have made clear that records from messaging apps can qualify as public records subject to disclosure under the CPRA. These records (such as Microsoft Teams or Slack messages) become public records when they substantively relate to the conduct of public business.[5] When determining whether private messages relate to public business, courts will look to: (1) the subject matter of the messages; (2) the context or purpose of the messages; (3) whether the author was acting in the scope of public employment; and (4) the audience of the messages.[6] If a message is found to relate to public business under these factors, it is subject to disclosure, even if the message is stored on a private account or device.[7]

Importantly, any type of chat message can qualify as a public record under this test. Even chats exchanged on ephemeral messaging apps with auto-deletion settings, like Signal, can constitute a public record. In light of general retention requirements and the CPRA, auto-deletion settings on such apps are discouraged. The public may even request screenshots of the settings page of Signal accounts for public officials. While there is no clear authority stating that app settings on private devices are subject to disclosure, courts could reasonably determine that messaging app settings are public records which relate to the conduct of the public's business, in particular because the public has an interest in communications by public officials especially

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[4] *City of San Jose v. Superior Court* (2017) 2 Cal.5th 608, 618 ("[T]o qualify as a public record under CPRA, at a minimum, a writing must relate in some substantive way to the conduct of the public's business.")

[5] *Id.* at 629.

[6] *Id*. at 618.

[7] *Id*. at 614.

when artful transparency loopholes like Signal exist. All chat-related records substantively related to public business should therefore be considered as potential public records.

3. Metadata as a Public Record

Electronic records, including chat messages and AI transcripts, often have associated metadata. Metadata is the "data about data," meaning that it is not visible in the text of a record but rather is behind-the-scenes information that provides details and context for the data it describes. Metadata includes information about the author of a document, document creation date, timestamps, device type, document permissions, etc. Metadata is an important consideration when disclosing and retaining electronic records, as it can contain sensitive information, provide crucial detail for locating records, or even house the data necessary for preserving the digital file.

Unfortunately, no provision of the CPRA explicitly addresses metadata, and there have been no reported California opinions on the extent to which metadata must be disclosed. Other jurisdictions have held that metadata is a public record subject to disclosure if no exemptions apply.[8] Moreover, the CPRA does provide that electronic records must be produced in native format, assumingly with metadata intact, if so requested (i.e., producing a native Word document that is in possession of the entity instead of producing a PDF printout of the same document).[9] In absence of direct law on the issue, the prevailing guidance is for public entities to treat requests for metadata the same as all other requests and disclose nonexempt metadata when requested.[10] If a requester does seek metadata, it is important to review any responsive metadata to ensure that private data, system security information, or other sensitive information is redacted prior to release if such material is not responsive to the request or qualifies as exempt under the CPRA.

B. Retention of AI and Messaging Records

1. Retention of AI Interactions

California public entities are required to retain certain categories of records pursuant to statutes and regulations. These requirements often relate to specific record types, such as personnel records. There is no authority directly addressing retention of AI Interactions because, as with all public records, whether AI Interactions should be retained is based on their *content and purpose*, not their format. Thus, if a particular exchange of messages is relevant to a specific facet of the public's business that has a record series in the public entity's retention schedule,

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[8] *Lake v. City of Phoenix* (Ariz. 2009) 218 P.3d 1004, 1008; *O'Neill v. City of Shoreline* (Wash. 2010) 240 P.3d 1149, 1154; *Irwin v. Onondaga County* (N.Y. 2010) 895 N.Y.S.2d 262, 268.

[9] Gov. Code § 7922.570.

[10] *See* League of California Cities, A Guide to the California Public Records Act, Revised September 2025, p. 14.

then those AI Interactions should be categorized for retention and saved for the appropriate time period.

To facilitate proper retention and avoid commingling of records, public employees should create work accounts for AI Interactions and use those accounts solely for entity business, not personal matters. Public employees should save any outputs or AI-generated transcripts that relate substantively to an existing record series, or which otherwise have long term value to the public entity's work. The public entity's IT Department should conduct routine purges of AI Interactions that have served their purpose and have not been designated for retention. Since some AI interactions are likely to have longer-term value than informal chat messages, it is advisable to wait six months to two years before purging AI records.

While not directly related to record retention, some public agencies have issued guidance to employees for citing the use of generative AI in documents. For example, the City of Long Beach encourages employees to be transparent about AI use and include citations such as, "This document was drafted with support from (GEN AI SYSTEM) on DD/MM/YYYY. The content was fact-checked by City staff. This information is unmodified."[11] As public employees work to gain familiarity with AI and integrate it into their operations, encouraging citations to indicate AI assistance can be beneficial, both for transparency and for knowing when AI Interactions rise to a level of significance that they should be retained. As a general rule, it is recommended to save any AI Interactions related to the drafting of shared documents (i.e., living documents where multiple people can contribute to drafting), particularly if those documents indicate that AI provided assistance. Conversely, AI Interactions in which the user is seeking general information (e.g., how to perform technology tasks, such as converting file formats or translating languages), the AI Interaction likely does not need to be retained unless the user is relying on the output in some other formal documentation that could qualify as a public record. Thus, guidelines for citing AI, instructions on appropriate use cases[12], and retention parameters for particular use cases are critical for informing management of AI data, particularly in this early phase of integrating AI tools.

Overall, AI Interactions should be viewed as another type of information format, like Word documents or emails, that must be retained only when their content relates significantly to public business, an existing record series, or otherwise has long-term value in light of its context and purpose. Clear guidance on AI use for employees is crucial for limiting the data burden of retaining AI Interactions while allowing for transparent engagement with tools that improve efficiency of public entity operations.

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[11] City of Long Beach Generative AI Guidance, https://longbeach.gov/globalassets/smart-city/media-library/documents/generative-ai-guidance-v1-1, p. 6.

[12] *See, e.g.,* City of Long Beach, Generative AI Use Case Registry, https://longbeach.gov/smartcity/projects/generative-ai-use-case-registry/.

2. Retention of Chat Messages

Like AI Interactions, chats should be analyzed for retention based on their substance and purpose. If chats relate to the public's business and are relevant to an existing record series, they should be designated for retention under the most appropriate category.

It is likely that many chat records will not fall into an existing record series because chats are often used informally and do not have long-lasting significance for the public's business. According to Government Code section 34090, city department heads may destroy records with the approval of the legislative body and consent of the city attorney, without copying the records, after they are no longer required. However, the statute further provides that certain records, including records less than two years old, may not be destroyed. This suggests that all public entity records, presumably including emails and chats, must be maintained for at least two years before they may be destroyed, even if they are no longer of value.

This two-year requirement does not apply to all records. The Government Code requires the Secretary of State to establish guidelines for record retention at the local level.[13] Those guidelines are contained in the Secretary of State's Record Management Handbook. Under those guidelines, messages which are "transitory," meaning that they are created primarily to communicate informal information, are meant to be short-lived, and have a limited purpose may be destroyed once they have served their purpose.[14] This guidance explicitly applies to emails, but the description can be extended to chat messages, which are equally if not more transitory in nature than emails, given the informality of most chats on platforms like Teams. Accordingly, several local entities characterize chats as "transitory" in their retention policies and permit regular deletion of chats.[15] These policies typically treat all chats as transitory unless the custodian of the chats affirmatively identifies the exchange as something that has more than transitory value. Under these policies, all chats not categorized as eligible for retention are deleted on a routine basis.

While there is a strong argument that policies permitting deletion of emails and chats before two years are legally permissible, there is some dispute about whether these policies comply with Government Code section 34090. In 2019, AB 1184, which would have required emails sent or received regarding public business be retained for a minimum of two years, was

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[13] Gov. Code § 12236.

[14] California Secretary of State, Records Management Handbook, *Chapter 3 – Electronic Records and Storage*, https://www.sos.ca.gov/archives/records-management-and-appraisal/records-management-handbook/chapter-3.

[15] *See* University of California Irvine, Chat Platform Message Retention Project | Office of Information Technology (destruction of chat messages after one year); City of Fresno, Resolution 2019-122 (instant messages and chats deleted every six months); County of El Dorado, California, Electronic Messaging Retention Policy (Teams chats automatically purged and permanently deleted 29 days from the last modified date).

introduced to settle this debate. The bill was vetoed by the Governor. In 2020, AB 2093, which largely mirrored AB 1184, was introduced but ultimately withdrawn. The committee comments for both AB 1184 and AB 2093 mentioned the ambiguity in Government Code section 34090. The comments to AB 2093 also noted that some courts have moved in the direction of applying the existing retention statute to emails. That statement, however, was only supported by citation to a single stipulated order out of San Diego that only applied to the parties in that case.[16]

Most recently, in 2022, AB 2370, a bill that would have required state agencies to retain digital records for two years, was introduced. Articles about the legislation noted that "State law already requires that local government do this," but that state agencies have been allowed to delete informal/transitory emails all along.[17] The bill comments referenced the ambiguity around whether the two-year retention requirement for emails applies to local governments, and expressed concern that creating a rule for state agencies would open the door to eventually applying the same to local agencies.[18] Like the previous two attempts, AB 2370 failed.

The fact that the legislature has failed three times to enact clarifying legislation, the noted existence of public entity policies permitting automatic deletion of email, and the lack of case law strongly suggests that email—and likely chats—can be treated as presumptively transitory and purged through an automatic deletion policy. It is critical, however, that any policy clarifies the responsibilities of the custodian to determine whether a message is transitory or should be retained. Helpful metrics to assist local agency staff in making that determination include: (1) whether the message was sent to communicate informal information, as opposed to formal communications; (2) whether the message loses its value once its immediate purpose is served (i.e., once the recipient receives it); (3) whether the information shared is of only short-term value and does not document official decisions, policies, or financial obligations (e.g., messages sent to plan a meeting are likely transitory while the minutes from that meeting are not transitory); and (4) whether or not the message provides substantive evidence of a transaction, explains a decision, or is required for legal or financial audits. It is also important that the policy make clear that staff should not use the chat feature as a storage device and, instead, should preserve any chats determined to a public record. Records created by chat can be stored by exporting them via the app's settings menu (if the option is available) or if necessary, screenshotting the relevant chats and saving the screenshots to an appropriate location for

[16] Cal. Assemb. Comm. on Judiciary, Analysis of AB 2093 (2019-2020 Reg. Sess.), at p. 3 (May 10, 2020).

[17] Los Angeles Times, "Government emails are public records. Deleting them too quickly is not OK" (March 28, 2022), https://www.latimes.com/opinion/story/2022-03-28/editorial-california-public-records-delete-emails.

[18] Cal. Assemb. Floor Analysis, Analysis of AB 2370, (2021-2022 Reg. Sess.), at p. 3 (March 23, 2022).

retention. It is recommended that public entities provide clear guidance to employees on how and where to save chats that are public records to ensure consistent retention practices.[19]

Policies that automatically delete chats (and emails) after a prescribed period of time allow public entities to control costly data proliferation. However, there is a lingering possibility that these policies could be subject to scrutiny and legal challenge under Government Code section 34090.[20]

3. Retention of Metadata

As explained above, metadata accompanies other electronic records and is not typically considered a standalone record. Thus, the metadata of electronic records, like chats and AI Interactions, should be retained whenever the primary record qualifies for retention. Public entities should work through their IT departments to ensure proper procedures for the preservation of metadata, as there is always a risk that metadata can deteriorate, be lost, or destroyed unintentionally, such as when converting file formats or transferring files between different operating systems.

III. Conducting the Exemption Analysis

Once a public record has been created and is in possession of the public entity, it is subject to potential disclosure under the CPRA unless one of the CPRA's several exemptions apply to support withholding or redacting the document. This section will address guidance for the exemption analysis of AI Interactions, chats, and metadata that are public records. It also discusses the risk of waiving a privilege or exemption when using these technologies.

A. CPRA Exemptions in the Context of AI Interactions

1. Considerations for the Exemption Analysis

AI Interactions that relate to a public entity's business likely qualify as public records. However, the nature of generative AI apps and assistants as brainstorming tools creates unique questions regarding the applicability of established CPRA exemptions. California courts have yet to address this question, but based on statutes and case law, the most likely applicable exemption is the public interest exemption (also known as the "catchall" or "balancing test" exemption).

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[19] Public officials should apply any retention policy for chats to messages exchanged on personal devices or accounts if the messages relate to public entity business. If officials use apps with automatic message deletion, then they should opt out of automatic deletion settings or actively preserve public business-related messages before they are deleted.

[20] *See* 2015-2016 Alameda County Grand Jury Final Report*, The Public's Right to Know: Electronic Records Retention and Access* (Grand Jury found automatic email purge after 30-60 days to be an impediment to efficiency and transparency and encouraged cities in Alameda County to ensure email preservation for at least two years).

This "catchall" provision does not apply to any specific category of records, but instead allows agencies to justify withholding any record by demonstrating that on the facts of a particular case, the public interest in nondisclosure clearly outweighs the public interest in disclosure (i.e., a balancing test).[21] This exemption is often invoked in the context of protecting private information, contract negotiations, or where extensive redactions make the remaining information serve little value to potential readers. To the extent that a public entity uses a closed, enterprise AI system[22], records generated by AI tools that are a part of the closed system and which contain confidential information can be redacted in accordance with the public interest exemption. However, privacy-based redactions are unlikely to arise in the context of public, non-enterprise AI tools (i.e., open system tools like Claude or ChatGPT which train off of interactions with all users)

– none of which are likely to arise in the context of public, non-enterprise AI tools (i.e., open system tools like Claude which train off of interactions with all users) where inputting private information should be avoided. While the general public interest exemption may lend itself to creative arguments for nondisclosure given its flexibility, any decision to withhold AI records on this ground must be supported with a clear explanation as to weight the balancing of the interests favors nondisclosure.where inputting private information should be avoided. While the general public interest exemption may lend itself to creative arguments for nondisclosure given its flexibility, any decision to withhold AI records on this ground must be supported with a clear explanation as to weight the balancing of the interests favors nondisclosure.

However, in addition to the general balancing test, there are several specific manifestations of the public interest exemption that might apply to AI Interactions.[23] The iterations of this exemption that are most likely to apply in the AI context are the deliberative process exemption and drafts exemptions, which are discussed below. Exemptions which relate to the privacy of information itself (rather than the privacy of a process or exchange) are less

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[21] Gov. Code, § 7922.000; *Long Beach Police Officers Assn. v. City of Long Beach* (2014) 59 Cal.4th 59, 67.

[22] An enterprise closed AI system is a proprietary AI platform designed for, and deployed within, an organization and which restricts access to its underlying models, training data, and codebase. Unlike public AI tools (such as public ChatGPT), closed systems ensure that organization data, proprietary information, and user queries never leave the organization's secure, firewalled environment, providing security and confidentiality.

[23] The nature of the record and surrounding circumstances guide the invocation of the public interest exemption. As such, the exemption is used in a variety of contexts and there have been specific outgrowths of the exemption both in statute (e.g., drafts under Gov. Code, § 7927.500) and in caselaw (e.g., deliberative process under *Times Mirror Company v. Superior Court* (1991) 53 Cal.3d 1325) which address specific types of records while still ultimately requiring the balancing test analysis to properly invoke the exemption for any particular record.

likely to apply to AI records because inputting private information into an AI program itself arguably exposes that information to the public, depending on the AI tool.

(a) Deliberative Process Exemption

The deliberative process privilege can be invoked to withhold records from disclosure in response to PRA requests in order to protect "frank discussion of legal or policy matters" where disclosure could greatly hamper governmental efficiency.[24] Specifically, "predecisional" documents that are generated before the adoption of a policy or decision are the type of document typically protected by deliberative process.[25] Conversely, communications "made after the decision and designed to explain it" are not privileged.[26] Further, purely factual and investigative information will generally not be protected as part of the deliberative process unless "actually related to the process by which policies are formulated" or "inextricably intertwined" with "policy-making processes."[27] Given the focus on protecting the decision-making process, the deliberative process exemption is most often applicable to protect predecisional discussions of an entity's high level decision-makers, such as councilmembers, managers, and department heads. Overall, the key question in every case is "whether the disclosure of materials would expose an agency's decision making process in such a way as to discourage candid discussion within the agency and thereby undermine the agency's ability to perform its functions."[28] However, even if disclosure may impact the decision making process, if the impact is minimal, then disclosure may be still be required if it is justified by the public's interest in receiving the information at issue.[29]

The purpose and scope of the deliberative process exemption make it appear a worthy candidate for AI Interactions when they are used to develop a policy or help the public agency come to a decision. On one hand, AI Interactions can be viewed as a reflection of a public employee's deliberative process, albeit through communication with a computer assistant rather than another employee. The release of employee AI Interactions could thus arguably impede an employee's willingness to use these tools, to the detriment of efficiency. On the other hand, the lack of person-to-person interaction involved with AI Interactions raises the potential that courts will not view such records as worthy of the same protections as candid discussions among employees when deciding important policy matters and/or determine that the public interest in disclosure outweighs the interest in non-disclosure. Indeed, the deliberative process exemption was developed to safeguard free *discussion*, so expanding the exemption to apply to AI Interactions would involve the novel argument that candid deliberation worthy of protection can

[24] *Times Mirror Company v. Superior Court* (1991) 53 Cal.3d 1325, 1340.

[25] *Id*. at 1341.

[26] *Id*.

[27] *Id*. at 1342.

[28] *Id*. (internal citation omitted.)

[29] *See State v. Superior Court of Los Angeles County* (2024) 101 Cal.App.5th at 235.

occur between one person and an AI tool, not just between decisionmakers. The unknown future of AI and its implementation in public entity operations may ultimately guide how courts decide to apply the deliberative process privilege to AI Interactions,[30] but until then, the scope of the CPRA and competing arguments for application of the deliberative process exemption suggest that public entities should be sparing with their invocation of the exemption for AI records. If it is invoked at all, public entities should have well-articulated grounds for why the entity's functions would be harmed by release of such a deliberative record and understand that the decision may be subject to legal challenge.

(b) Preliminary Drafts Exemption

The CPRA also exempts from disclosure "[p]reliminary drafts, notes, or interagency or intra-agency memorandums that are not retained by the public agency in the ordinary course of business, if the public interest in withholding those records clearly outweighs the public interest in disclosure."[31] This "drafts" exemption extends some protection from public scrutiny for writings which relate to pending actions or decisions. To qualify for the "drafts" exemption, the record must be a preliminary draft, note, or memorandum; it must not be retained in the ordinary course of business; and the public interest in withholding the record must clearly outweigh the public interest in disclosure.[32]

AI Interactions that relate to, or constitute a part of, a preliminary draft may qualify for the drafts exemption. Like the deliberative process exemption, some may argue that AI Interactions do not implicate freedom of expression concerns sufficient to warrant invocation of the drafts exemption. However, the drafts exemption may be more appropriate and cause less transparency concerns than other exemptions because preliminary drafts, even those generated by AI, are eventually released as final versions. However, there is also an argument that the public has an interest in the information underlying public documents, particularly when that information is derived from AI assistants which can hallucinate, contain biases, or provide incomplete or untrustworthy information. One way to address this public interest while still preserving the ability to invoke the drafts exemption is to include citations in public documents that make clear when AI was used in the creation of a document (as discussed in Section II(B)(1) above). This way, the use of AI is not a secret, the public can scrutinize the document, and the public entity will have greater incentive to verify the information before releasing it. Thus, it is recommended that public entities include a statement in documents that were created with AI

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[30] Indeed, courts may ask whether we have reached a point that AI is necessary to the deliberative process, such that deprival of a 'private audience' with an AI assistant would genuinely undermine public entity operations. Or, courts could favor the opposing position that decision-making occurred without AI before and thus allowing public insight into public entity AI Interactions does nothing to interrupt the true avenues for deliberation.

[31] Gov. Code, § 7927.500.

[32] *Citizens for a Better Environment v. Department of Food and Agriculture* (1985) 171 Cal.App.3d 704, 711–712; Gov. Code, § 7927.500.

assistance. Additionally, any use of the drafts exemption should be based on well-articulated reasons that serve the goals of protecting the drafting process.

While there are arguments which may support applying exemptions to AI Interactions, it is important to reiterate that there is no express authority on the issue. Thus, it is recommended that AI-use policies be implemented, which provide guidance about appropriate uses of AI when conducting public entity work and discourage the input of any information that is not suitable for public release into public, open universe AI tools.

2. Managing the Risk of Privilege Waiver

Because AI assistants often learn from interactions and data from a vast number of users, some AI technologies are not contained to "closed universes" and thus do not guarantee that the information inputted will remain private. Indeed, AI applications often share data and the prevailing guidance is to avoid inputting any private or sensitive information into an AI operating in an "open universe", even due to the risk of data breaches alone.[33] Public entities often deal with private information, including information about building and technology security, private consumer information, and confidential material submitted by vendors and constituents. **Accordingly, public employees should never input private, sensitive, confidential, or privileged information into an AI assistant that is not a part of a secure, closed universe.**

For those entities which have licensed with technology vendors to establish AI integrations which operate in a secure, closed and private system, there is a much lower risk of breaches which could release private information. With closed system AI tools, entities should coordinate with Information Technology staff and consultants to ensure that the technology is set up according to best practices and contains adequate security measures. Then, those entities should establish clear policies for when certain private or confidential information may be used in the enterprise AI system.

Additionally, AI assistants that are not a part of closed systems pose the additional risk that public employees may inadvertently waive a privilege, including the attorney-client privilege, by uploading confidential documents or information into the AI. This is in part because AI assistants are not presumed to be a private space – on the contrary, many AI models collect and learn from any information they receive. Thus, giving an AI assistant private information could be viewed as akin to sending private information to a third party, reducing a public entity's ability to claim a legitimate privacy interest in the material. Indeed, a federal court in New York recently held that a criminal defendant's interactions with a public AI platform (Claude) were not

[33] *See* Stanford University Human-Centered Artificial Intelligence, "Be Careful What You Tell Your AI Chatbot" (Oct. 15, 2025), https://hai.stanford.edu/news/be-careful-what-you-tell-your-ai-chatbot; City of Long Beach Generative AI Guidance, https://longbeach.gov/globalassets/smart-city/media-library/documents/generative-ai-guidance-v1-1, p. 2.

protected by the attorney-client privilege or the work-product doctrine.[34] This risk is particularly relevant now, as courts have yet to weigh in on whether and when AI Interactions may be exempt.

Some organizations have started to use AI notetaking technology to transcribe oral conversations during meetings. If an AI transcription is used for a meeting between public employees, the record will likely qualify as a public record and withholding the entire transcript could be difficult to justify in light of transparency considerations under the CPRA. Further, if a third-party AI application is used, it may constitute a waiver of privilege. Thus, AI transcription technologies should be used cautiously, if at all. Indeed, meeting conversations can include stray comments, speculation, or even sensitive information that will require redaction. Further, transcripts generated by AI can misunderstand context or fail to accurately reflect the tone of statements, including sarcastic or joking comments. Those statements may not qualify for redaction on their own, and run the risk of creating false impressions about what was discussed in a meeting. Thus, notetaking technologies should generally be avoided when public employees are engaging in predecisional deliberations or discussing privileged or sensitive information. Transcription technologies are likely more appropriate for meetings with constituents or third-parties.If a public entity chooses to allow the use of AI notetaking, it is recommended that a policy be established which requires that a human verify and revise the transcription as appropriate to accurately reflect the discussion.[35]

B. CPRA Exemptions in the Context of Chat Records

Chat records are akin to email records in terms of the exemption analysis. That is, emails and chats generally have the potential to qualify for a variety of different exemptions including deliberative process (e.g., predecisional discussions of a new policy), drafts (e.g., exchange of draft language of a press release), medical and personnel records (e.g., human resources emails about private personnel records or information), attorney-client privilege (e.g., city attorney advice), and general privacy (e.g., contact information and other private data about constituents). Thus, chat records should be reviewed for potential exemptions depending on their context and the type of information exchanged.

Importantly, chats or text messages often involve a longer exchange which may contain both exempt and non-exempt information. In those instances, the record should be released with

[34] *United States v. Heppner*, 25-cr-00503-JSR (S.D.N.Y.)

[35] Companies have even started to develop AI assistants which purposely include obviously false or obscure information in automated notes or reports that the human reviewing must remove during the verification process, adding a layer of accuracy and assurance that the document has been reviewed by a human. (*See* Philip Lukens, "Automated report writing: Benefits and risks for police" (March 1, 2025), https://www.police1.com/artificial-intelligence/automated-report-writing-benefits-and-risks-for-police.) As technologies develop, these types of verification systems will help entities capitalize on the efficiency of AI tools while ensuring continued human oversight.

redaction of the exempt information whenever possible, rather than nondisclosure of the entire record.[36] Chats and texts also often contain both responsive and nonresponsive information within the same thread. In that scenario, given the CPRA's preference for transparency, it is generally recommended to produce both the responsive and nonresponsive information unless the nonresponsive information is itself exempt from disclosure because redactions are only justified where a valid exemption applies.

IV. Managing the Benefits of Technology Against the Drawbacks

A. Potential Uses for AI in Processing Public Records Requests

In a recent survey by the National Archives and Records Administration, almost one-fifth (18.6 percent) of respondent agencies report using AI and/or machine learning in processing Freedom of Information Act ("FOIA") requests, which is the federal public records law.[37] The survey report sums up the AI issue for public records by noting that it is important for agencies to consider AI technologies that will reduce processing times while reiterating the importance of human input when making exemption decisions.[38] In recognition of the potential efficiency savings, some federal agencies have tested machine-learning models and algorithms to search extensive document repositories which are only growing with the proliferation of electronic documents.[39] Other tools have also emerged, which not only help with searching for responsive documents, but can also identify private information and redact it or even flag documents which appear to contain "deliberations."[40] Additionally, AI integrations on public websites are being

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[36] A public entity has a duty to provide such a record to the requester in redacted form if the nonexempt information is "reasonably segregable" from what is exempt, unless the burden of redacting the record becomes too great. (Gov. Code, § 7922.525, subd. (b); *American Civil Liberties Union Foundation v. Deukmejian* (1982) 32 Cal.3d 440, 452-454, 458; *Becerra v. Superior Court* (2020) 44 Cal.App.5th 897, 929–934.

[37] National Archives and Records Administration, *Assessing Freedom of Information Act Compliance through the National Archives and Records Administration's 2024 Records Management Self-Assessment*, https://www.archives.gov/files/ogis/documents/ogis-2024-rmsa-final-9.25.2025.pdf.

[38] *Id*.

[39] NBC News, "Some U.S. government agencies are testing out AI to help fulfill public records requests" (Aug. 1, 2023), https://www.nbcnews.com/news/us-news/federal-agencies-testing-ai-foia-concerns-rcna97313.

[40] *See, e.g.*, FOIA Assistant ("Key to the FOIA Assistant's capabilities is highlighting *deliberative language*—that is, language containing multiple linguistic features such as suggestion, opinion, emotion, supposition, and conjecture—in PDF documents. Since deliberative language frequently points toward potential exemptions, this instant identification helps government analysts choose whether to redact the suggestion."); Everlaw ("Use

developed to help requesters draft requests or quickly locate documents, which are already available online so that the requester does not need to submit a request at all.[41] While many of these tools appear to be in development, they are constantly emerging and more tools are being introduced to the market every day. These technologies will benefit agencies and the public if they effectively create efficiencies in the era of electronic public records.

However, of course, AI itself is new and developing, which means that there are legitimate concerns to consider when deciding whether to purchase AI tools. As government watchdogs have pointed out, AI tools run the risk of creating complacency, inconsistency in decision-making, and inadvertent redactions or disclosures when used without consistent standards and enforcement of those standards.[42] Thus, while public agencies should consider implementing AI technologies to assist with processing CPRA requests, those agencies must be prepared to work internally and with vendors to create standards and assurances that AI work product will be reviewed by a human, particularly when it comes to invoking exemptions.

B. Managing the Creation and Production of Public Records

While AI technologies have great potential for improving the process of responding to CPRA requests, AI and chat applications also contribute to the number of public records that may need to be searched, reviewed, and disclosed. Thus, internal policies are critical for managing the creation of public records, the volume of data to be retained, and the efficient processing of requests for records housed in personal devices of public officials.

1. Internal Policies

To manage both the number of public records and content of those records, it is crucial that public entities create policies to guide the appropriate use of AI and chat application technologies. There are several key issues which should be addressed in these policies:

- **First**, internal policies should provide approved uses for such technologies, including the appropriate use of AI (e.g., drafting, translating, etc.) and messaging applications (e.g., transitory matters only).

- **Second**, policies should address what types of information should not be inserted when using technology, including a clear prohibition on uploading private information to an AI tool that is not a part of the entity's closed system, an

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Everlaw[AI]'s Coding Suggestions to quickly organize documents based on relevance, privilege, or custom coding instructions.")

[41] NBC News, "Some U.S. government agencies are testing out AI to help fulfill public records requests" (Aug. 1, 2023), https://www.nbcnews.com/news/us-news/federal-agencies-testing-ai-foia-concerns-rcna97313.

[42] *Id*.

explanation of what information may be entered into a closed system AI tool, and guidance on avoiding the reference of private information in chats, particularly those with external participants.

- **Third**, guidance on when and how to save important (i.e., non-transitory) AI Interactions and chats should be included in policies to ensure compliance with retention schedules and implement consistent record-keeping procedures.

- **Fourth**, policies should recommend or require that public entity business only be discussed on entity-specific accounts to avoid commingling of personal and public business, and reduce the need to search personal accounts when responding to records requests. Additionally, to the extent that public officials may inherently receive messages related to public business on their personal accounts, policies should give guidance on how to save and search for public records on personal devices or accounts. (*See* Section IV(B)(2) below.)

- **Fifth**, policies should address when and how to indicate that AI was used to assist with creating a record to ensure internal accountability over content and transparency with the use of assistive technologies in public operations.

- **Sixth**, policies should provide specific guidance on opting out of data collection on approved applications to reduce the risk of inadvertent exposure of sensitive information.

There may be further issues that should be addressed in internal policies, depending on the technologies used by a public entity, the entity's goals and preferences, and any limitations imposed by local laws or regulations.

2. Personal Device Searches

AI assistants and chat applications have the added benefit of being widely available to the public. This means that public officials or employees may use private, non-official accounts for services like Signal or ChatGPT. As noted above, if public officials utilize such applications for public business, *even if on a private device or account*, the resulting records remain public and must be disclosed unless they are exempt.[43] The ease and efficiency of online tools, including social media, means that officials are increasingly using private accounts, even if just to receive unsolicited messages from constituents or colleagues. Accordingly, the need to search personal devices and accounts in order to comply with the CPRA is ever-growing. To facilitate efficient personal device searches and ensure demonstrable compliance with the CPRA, the following procedures are recommended:

[43] *City of San Jose v. Superior Court, supra,* 2 Cal.5th at 625-29.

- Inform all public officials early and often that any record relating to public business is subject to disclosure, even if contained in a personal device or account;

- Recommend that public officials only send correspondence regarding public business on public-facing accounts, reducing the potential responsive documents on personal accounts;

- Provide step-by-step instructions for searching for and extracting social media messages, chat messages, AI Interactions, and personal emails that constitute public records;

- Require that public officials conduct a search of personal devices/accounts whenever implicated by a request and require that the officials sign an affidavit attesting to the search and whether responsive documents were located[44]; and

- Create enforceability mechanisms if possible to hold officials accountable for completing the searches. Such mechanisms could include a Council adopted policy that: (1)requires public officials to conduct thorough searches and to complete and affidavit confirming that was done; and (2) permits the public entity to inform the requester of the failure of any public official to comply with that requirement after a reasonable effort to obtain compliance.

V. Key Takeaways

AI technology, chat platforms, and other technological tools are becoming increasingly important for public entities to aid in efficient operation. At the same time, these technologies pose clear consequences and concerns in light of their novelty, impact on data storage, and potential security risks. Overall, public entities should keep an open mind to technologies which can assist them with processing records requests or otherwise, but should concurrently work to develop internal policies and protocols which reign in the creation of public records, educate employees on the benefits and pitfalls of such tools, and prevent ill-advised used of these technologies. The primary considerations for the different record types discussed in this paper are summarized in the chart below:

Record Type	Public record?	Retention necessary?	Possible Exemptions?	Policy Considerations
AI Interactions	Presumed public if it relates to entity business. Transcriptions of	Standard 2 year retention applies if record relates substantively to public business and	Deliberative process: may be difficult to argue given lack of	Comprehensive policies with explanation of appropriate use-cases, data collection

[44] The affidavit procedure has been expressly approved of by the California Supreme Court. (*City of San Jose v. Superior Court, supra,* 2 Cal.5th at *628.*)

	some meetings are likely public. Interactions for the purpose of obtaining simple information may not constitute a public record (i.e., asking AI to solve a math problem or give computer instructions)	has some long-term value. If record relates to a specific record category, retain for corresponding period. Simple exchanges that do not have long-term value or relevance to public entity business may be eligible for destruction prior to 2 years.*	human deliberation. Drafts: may apply when AI exchange relates to or is part of a preliminary draft; citations to AI in final draft are recommended. Balancing test: case-specific and only applies if circumstances demonstrate a clear interest in nondisclosure.	settings, saving important records, and citing to AI are recommended. Policies should define when AI notetaking is permissible and require human review. Policies should specify types of information that should never be input into open system AI tools versus closed system AI tools, including personal info, security info, and privileged content.
Chats	Presumed public if it relates to entity's business. Informal messages that do not substantively relate to public business may not constitute public records (e.g., city employee wishing another a happy birthday)	Standard 2-year retention applies if record relates substantively to public business and has long-term value. If record relates to a specific record category, retain for corresponding period. Transitory exchanges may be eligible for destruction prior to 2 years.*	Many exemptions could potentially apply based on purpose, content,) audience, and public interest considerations. Should be reviewed similar to emails; redactions may often be necessary to segregate exempt from non-exempt and responsive from non-responsive material.	Policies should encourage minimal and informal-only use of chats, using public accounts only for entity business, and minimizing exchange of sensitive information. Specific policies and guidance for chat records contained on private accounts of officials are recommended.

Metadata	Presumed public if the primary document associated with the metadata relates to entity business. If the primary document is not a public record, neither is its metadata.	Subject to the same retention period as the primary document.	Subject to the same exemption as the primary document. May be specifically exempt even if primary document is not where disclosure would expose private information or create a security risk, which is not outweighed by interest in disclosure.	CPRA policies should include guidance on when metadata should be withheld to protect privacy and/or security. Internal policies should also address the technological processes for ensuring adequate retention of vital metadata.
***Retention periods of less than 2 years may be subject to legal challenge. (See Section II(B).)**				

LEAGUE OF
CALIFORNIA
CITIES

2026 General Municipal Litigation Update

GENERAL MUNICIPAL LITIGATION UPDATE

2026 CITY ATTORNEYS SPRING CONFERENCE
LEAGUE OF CALIFORNIA CITIES

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General Municipal Litigation Update

I. *Airport Business Center v. City of Santa Rosa*, 116 Cal.App.5th 501 (2025)

Holding: A city determination, supported by substantial evidence and written findings, that a city-owned asset constitutes surplus land under the Surplus Land Act does not require the city to find that the land is of no use to the public.

Facts/Background: In December 2022, the City of San Rosa adopted a resolution declaring that a property the City was using as a parking garage constituted surplus land under the Surplus Land Act ("the Act"). The Act allows the disposition of local government land under a uniform approach when it is no longer necessary for the agency's use. The Act also distinguishes surplus land from exempt surplus land; the latter is not subject to the same dispositional requirements. Before a local agency may dispose of surplus government land, the Act requires the agency to issue a Notice of Availability to affordable housing developers, among others, and negotiate in good faith with interested entities.

As part of its process, the City commissioned a study of city-owned downtown parking facilities to determine the regularity of public use, with the aim of identifying public land suitable for future housing development. The study revealed the parking garage at issue, Garage 5, was the smallest of the facilities surveyed and was in worse condition than other parking garages studied, requiring approximately $3 million in necessary repairs. Following the study, the City Council held a public meeting to review the City's potential surplus downtown assets, which resulted in a City Council directive to make Garage 5 available for development as affordable housing pursuant to the Surplus Land Act. Additionally, staff mentioned that because Garage 5 did not qualify as exempt surplus land under the statutory definition, the City must adhere to the Act's process for disposing of surplus land.

The City Council, at a regular noticed meeting, discussed the matter and considered adopting a resolution declaring Garage 5 as nonexempt surplus land, subject to retaining some public parking on the property. City staff provided analyses supporting the resolution, noting that the City had no additional public use for the property beyond ongoing public parking and that the property's beneficial use could be optimized if the City disposed of it, conditioned on retaining 75 public parking spaces.

After local business owners, including the Appellant, objected, the Council did not take formal action. Instead, it held additional study sessions and commissioned a study focused on the utilization of the City's downtown parking facilities before adopting the resolution. The commissioned study revealed that only 30 percent of downtown public parking spaces were being used. Even after accounting for parking demand levels before the COVID-19 pandemic, roughly 2,585 parking spaces in the downtown area would remain unused. If the City were to sell three parking facilities, including Garage 5, the remaining parking facilities could accommodate the parking demand.

After the resolution was adopted, the appellant challenged the City's decision, arguing the City failed to make the requisite findings under the Act to declare Garage 5 surplus land by failing to consider: (1) that prior to the COVID-19 pandemic, Garage 5 had the highest parking usage rate; (2) the City relied on short-term data as evidence; and (3) the Resolution's requirement to provide 75 public parking spaces on the property "on a go-forward basis" demonstrates that Garage 5 is not surplus property. However, the court found that the extensive administrative record showed the City's actions were not arbitrary or capricious; the decision to declare Garage 5 surplus property was not without evidentiary support or procedurally unfair; and appellant did not show the City had failed to comply with the Act.

Analysis: The appellate court affirmed the lower court's decision and concluded the City of Santa Rosa did not abuse its authority under the Surplus Land Act by designating a city-owned public parking garage as surplus land, despite the fact that the property still functioned as a parking facility and the City required the retention of some parking spaces for future developments.

The court rejected the argument that land currently used for a public purpose cannot be designated as surplus land under the Act. The statutory requirement under the Act that requires a local agency to take formal action declaring that the land is "not necessary for the agency's use" focuses on whether the property is essential to an agency's use, not on whether the property serves any public benefit.

In this case, an ongoing general need for public parking in the City's downtown area did not preclude the City from determining that a specific parking facility was unnecessary for the agency's use, particularly when other parking facilities are able to accommodate current and future demand. The court emphasized that the Legislature does not specify when property is considered "necessary for the agency's use," thereby allowing agencies to make their own assessments of current needs based on individualized factors.

The court also noted the City's 12,000-page administrative record contained substantial evidence supporting the City's determination that the property constituted surplus land. For example, the City conducted comprehensive studies on parking usage, and the data collected indicated that City parking facilities were underused, the Garage 5 structure required significant repairs, and other parking facilities could satisfy public demand if Garage 5 were sold.

Additionally, the court rejected the argument that the City failed to meet the written findings requirement of the Act by only providing a single substantive finding—that Garage 5 is "not necessary for the City's use"— in the City's resolution. In its analysis, the court indicated that the statute does not elaborate on what must be set forth in such written findings. However, it is reasonably expected that these findings will provide a factual predicate for a declaration that the property is, in this case, surplus land. The finding in the City's resolution, taking into account the recitals and other contents in support of the finding, meets this requirement.

Impact: The decision in this case affirms local governments' autonomy to evaluate and assess the unique factors relevant to their jurisdictions for purposes of determining whether a property is "necessary for the agency's use" when considering disposing of land under the Surplus Land Act, and that an ongoing public use does not preclude finding a property to be surplus land.

II. *Alameda County Taxpayers' Association Inc. v. City of Oakland* 118 Cal.App.5th 1264 (2026)

Holding: Provisions of Oakland Measure Y that identified the Conservation Society of California as the current "Zoo Operator" and assigned the "Zoo Operator" functions, duties, and financial obligations tied to a new parcel tax violated Article II, Section 12 of the California Constitution, which bars any initiative from naming or identifying a private corporation to perform any function or hold any power or duty. The three references to the Conservation Society were severable from the remainder of Measure Y, which remained valid and enforceable. Measure Y required only a simple majority to pass because it was a bona fide citizens' initiative, not a local government measure subject to the two-thirds supermajority requirements of Propositions 13 and 218 and Government Code section 50077.

Facts and Procedure: The Oakland Zoo is owned by the City of Oakland and managed by the Conservation Society of California, a nonprofit corporation, under a management agreement expiring in 2039. In November 2022, Oakland voters considered Measure Y, a citizens' initiative proposing a $68/year parcel tax on single-family properties (with varying amounts for other property types) for 20 years to raise roughly $12 million annually for zoo operations. The measure defined "Zoo Operator" and expressly stated that the Conservation Society "is currently the Zoo Operator pursuant to a management agreement with the City of Oakland." A companion definition of "Oakland Zoo" similarly identified the zoo as "currently managed by the Conservation Society of California, a California nonprofit corporation." A third provision addressed potential future changes in management and again named the Conservation Society by reference.

Under the measure, parcel tax proceeds were to be deposited into a special fund and distributed to the Zoo Operator for authorized purposes. As a condition of receiving those funds, the Zoo Operator was required to retain an independent auditor to prepare an annual report, maintain the zoo's accreditation, and indemnify the City against claims arising from administration of the tax. Measure Y received 63.1 percent of the vote, and the Oakland City Council certified its passage.

In February 2023, the Alameda County Taxpayers' Association, Inc. and Marcus Crawley filed a reverse validation action seeking to invalidate Measure Y on two grounds: (1) the measure violated Article II, Section 12 of the California Constitution by naming the Conservation Society and conferring functions, powers, and duties upon it; and (2) the measure required a two-thirds supermajority vote under Propositions 13 and 218 and Government Code section 50077. The trial court rejected both claims, finding: (1) no

Article II, Section 12 violation occurred, or, alternatively, any violation was severable; and (2) only a simple majority vote was required. The Association appealed.

Analysis: *Cal. Const. art. II, § 12***:** The court held that Measure Y's provisions naming the Conservation Society as Zoo Operator violated Article II, Section 12 of the California Constitution. The court relied principally on *Pala Band of Mission Indians v. Board of Supervisors*, 54 Cal.App.4th 565 (1997), a case in which an initiative defined "Applicant" as a specific corporation and then imposed duties on that Applicant. The *Pala Band* court found such provisions unconstitutional. The court here applied the same reasoning to reject the City's argument that Measure Y merely acknowledged the Conservation Society's preexisting contractual role. Measure Y went further: it independently assigned the named entity new statutory obligations tied to the parcel tax. The court distinguished *County of Alameda v. Alameda County Taxpayers' Assn.*, 99 Cal.App.5th 226 (2024), where a hospital was named in an initiative's findings, but not assigned any function, power, or duty. That passive role did not run afoul of Article II, Section 12. Here, by contrast, the Zoo Operator was expressly identified as the Conservation Society and bore concrete duties as a condition of receiving tax proceeds.

Severability: Because Measure Y contained an express severability clause, the court applied a presumption in favor of severance and evaluated the three-part test of grammatical, functional, and volitional separability. All three were satisfied. The references to the Conservation Society appeared in discrete sentences or clauses that remained coherent after removal. Deleting those references would not affect the collection of the parcel tax, the administration of the Zoo Fund, or the obligations of whoever holds the Zoo Operator role. Notably, the ballot arguments for and against Measure Y made no mention of the Conservation Society specifically (opponents criticized the involvement of a "private corporation" generically), which confirmed that the Conservation Society's identity was not material to a reasonable voter's decision. After severance, Measure Y continued to operate as intended, with functions and duties assigned to the generic role of "Zoo Operator" rather than to any named entity.

Supermajority Requirement: Under *California Cannabis Coalition v. City of Upland*, 3 Cal.5th 924 (2017) and a line of appellate authority, the two-thirds vote requirements of Propositions 13 and 218 constrain only local legislative bodies, not the electorate's initiative power. The court rejected the Association's argument that alleged government involvement in the Measure Y campaign converted it into a government measure. In doing so, the court agreed with *County of Alameda* (2024) and *Alliance San Diego v. California Taxpayers Action Network (Alliance II)*, 114 Cal.App.5th 1121 (2025) that *Rider v. County of San Diego*, 1 Cal.4th 1 (1991) (which addressed whether an agency qualified as a "special district" under Proposition 13) has no application in the initiative context. Under *Alliance II*, once the requisite procedural steps for a citizens' initiative are satisfied (i.e., notice, signature-gathering, ballot placement, and majority approval), the measure qualifies as a bona fide citizens' initiative and nothing more is required. The court also rejected the argument that Measure Y's cross-reference to Government Code section 50077.5 (a reverse validation procedure statute) imported section 50077's two-thirds enactment threshold. Measure Y expressly stated it would take effect upon approval by a simple majority, and that plain statement controlled.

Impact: This decision has three main implications for cities.

First, on drafting: initiatives that channel funds through a private operator or contractor should refer only to the functional role (e.g., "Zoo Operator") and not identify any occupant of that role by name. Assigning duties to a generic role is permissible, but naming a specific corporation that fills it is not, at least when those duties are also tied to the initiative. Where a named contractor is already in place, the drafting solution is straightforward: describe the role, not the entity.

Second, on severability: a well-drafted severability clause is always an essential safeguard. The court's willingness to sever the three offending references preserved the entirety of Measure Y's taxing and spending mechanism, avoiding the need to re-run the measure.

Third, on the supermajority question: this decision, together with *Alliance II* and *County of Alameda*, firmly settles that government support for a citizens' initiative, even significant involvement, does not trigger a two-thirds vote requirement under Propositions 13 and 218 and Government Code section 50077.

III. *Alliance San Diego v. California Taxpayers Action Network et al.*, 114 Cal.App.5th 1121 (2025)

Holding: The Court of Appeal upheld Measure C, finding that the city's validation action was proper, that the city's bond authorizations were valid under the Special Fund Doctrine and not subject to constitutional debt limitations, and that the measure qualified as a bona fide citizens' initiative subject to a simple majority vote.

Facts/Background: Consistent with recent case law, including *County of Alameda v. Alameda County Taxpayers' Assn., Inc.* (2024) 99 Cal.App.5th 226, courts have held that voter initiatives imposing special purpose taxes are subject to a simple majority vote because the two-thirds supermajority requirements of Propositions 13 and 218 apply only to special purpose taxes imposed by local governments.

In the City of San Diego, proponents qualified a citizens' initiative, Measure C, for the March 2020 ballot. Measure C increased the City's transient occupancy tax and dedicated the additional revenue to special purposes, including homelessness programs, street repairs, and convention center improvements. The measure also authorized the City to issue bonds to be repaid from the additional tax revenues. Measure C passed with approximately 65 percent of the vote. The City Council subsequently adopted resolutions declaring the measure approved and authorizing the issuance and sale of bonds. A taxpayer organization then filed suit challenging the validity of the measure and the related bond authorizations, including on the ground that the measure required a two-thirds vote to pass.

Analysis: In concluding that Measure C was valid, the Court of Appeal made the following holdings:

First, the Court held that the trial court had subject matter jurisdiction over the City's validation action. The Court rejected the argument that validation actions apply only to already issued bonds because the City's resolutions authorizing and approving the issuance and sale of bonds were sufficiently connected to government indebtedness, as they were necessary steps in the bond finance process, and the project financing depended on them. The Court further explained that bonds are deemed to exist upon authorization under the state's Code of Civil Procedure § 864. Accordingly, the preliminary bond authorizations fell within the scope of the validation statutes, and jurisdiction was proper.

Second, the Court found the case was ripe under a two-pronged test: whether the dispute was sufficiently concrete to warrant declaratory relief, and whether delaying judicial review would cause hardship to the parties. The first prong was satisfied because the City Council's resolutions certifying the election results and authorizing and approving the bonds presented a concrete set of facts suitable for judicial review. The second prong was also satisfied because, absent judicial intervention, the City might be unable to proceed with issuing the bonds or do so at reasonable interest rates, as the risk of future litigation could deter lenders and create hardship. Therefore, the case was ripe for adjudication.

Third, the Court found that, although cities are generally subject to the constitutional debt limitation set forth in Article XVI, section 18 of the California Constitution, including the requirement of a two-thirds vote to incur debt, that requirement did not apply here under the Special Fund Doctrine, which provides that obligations payable solely from a specific fund do not constitute debt within the meaning of that provision. Although challengers argued that language permitting the City to "supplement" bond payments with other legally available funds created an implied obligation to use general funds, the Court rejected that interpretation, concluding that, read as a whole, the bond documents limited repayment to Measure C's special tax revenues and did not obligate the City to any other source of funding. Accordingly, the bonds were limited obligations payable from a special fund rather than general obligation bonds, and thus subject only to a majority vote.

Fourth, the Court found that Measure C was a bona fide citizens' initiative and therefore subject only to a simple majority vote. Although challengers argued that involvement by individuals connected to a city-created and affiliated nonprofit corporation, as well as the corporation's formal support of the measure rendered the initiative effectively government-sponsored, the Court rejected that argument, concluding that such involvement did not amount to substantial control, which would have subjected the measure to a two-thirds vote requirement. The Court emphasized that the proponents acted in their individual capacities, that the corporation's role was limited to expressing support, and that the initiative was proposed, circulated, and qualified for the ballot through voter petition.

Fifth, the Court found that the trial court did not abuse its discretion by excluding newspaper articles offered as hearsay evidence purportedly showing that government-affiliated individuals sponsored Measure C. Although it was argued that the articles fell

within recognized hearsay exceptions, the Court rejected those arguments, finding that the individuals were not parties or authorized representatives and that the asserted exceptions were either inapplicable or forfeited. The Court emphasized that no substantive legal analysis or authority was provided to establish error, which would have been required to demonstrate an abuse of discretion. Absent such a showing, there was no basis for reversal, and the judgment was affirmed.

Impact: *Alliance San Diego* reinforces that cities may rely on the voter initiative process to approve special purpose taxes by a simple majority, even where similar taxes imposed by the city would require a two-thirds vote. It also reinforces that a citizens' initiative will not be treated as a government-sponsored measure absent evidence that the city exercised substantial control over the initiative process, which the challenger failed to establish on the record in this case. This case also confirms that cities may structure bond financings backed by special tax revenues to avoid constitutional debt limitations under the Special Fund Doctrine. Finally, the decision confirms that cities may use validation actions at the bond authorization stage, reducing legal uncertainty and mitigating litigation risk that could affect financing.

IV. *Baird v. Bonta*, 163 F.4th 723 (9th Cir. 2026)

Holding: California's geographic ban on openly carrying loaded or unloaded firearms in densely populated counties is facially unconstitutional under the Second Amendment and Fourteenth Amendment, applying the standard established in *New York State Rifle & Pistol Ass'n v. Bruen* (2022) 597 U.S. 1.

Facts/Background: In *Bruen*, the U.S. Supreme Court established a two-prong standard to evaluate firearm-related regulations. First, the Constitution presumptively protects any regulated conduct that is covered by the plain text of the Second Amendment. Next, the government must demonstrate that a regulation is "consistent with the Nation's historical tradition of firearm regulation." A challenged firearm law may pass constitutional muster if supported by a proper historical analogue.

The appellant Mark Baird is a resident of Siskiyou County and lawful firearm owner. For several years, he sought to obtain a license that would allow him to open-carry throughout the State of California. The practice of openly carrying a loaded or unloaded firearm was outright prohibited in counties with populations greater than 200,000 under California Penal Code sections 25850 and 26350. However, the practice was permitted for firearm owners issued an open-carry license in counties with populations less than 200,000. Baird challenged both the "urban open-carry ban" in populous counties and the "rural licensing scheme."

The district court denied Baird's motion to enjoin the enforcement of these provisions that criminalized open-carry for both his facial and as-applied claims on procedural and substantive grounds. After the Ninth Circuit reversed and remanded the decision with instructions for the lower court to assess all injunctive factors, including the likelihood of

success on the merits of the constitutional claim, the district court dismissed the as-applied challenge of the rural licensing scheme since he had not sued a licensing official or agency, and ruled in favor of the state with respect to the facial challenge of the open-carry ban.

Analysis: The Ninth Circuit was again unpersuaded by the state's historical argument, holding that the prohibition on the issuance of open-carry licenses in populous jurisdictions constituted an effective ban, and was thus invalid under the *Bruen* test.

The panel affirmed the district court's dismissal of the challenge to the rural open-carry licensing scheme, and reversed the decision to dismiss the constitutional challenge to the open-carry ban.

The open-carry ban failed the second prong of the *Bruen* test. The state did not affirmatively prove that the challenged provisions, which regulate constitutionally-protected conduct, were consistent with "the Nation's historical tradition of firearm regulation." In the absence of a distinctly similar historical regulation that banned open or public carry altogether, the court concluded that the challenged provisions violate the Second Amendment as applied to states through the Fourteenth Amendment.

Impact: The key impact of this decision is that agencies may no longer categorically prohibit a person from openly carrying an exposed unloaded or loaded handgun on their person (e.g. visible in a belt holster) in any county, regardless of population density. In addition, agencies may still require firearm owners to apply for open-carry licenses, provided that the licensing criteria is objective and consistent with the *Bruen* standard. Open-carry licensing schemes are not per se unconstitutional, but remain vulnerable to as-applied challenges.

As of April 15, 2026, this decision has been vacated as the Ninth Circuit ordered that this case be reheard en banc.

V. *California Apartment Assn. v. City of Pasadena*, 117 Cal.App.5th 187 (2025)

Holding: Pasadena's voter-approved Measure H is a valid exercise of the local initiative power as a charter amendment and is not an impermissible charter revision. The Measure's requirements governing the composition of the rental housing board do not violate the state constitutional prohibition on property qualifications or the equal protection clauses of the California and United States. However, Measure H's provisions requiring relocation assistance triggered by lawful rent increases and provisions imposing additional procedural requirements on unlawful detainer actions are preempted by state law and thus void.

Facts and Background: In November 2022, Pasadena voters approved Measure H, a charter amendment aimed at rent stabilization and tenant protections. The Measure states that its purpose "is to promote neighborhood and community stability, healthy

housing, and affordability for renters in Pasadena by regulating excessive rent increases and arbitrary evictions to the maximum extent permitted under California law…." (Pasadena Charter art. XVIII § 1801.)

Measure H does several things at once. It caps rent increases for certain pre-1995 multifamily units, it requires just cause for eviction, and it creates an independent Rental Housing Board ("Rental Board").

The Rental Board is composed of eleven members appointed by the City Council, seven of whom must be tenants without a material interest in rental property, and four at-large members who may be any Pasadena residents. The Rental Board has authority to administer and enforce the provisions of Measure H. It is authorized to set allowable rent increases, adjudicate petitions for rent adjustments, establish and maintain a rental registry, promulgate regulations, impose fees, and otherwise implement the measure. Measure H provides that the Rental Board "shall be an integral part of the government of the City, but shall exercise its powers and duties under this Article independent from the City Council, City Manager, and City Attorney…." (Pasadena Charter art. XVIII § 1811(m).)

After Measure H passed, the California Apartment Association and several individual landlords filed a lawsuit. They alleged that Measure H constituted an impermissible charter revision, imposed unconstitutional property qualifications for public office, violated the equal protection clauses of California and the United States, and conflicted with state law. The trial court rejected most of these claims but found limited preemption as to certain notice provisions. Petitioners appealed.

Analysis: The Court of Appeal began by addressing the central question of whether Measure H constitutes an amendment or a revision of the City's Charter. The distinction is significant because the initiative power extends only to amendments. (Cal. Const., art. II, § 8, subd. (a).) Therefore, the Constitution may be amended but not revised by initiative because a constitutional revision requires more formality, discussion, and deliberation than is available through the initiative process.

To answer this question, the court assessed the quantitative and qualitative effects of Measure H on the existing governmental framework.

On the quantitative side, the court found that the number of changes alone was not determinative. Petitioners had leaned heavily on the Supreme Court's decision in *McFadden v. Jordan* (1948) 32 Cal.2d 330 (*McFadden*)), where a proposed amendment was ruled to be an impermissible revision, in part because of the substantial quantity of changes proposed; the initiative there proposed to add 21,000 words to a then-55,000-word Constitution. Petitioners here argued that Measure H added more than 18,000 words to a Charter that previously contained approximately 24,000 words and was therefore akin in scope to *McFadden* and should be struck down as an impermissible revision. The court acknowledged the size of the addition but found that length alone was not determinative, and emphasized that Measure H addressed the single subject of housing. Moreover, Measure H added to the Charter but did not delete or alter preexisting

provisions. Measure H therefore bears little resemblance to the proposed amendment in *McFadden*, where the initiative spanned a "wide and diverse range of subject matters" and would have significantly altered existing constitutional provisions.

On the qualitative side, the court rejected Petitioners' contention that Measure H fundamentally restructured Pasadena's council-manager form of government by transferring core legislative and executive authority to the unelected Rental Board. The court reasoned that although the Rental Board exercises significant authority, that authority is confined to the limited domain of housing matters and does not displace the City Council's general legislative power or the City Manager's administrative power. The Charter already vests power in the City Council "subject to the provisions of this Charter,"(Pasadena Charter art. IV § 409) and Measure H operates within that structure and does not rewrite it.

The court also noted that the delegation of rule-making power to specialized bodies is not unique in municipal governance. Pasadena's own municipal code extends such rule and regulatory power to, among others, the finance director, the retirement board, and the tax administrator. The Rental Board is not an outlier simply because it has meaningful responsibilities. Further, Measure H authorizes judicial review of the Rental Board's actions and acknowledges that courts may invalidate it provisions.

The court also held that the Board's budget authority, compensation structure, and removal procedures, which differ from those applicable to other boards, did not "necessarily or inevitably" alter the City's basic governmental framework.

Turning next to the state constitutional claim, the court addressed whether reserving seven Rental Board seats exclusively for tenants violates article I, section 22, which provides that "[t]he right to vote or hold office may not be conditioned by a property qualification." (Cal. Const., art. I, § 22.) The court concluded that the term "property qualification" refers to ownership of real property, not to leasehold interests or other forms of property. The provision was intended to prevent exclusion of individuals who did not own land, not to prohibit all eligibility criteria tied to economic or housing status. Because Measure H does not require real property ownership, it does not violate the constitutional prohibition.

The court declined to adopt Petitioners' reverse theory that the Constitution also prohibits disqualifying individuals because they do own property. The court noted that no authority supports such an "inverse property qualification" theory and even so, Measure H does not categorically exclude property owners from the Board.

Petitioners' equal protection claim also failed. Because landlords and property owners are not a suspect class and because there is no fundamental right to serve on this type of board, the court applied rational basis review. Under the deferential standard, the court examined whether there is any rational relationship between the disparity of treatment and a legitimate governmental interest. The court concluded that reserving a majority of seats for tenants is rationally related to the City's interest in regulating rental housing and

ensuring representation of the majority of the City's population who are renters and who are most directly affected by rent stabilization policies.

Finally, the court addressed preemption and agreed with Petitioners that certain provisions of Measure H conflict with state law. First, the requirement that landlords pay relocation assistance when increasing rent on units exempt from rent control conflicts with the Costa-Hawkins Rental Housing Act because it burdens conduct the statute expressly permits and therefore frustrates the purpose of the Act. Second, Measure H adds steps to the process for unlawful detainer actions that the court found add an extra procedural barrier for landlords and thus conflict with the procedures outlined in the Unlawful Detainer Act. Therefore, both provisions are preempted and void.

Impact: The decision reinforces the breadth of the local initiative power in charter cities, even where those initiatives create independent bodies with substantial authority, as long as they do not fundamentally alter the framework of existing government. The court's interpretation of the property qualification clause gives cities firmer footing to structure housing-related boards with tenant-majority representation without running afoul of constitutional provisions, and potentially to structure other types of boards favoring a certain stakeholder classes if sufficient legislative findings can be made. At the same time, the opinion underscores that local regulation in the housing space remains constrained by state law, particularly where local measures burden rights affirmatively granted by statute. Efforts to protect tenants from economic displacement due to rent increases on Costa-Hawkins-exempt units must be carefully reviewed and may be vulnerable, and additional procedural requirements in the unlawful detainer process may be preempted.

VI. *City of Gilroy v. Superior Court of Santa Clara County*, 19 Cal.5th 38 (2026)

Holding: The California Public Records Act ("CPRA") authorizes declaratory relief in some circumstances in which an agency has already disclosed all nonexempt records responsive to a records request, including situations in which an agency is likely to repeat past conduct that allegedly violates the CPRA in response to future records requests.

In addition, the CPRA does not impose a duty upon public agencies to preserve responsive records to a public records request that has been withheld as "exempt" for a period of three years, commencing from when a public agency invokes a statutory exemption to withhold the records.

Facts/Background: This case arose from multiple CPRA requests made by the Law Foundation of Silicon Valley ("Law Foundation"), a nonprofit legal services organization, to the City of Gilroy ("City") between 2018 and 2019 seeking all records related to police enforcement at homeless encampments, including the disclosure of police body-worn camera footage.

The City released some responsive records but withheld its video and audio recordings of police encampment sweeps occurring on or after January 1, 2016, under the investigative exemption in CPRA section 7923.600. Following the City's initial denial of the requests, the Law Foundation threatened legal action. Due to the Law Foundation's stated threat, the City, still contending that the bodycam footage was exempt from disclosure, released bodycam footage from encampment sweeps that were unrelated to citations or arrests.

Then the City informed the Law Foundation that all responsive, nonexempt records had been disclosed and that bodycam footage taken before early 2018 had been destroyed pursuant to its records retention policy, which required bodycam footage to be retained for one year.

The Law Foundation did not dispute that the City produced all responsive, nonexempt records, but nonetheless sought a writ of mandate requesting, in relevant part, a declaration that the City mishandled the CPRA requests and "failed to produce responsive records that existed at the time and were subsequently destroyed."

The trial court granted the Law Foundation partial declaratory relief. However, the Court of Appeal reversed, concluding that, since no further records could be ordered for disclosure because they had been destroyed, the Law Foundation could not obtain relief and that their CPRA requests were moot. Subsequently, the Law Foundation sought and was granted review by the California Supreme Court.

Analysis: The California Supreme Court analyzed (1) whether the CPRA authorizes courts to grant declaratory relief for violations of its provisions when it is undisputed that an agency has disclosed all responsive nonexempt existing records, and (2) whether the CPRA requires agencies to preserve records for three years from the date the exemption is invoked.

As to the first issue, the Court held the CPRA authorizes declaratory relief for CPRA violations in some circumstances, including when an agency has disclosed or destroyed all responsive, nonexempt records. The Court rejected the City's arguments, and the Court of Appeal's decision, supporting a narrow interpretation of CPRA Section 7923.000 such that declaratory relief would not be available if all responsive non-exempt documents had been produced. In its reasoning, the Supreme Court noted that the CPRA allows courts to clarify agencies' legal obligations to resolve ongoing disputes in a manner that minimizes the likelihood of affecting future public records requests and advances the CPRA's purpose of "increasing freedom of information." Relying on CPRA Section 7923.000, which allows a person to initiate proceedings "to enforce that person's right under [the CPRA] to inspect or receive a copy of any public record or class of public records," the Court concluded this language applies to pending or future requests.

Regarding the second issue presented, the Court held that the CPRA does not impose a three-year retention period commencing when an agency asserts an exemption to withhold records. The Court highlighted the fact that the text of the CPRA contains no

language requiring record preservation, despite being a "detailed" statute. The CPRA's legislative history also indicates that the Legislature did not perceive it as imposing a retention requirement. Additionally, the existence of retention periods in other laws related to records frequently requested through CPRA litigation, along with penalties for spoliation in legal cases, alleviates concerns about the lack of a retention requirement. This supports the conclusion that omitting a preservation obligation in the CPRA was deliberate.

The Supreme Court reversed the Court of Appeal's judgment to the extent it unduly limited the scope of declaratory relief available under the CPRA and remanded the case for further proceedings consistent with its opinion.

Impact: Public agencies should be aware that disclosing requested records may not immunize them from potential CPRA litigation seeking declaratory relief. Prevailing requesters may be entitled to recover reasonable attorneys' fees under the CPRA. Although a public agency is not legally required to retain records under the CPRA, public agencies should adhere to records retention obligations in other statutes. Additionally, public agencies should implement litigation holds to prevent the destruction of records when litigation is reasonably anticipated.

VII. *City of San Jose v. Howard Jarvis Taxpayers Association*, 18 Cal.5th 1106 (2025)

Holding: Unfunded pension liabilities arising from a city's legal duty to maintain an actuarially sound retirement system are obligations imposed by law. Accordingly, debt incurred to satisfy those liabilities falls outside the California Constitution's debt limitation.

Facts/Background: Article XVI of the California Constitution prohibits cities from incurring indebtedness or liability exceeding their income and revenue for that year unless approved by two-thirds of voters. *See*, Cal. Const., art. XVI § 18, subd(a)). However, the debt limitation does not apply to indebtedness or liability incurred to fulfill obligations imposed by law. *See*, *County of Los Angeles v. Byram* (1951) 36 Cal.2d 694 (1951).

The City of San Jose's (the "City") charter requires the city council to provide for the creation, establishment, and maintenance of a retirement plan for all City employees.

The City identified a significant unfunded liability arising when the value of the retirement plan's assets fell below the present value of benefits already earned by employees and retirees.

Initially, the City addressed this shortfall through lump-sum annual payments. However, after receiving analysis cautioning that increases to the annual payments threatened to erode capacity for other City services, the City sought to finance the liability through the issuance of pension obligation bonds.

The City filed a validation action, and Howard Jarvis Taxpayers Association ("HJTA") filed an answer arguing that voter approval of the bonds was required. The trial court concluded that the unfunded liability was an obligation imposed by law and therefore exempt from the constitutional debt limitation. The Court of Appeal affirmed on the grounds that the debt limitation was not triggered because the liability did not constitute new debt.

Analysis: The California Supreme Court affirmed the Court of Appeal's decision on the grounds that the City's unfunded pension liability constituted an obligation imposed by law. Under the City's charter, the City was required to establish and maintain a retirement plan, and under state law, such systems must be maintained on a sound actuarial basis.

The Court rejected HJTA's argument that this obligation was merely voluntary because the City chose to offer pensions. It explained that once the City established a retirement system, it became legally bound by both charter and state law to fund that system in accordance with actuarial requirements. The City therefore could not avoid the underlying financial obligations calculated by its retirement board.

The Court also rejected HJTA's argument that the obligation-imposed-by-law exception to the debt limitation applies only if the specific funding mechanism used is legally mandated. It clarified that the City's burden was to demonstrate that the unfunded liability is an obligation imposed by law, not that the particular method it chose to fulfill that obligation was mandated by law. Decisions regarding how to address the obligation fall within the City's discretion.

Because the City's duty to maintain an actuarially sound pension system was imposed by law, its efforts to meet that obligation are not considered voluntary for purposes of the debt limitation.

The Court declined to decide whether the bonds would constitute "new" debt, reasoning that even if they did, they would fall within the exception for obligations imposed by law.

Impact: The decision clarifies that where a city is legally required to maintain a retirement system on an actuarially sound basis, unfunded pension liabilities constitute obligations imposed by law and therefore fall outside the California Constitution's debt limitation. As a result, a city does not need voter approval to incur indebtedness used to address those liabilities, even if it does so through instruments such as pension obligation bonds.

The ruling does not endorse any particular financing mechanism, instead emphasizing that the analysis turns on whether the underlying liability is mandatory, while leaving cities the discretion to determine how best to satisfy that obligation.

Although the Court relied on the City's charter and statutory provisions specific to municipal retirement systems, the reasoning suggests that the same analysis may apply where other public entities are subject to comparable legal requirements to fund pension systems on an actuarially sound basis.

VIII. *Disney Platform Distribution Inc. v. City of Santa Barbara*, 118 Cal.App.5th 238 (2026)

Holding: An existing city tax on "video services" can be applied to internet-based video streaming services, such as those provided by Disney Platform Distribution, BAMTech, and Hulu, consistent with the voters' intent to apply such a tax to all types of telecommunication. The application of a video service tax to streaming services does not violate the federal Internet Tax Freedom Act, the First Amendment, or Article XIII C of the California Constitution (Proposition 218). Finally, a city is not required to provide notice under Public Utilities Code section 799 before enforcing a previously enacted tax on a tax base.

Facts / Background: In 2008, the City of Santa Barbara (the "City") enacted Ordinance 5471, approved by voters as Measure G, which modernized the City's utility users tax regime and imposed a 5.75% tax on "video services." The ordinance defined "video services" broadly, with the definition in the ordinance including video programming delivered "using one or more channels" by a "video service supplier." The ordinance explicitly stated that the tax applied "regardless of the technology used."

Disney Platform Distribution, BAMTech, and Hulu (the "appellants") provide subscription-based streaming services delivering live and on-demand video content over the internet. These services are available to taxpayers in the City. In 2022, the City issued notices of deficiency to appellants for unpaid video users' taxes covering the period from 2018 to 2020. The unpaid taxes plus penalties and interest equaled $68,950 for Disney Platform Distribution, $37,270 for BAMTech, and $506,117 for Hulu.

Appellants appealed to the City Administrator, but the hearing officer upheld the City's tax assessment. Appellants then sought judicial review, arguing that the ordinance does not apply to streaming services because streaming providers do not provide "channels," that application of the tax violates the Internet Tax Freedom Act, that the tax infringes the First Amendment, that enforcement of the tax constituted an unapproved tax increase under Proposition 218, and that the City failed to comply with statutory notice requirements under Public Utilities Code section 799.

Analysis: The Court first assessed whether streaming platforms fall within the ordinance's requirement that video services be delivered via "one or more channels." Appellants urged for the application of a technical definition derived from federal telecommunications law, the Cable Communications Policy Act of 1984, under which a "channel" is a physical transmission path controlled by the provider. The Court rejected this approach, emphasizing that voter-approved tax measures must be interpreted according to the electorate's intent, using ordinary and commonly understood meanings unless a technical definition is clearly indicated. Neither the ordinance nor the ballot materials signaled that "channel" should be interpreted using its technical definition.

Instead, the Court adopted the ordinary meaning of "channel" as a source of programming (e.g., ESPN or CNN). This interpretation was reinforced by the ordinance's express

statement that it applies "regardless of the technology used" and by ballot materials emphasizing modernization and technological neutrality. Excluding streaming services would undermine the ordinance's stated goal of closing loopholes and ensuring equal treatment among providers of comparable video content.

Next, appellants contended that the tax discriminates against electronic commerce in violation of the federal Internet Tax Freedom Act (the "Act") because it applies to streaming services but not to offline DVD rentals or sales. The Court disagreed, concluding that streaming subscriptions and DVD purchases are not "similar" transactions under the Act. The Court emphasized the distinction between services and tangible goods; streaming provides access to content as a service, whereas DVDs are physical items subject to sales and use taxes. Because the transactions are not equivalent, the absence of an equivalent video users' tax on DVDs does not constitute discriminatory treatment. The Court also noted that DVD sales are already subject to sales tax, and imposing an additional tax could result in impermissible double taxation.

The Court then rejected appellants' argument that the ordinance is a content-based regulation on speech in violation of the First Amendment. While acknowledging that video programming constitutes protected speech, the Court found the tax to be content-neutral. It applies uniformly to video services regardless of the message, subject matter, or viewpoint of the programming. There was no evidence that the ordinance was enacted to suppress particular ideas or speakers, nor did its structure suggest such an intent.

Appellants also argued that the City's decision to begin enforcing the tax against streaming providers constituted an expansion of the tax base without voter approval in violation of Proposition 218. The Court disagreed, holding that delayed enforcement of an existing tax does not amount to a change in tax methodology or an expansion of the tax base requiring voter approval. Relying on *AB Cellular LA, LLC v. City of Los Angeles* (2007), 150, Cal.App.4th 747, the Court distinguished between altering the formula used to calculate a tax and simply applying an unchanged formula to entities already encompassed within its scope. Because the ordinance always covered steaming service providers via its broad definition of "video services," the decision to begin enforcement did not violate Proposition 218. This was true even though the subject video streaming services largely didn't exist at the time the Ordinance was adopted.

Finally, the Court held that the City was not required to provide notice under Public Utilities Code section 799, which generally requires local jurisdictions to notify public utilities following enactment of a new tax, because the City's decision to enforce the tax was not equivalent to enacting a new tax or modifying an existing one. The statute's notice requirements are triggered by legislative changes, not by enforcement actions. As the Court had already determined that the City had not adopted a new tax or altered the tax base, the City's collection effort was merely an enforcement action and did not constitute an "enactment" of a tax requiring advance notice.

Impact: For cities, this decision represents a significant affirmation of local government authority to apply legacy video service taxes to modern streaming platforms, so long as

the jurisdiction's voter-approved tax is broadly written to apply to all technological means of delivering the service. Importantly, the court emphasized that the delayed enforcement to services that had not paid the tax for approximately 14 years since the tax's enactment did not result in an enlargement of the tax base requiring further voter approval. By emphasizing a technology-neutral interpretation of the existing tax grounded in voter intent, cities can rely on the framework of this case to apply digital video service taxes to new forms of content delivery.

As of this writing, a petition for review is currently pending before the California Supreme Court.

IX. *Move Eden Housing v. City of Livermore*, 114 Cal.App.5th 1282 (2025)

Holding: Elections Code Section 9241 does not prohibit a legislative body from re-adopting administrative acts that are not subject to referendum.

Facts/Background: In May 2022, the City of Livermore ("City") adopted a resolution that authorized the execution of a development agreement with Eden Housing, Inc. for an affordable workforce housing project and other elements, including the City's commitment to spend $5.5 million on constructing and improving a new public park ("2022 Resolution").

Following the City's adoption of the 2022 Resolution, the respondent submitted a referendum petition challenging the 2022 Resolution. The referendum power allows voters that gather enough signatures to place a legislative enactment on the ballot for a vote.

In July 2022, the City stated that it determined the 2022 Resolution was an administrative act and therefore not subject to referendum. In August 2022, the respondent filed a petition for writ of mandate seeking to compel the City to process the referendum.

In *Move Eden Housing v. City of Livermore* (2024) 100 Cal.App.5th 263 ("*Move Eden I*"), the Court of Appeal held that the 2022 Resolution was a legislative act and subject to referendum. The Court explained that even though the 2022 Resolution largely involved administrative acts not subject to referendum, the 2022 Resolution was a legislative act because it authorized the construction of and improvements to a new public park for the first time. The Court remanded the case to the trial court with directions to issue a writ of mandate ordering the City to process the referendum petition.

After the *Move Eden I* decision, the referendum petition was processed and certified. The referendum was then presented to the City Council for a decision on whether to repeal the 2022 Resolution or place it on a ballot for voter approval. In June 2024, the City Council repealed the 2022 Resolution and then enacted a new resolution approving the same agreement approved in the 2022 Resolution, except the new resolution omitted the

provisions related to the construction of and improvements to the public park ("2024 Resolution").

The respondent then moved for an order to compel the City to comply with the writ of mandate, arguing that the 2024 Resolution violated Elections Code Section 9241. This Section provides, in part, that if a city repeals an ordinance against which a successful referendum petition is filed, then such ordinance may not be re-adopted for one year.

The trial court granted the motion on the basis that the City violated Section 9241 because the City effectively repealed only part of the 2022 Resolution and the 2024 Resolution could not be enacted for a one-year period following the repeal of the 2022 Resolution.

Analysis: The Court of Appeal reversed the trial court, holding that Elections Code Section 9241 does not prohibit the re-adoption of administrative acts that are not subject to referendum.

First, the Court held that the 2022 Resolution was "entirely repealed" within the meaning of Elections Code Section 9241. The Court applied the test from *County of Kern v. TCEF* ((2016) 246 Cal.App.4th 301) to determine that the 2022 Resolution was "entirely repealed." Under the *TCEF* test, to "entirely repeal" an ordinance, an agency must: (1) revoke the protested ordinance in all its parts; and (2) refrain from additional action that has the practical effect of implementing the essential feature of the protested ordinance.

The Court found that the City revoked the 2022 Resolution in all its parts. In analyzing the second part of the *TCEF* test, the Court explained that the "essential feature" must include a legislative act that made the prior ordinance subject to challenge by referendum. The Court found that because the 2024 Resolution did not have the practical effect of undermining the repeal of the public park provisions — the only legislative act of the 2022 Resolution — the 2024 Resolution did not implement the "essential feature" of the 2022 Resolution.

Second, the Court held that the 2024 Resolution did not violate the Elections Code Section 9241 one-year stay. The Court explained that Section 9241 is part of the referendum process and must be construed accordingly. The Court further explained that applying Section 9241's stay to administrative acts would undermine essential government functions for no purpose consistent with the referendum power. The Court concluded that a city's re-adoption violates the Section 9241 stay if the city readopts one or more ***legislative*** acts in an identical or insufficiently modified form, but Section 9241 does not prohibit a city from readopting ***administrative*** acts during the one-year stay period. The Court found that because the 2024 Resolution only readopted the administrative acts from the 2022 Resolution, the 2024 Resolution did not violate the Section 9241 one-year stay.

Impact: This case affirms that Elections Code Section 9241 does not prohibit cities from re-adopting administrative acts, even if those acts were initially part of a resolution that also contained legislative acts challenged by referendum. Another takeaway from this

case is that cities should separate legislative acts from administrative acts to prevent administrative acts from being included in a referendum petition. This will help ensure that projects stay on track because approvals that only include administrative acts cannot be challenged by referendum.

X. *Uber Technologies, Inc. v. City of Seattle*, 68 F.4th 1202 (9th Cir. 2026)

Holding: An ordinance that requires a company to inform its app-based workers in writing of the company's deactivation policy, and requires the deactivation policy to be reasonably related to the company's safe and efficient operations, does not compel speech in violation of the First Amendment and is not void for vagueness.

Facts/Background: Uber and Instacart rely on app-based workers for their businesses in the growing gig economy. Those workers pick up orders from restaurants and retailers, and deliver items to customers based on assignments generated by an app. But Seattle determined that some gig workers could be threatened by unwarranted deactivations of their accounts by the companies. To address instability in the gig economy and prevent unwarranted deactivations of the workers' accounts, Seattle passed the ordinance at issue in 2023. The ordinance required companies like Uber and Instacart, which provide a platform for customers to hire app-based workers, to inform app-based workers "in writing" of the companies' deactivation policies, and required the deactivation policies to be "reasonably related" to the "safe and efficient operations" of the companies. (The ordinance did not apply to certain categories of app-based workers, such as rideshare drivers.) Uber and Instacart challenged the ordinance and, in a motion for a preliminary injunction, argued that the ordinance infringed on their protected speech and was void for vagueness.

The District Court for the Western District of Washington denied the motion. The District Court held that the ordinance regulated conduct, not speech, with any effects on speech being "incidental to its worker-related conduct goals." The District Court also held that the ordinance was not void because the term "reasonable" was not vague.

Analysis: The Court of Appeals for the Ninth Circuit affirmed the District Court's decision. The Ninth Circuit agreed that the ordinance regulated conduct, not speech, because the ordinance was concerned only with the deactivation of workers' accounts. While some conduct may be "expressive" and therefore still entitled to First Amendment scrutiny, here, the conduct was "nonexpressive" because the ordinance aimed to keep app-based workers informed and employed and have companies devise policies that do not result in unwarranted deactivations. Essentially, the ordinance regulated a business agreement between the companies and app-based workers.
The Ninth Circuit stated that even if the ordinance regulated speech, the speech was commercial speech subject to lower scrutiny under the First Amendment. Generally, hiring communications can be commercial speech, and here, the ordinance was a hiring communication because it regulated how and when a company may prevent app-based workers from accessing the company's platform to seek employment.

Under the lower scrutiny for commercial speech, the government may compel disclosure in commercial speech as long as the compelled disclosure is reasonably related to a substantial governmental interest and involves purely factual and uncontroversial information that relates to the service provided. Here, the government had a substantial interest in protecting the health and safety of workers, and the compelled speech was purely factual and concerned only the details of the companies' deactivation policies.

Additionally, any challenge involving the regulation of commercial speech requires that the speech is not related to unlawful activity. Here, however, the speech related to what Seattle had designated as unlawful activity: the unwarranted deactivations of workers' accounts.
The Ninth Circuit also found that the ordinance was not vague when it required deactivation policies to be "reasonably related" to the safe and efficient operations of the companies because the term "reasonable" was a well-established standard and it was supplemented with examples in the ordinance. As a result, the ordinance provided fair notice to a person of ordinary intelligence as to what grounds for deactivation are reasonably related to safety and efficiency.

Impact: The major impact of this case is that it shows cities may play a somewhat greater role in shaping the growing gig economy. Cities can look to Seattle's ordinance and determine whether they would also like to regulate, to a certain extent, the business agreements between app-based workers and the companies that provide a platform for them. When drafting an ordinance for that purpose, cities must be aware of two critical issues: (1) whether the ordinance will be seen as regulating speech or nonexpressive conduct, and (2) whether the ordinance will be seen as vague. This case suggests that an ordinance will be permissible if it only aims to prevent unwarranted deactivations of app-based workers' accounts and provides fair notice as to what grounds for deactivation are reasonable.

City Under Scrutiny - Employment Matters and High-Profile Investigations

City Attorneys Conference

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City Under Scrutiny: Employment Matters and High-Profile Investigations

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INTRODUCTION

Workplace complaints within California public agencies rarely fit neatly into a single legal category. A report of discrimination may evolve into a retaliation claim. A whistleblower allegation may implicate First Amendment protections. Union activity may overlap with protected concerted activity and trigger unfair practice concerns. And in the public sector, virtually any of these matters may generate California Public Records Act ("CPRA") exposure. CPRA requests that accompany workplace claims present a significant and often underappreciated challenge for organizations managing internal investigations: outside scrutiny resulting from what once was a confidential internal investigation transformed into public record. This publicity can create real operational problems as witnesses grow reluctant to participate, parties feel pressure to posture publicity, and the organization's ability to conduct a thorough, impartial inquiry is compromised. What begins as a personnel issue can quickly become a liability game of whack-a-mole.

This whitepaper examines several of the most consequential areas of exposure facing public employers: discrimination, harassment, and retaliation under California's Fair Employment and Housing Act; whistleblower liability; constitutional speech protections; labor and union considerations; and potential CPRA implications. Each of these doctrines carries its own legal framework and evidentiary standards. Yet in practice, they often converge in a single investigation. The same set of facts may be scrutinized under statutory, constitutional, and labor law lenses simultaneously.

The connective tissue across these high-risk domains is the investigative process itself. Decisions about whether to investigate, how to define scope, who should conduct the inquiry, how findings are framed, and how records are maintained can materially shape agency legal compliance efforts and potential liability across all of these areas. An investigation that is narrowly structured to address harassment may inadvertently create retaliation exposure. An inquiry into whistleblower complaints may generate discoverable communications or public records requests. A disciplinary review touching on employee speech or union advocacy may raise constitutional or unfair practice implications.

Accordingly, this paper approaches these substantive areas of law through a common strategic lens: how investigative choices intersect with, and often influence, legal outcomes. Understanding that intersectionality is critical. In high-profile public-sector employment matters, the investigation is not merely responsive, it is foundational.

LEGAL CONSIDERATIONS

a. DISCRIMINATION, HARASSMENT AND RETALIATION

California's Fair Employment and Housing Act ("FEHA") imposes expansive obligations on public and private employers to prevent and remedy discrimination, harassment, and retaliation in the workplace. FEHA prohibits discrimination and harassment based on protected characteristics and makes it unlawful for an employer to retaliate against an employee for engaging in protected activity, including complaining about or opposing conduct reasonably believed to violate the statute. (Gov. Code §§ 12940(a), (h), (j).)

Courts have construed these protections broadly, recognizing retaliation where protected activity is a substantial motivating factor in an adverse employment action. See *Yanowitz v. L'Oreal USA, Inc*. (2005) 36 Cal.4th 1028. Critically, FEHA also imposes an affirmative duty on employers to take "all reasonable steps necessary to prevent discrimination and harassment from occurring" (Gov. Code § 12940(k)), which California courts have interpreted to include a prompt, thorough, and impartial investigation once the employer becomes aware of allegations of misconduct. See *Lyle v. Warner Bros. Television Productions* (2006) 38 Cal.4th 264. In practice, therefore, an employer's response to complaints, particularly the

decision whether and how to investigate, often becomes central to both liability exposure and defense strategy.

Investigations into discrimination, harassment, and retaliation clams demand a structured, even-handed process that affords both the complainant(s) and the respondent(s) a full and fair opportunity to be heard and to present supporting evidence. This can be achieved by providing all parties with a clear explanation of the process and their rights within it at the outset of the investigation, coupled with preserving a complete and organized record of all evidence gathered. Mitigation of liability depends not only on reaching a well-supported conclusion but also on demonstrating that the process itself was impartial. Organizations that can demonstrate procedural fairness are significantly better positioned to defend against claims that the investigation was pretextual or outcome driven.

i. Discrimination and Disparate Treatment

Discrimination based upon protected categories is unlawful under both State and Federal law. When an employee alleges that they are subject to "disparate treatment," the employee must prove by a preponderance of the evidence that the employer intentionally treated them less favorably than other employees because of their membership in the protected category. *St. Mary's Honor Center v. Hicks* (1993) 509 U.S. 502. In a disparate treatment case, the employee must either present direct evidence of discriminatory intent or prove their case with circumstantial evidence under the burden shifting analysis framework set out in *McDonnell-Douglas Corp. v. Green* (1973) 41 U.S. 792; *Guz v. Bechtel National, Inc*. (2000) 24 Cal.4th 317. An employer will be liable for intentional discrimination if it is shown that its employment decision was premised upon an illegitimate criterion. *Heard v. Lockheed Missiles & Space Co*. (1996) 44 Cal.App.4th 1735.

Although the employee ultimately has the burden of persuading the trier-of-fact that the employer intentionally discriminated against the employee, courts have developed a burden-shifting analysis for cases involving circumstantial proof of discrimination. *St. Mary's Honor Center v. Hicks*. The allocation of the burden of producing evidence in a disparate treatment case is well established. *Texas Dept. of Community Affairs v. Burdine* (1981) 450 U.S. 248; *McDonnell-Douglas Corp*. The employee first must establish a prima facie case of discrimination. The employer is then obligated to articulate a legitimate, non-discriminatory reason for the action taken against the employee. Finally, the employee must demonstrate through "specific, substantial" evidence that the employer's proffered reason was pretextual, and the real reason for the employer's decision was discrimination. *Godwin v. Hunt Wesson, Inc*. (9th Cir. 1998) 150 F.3d 121. If the plaintiff can show pretext, then the sole remaining issue is whether there was intentional discrimination. *Reeves v. Sanderson Plumbing Products* (2000) 530 U.S. 133.

In *McDonnell-Douglas*, the Supreme Court created the model for a prima facie case focusing on discriminatory hiring practices, but the elements vary to fit the particular theory of discrimination. For example, the prima facie elements for discriminatory failure to promote are: (1) complainant belongs to a protected class; (2) his job performance was satisfactory; (3) he was not promoted; and (4) others not in the protected class with similar qualifications were promoted and/or the positions were filled by individuals of comparable qualifications not in the protected class. *Mixon v. Fair Employment & Housing Com*. (1987) 192 Cal.App.3d 1306.

Once the employer has demonstrated that it had a legitimate nondiscriminatory reason for its actions, the employee must offer evidence demonstrating that the stated reasons for the action were either untrue or a pretext for discrimination. *Villiarimo v. Aloha Island Air* (9th Cir. 2002) 281 F.3d 1054. Circumstantial evidence used to show that the employer's proffered motives were not the actual motives must be "specific" and "substantial" to create a triable issue with respect to whether the employer intended to discriminate on the basis of the protected category. Employees must do more than attack the soundness of the employer's

decision. The reasons must be implausible, or inconsistent or baseless, to support a reasonable inference the reasons were pretextual. *Hersant v. Dept. of Social Services* (1997) 57 Cal.App.4th 997. Courts do not sit as "super-personnel departments" reviewing the wisdom or fairness of business judgments, except to the extent that they involve intentional discrimination. The employee loses a discrimination case if the employer honestly believed in the nondiscriminatory reasons for its actions, even if they are foolish, trivial, or baseless. The issue of pretext does not address the correctness or desirability of reasons offered for employment decisions.

ii. Harassment and Hostile Work Environment

State and federal law prohibit harassment in the workplace. Harassment in employment occurs when an employee is: 1) subject to unwelcome conduct; 2) based on the employee's protected status; and 3) the conduct affects a term, condition, or privilege of employment. *Meritor Savings Bank v. Vinson* (1986) 477 U.S. 57; *Harris v. Forklift Systems, Inc*. (1993) 510 U.S. 17. Federal and state law recognize that these three components must be met to impose liability. Hostile work environment harassment occurs when unwelcome and offensive conduct (based on any protected classification) unreasonably interferes with an individual's job performance or creates an intimidating, hostile or offensive work environment. The courts have provided guidelines regarding what constitutes hostile work environment harassment:

- Conduct that a reasonable person would find hostile or abusive, and that the victim subjectively perceives as abusive, is enough to constitute harassment.

- Whether a working environment is "hostile" or "abusive" can be determined only by looking at all the circumstances surrounding the alleged harassment.

- Relevant factors to consider in deciding whether a working environment is "hostile" or "abusive" include: 1) frequency of the conduct; 2) its severity; 3) whether the conduct is physically threatening or humiliating, or a mere offensive utterance; and 4) whether it unreasonably interferes with the employee's work performance.

- Conduct must be "unwelcome", i.e., unsolicited, uninvited, undesirable and offensive in order to constitute harassment. *Beyda v. City of Los Angeles* (1998) 65 Cal.App.4th 511; *Fisher v. San Pedro Peninsula Hospital* (1989) 214 Cal.App.3d 590.

In a hostile environment case, the employee must show that the conduct was sufficiently severe or pervasive to alter the conditions of employment and create an abusive working environment. Hostile environment harassment is analyzed from the standpoint of a reasonable person. This means that conduct does not constitute harassment unless it would substantially affect a reasonable person with the same fundamental characteristics as the victim in a similar work environment under similar circumstances. *Fuller v. City of Oakland* (9th Cir. 1995) 47 F.3d 1522. The working environment must be both subjectively and objectively abusive. *Brooks v. City of San Mateo* (9th Cir. 2000) 229 F.3d 917. Additionally, the conduct must be based on the employee's protected status. The harassment laws are not a general civility code which protects employees from difficult or demeaning supervisors. *Oncale v. Sundowner Offshore Services, Inc.* (1998) 523 U.S. 75. "Occasional, isolated, sporadic or trivial acts" of harassment including verbal abuse are not actionable. *Etter v. Veriflo Corp.* (1998) 67 Cal.App.4th 457.

iii. Retaliation

Retaliation is unlawful under federal and state law. The employee must prove the employer took an adverse employment action against the employee because the employee engaged in a protected activity. Courts use a burden-shifting analysis in retaliation claims. To establish a prima facie case of retaliation, an employee

must show that: 1) the employee engaged in a protected activity (such as opposing discrimination or participating in an investigation into discrimination or harassment); 2) the employee was thereafter subjected to an adverse employment action; and 3) there is a casual link between the protected activity and the adverse employment action. *Yanowitz v. L'Oreal USA, Inc.* (2005) 36 Cal.4th 1028, 1042.

Retaliation claims can be based on a wide variety of activities protected under both state and federal law. The protected activity could be opposing an employment practice prohibited by state or federal statute, rule or regulation. The protected activity can also be filing a charge, testifying, or assisting or participating in an investigation, proceeding or hearing of the employee's own claim of unlawful conduct or the claim of another employee under a statute, regulation or an employer's own policies. Employees must reasonably believe that the action they opposed was unlawful, but even if the action is later found to have been a lawful action by a court, the employer's liability for employees' claims for retaliation may remain. *Clark County School City v. Breeden* (2001) 532 U.S. 268; *Yanowitz v. L'Oreal USA, Inc.*, *supra*; *Ohton v. Board of Trustees of the California State University* (2010) 180 Cal.App.4th 1402.

A causal connection for a retaliation claim may be established through evidence that an employee engaged in protected activities and that the adverse action followed within a relatively short time thereafter ("temporal proximity"). *Morgan v. Regents of University of Cal.* (2000) 88 Cal.App.4th 52; *Addy v. Bliss & Glennon* (1996) Cal.App.4th 205; *Fisher v. San Pedro Peninsula Hospital* (1989) 214 Cal.App.3d 590. In addition to temporal proximity, it must be demonstrated that employers have knowledge of the protected activity in order to show that a causal link exists between the protected activity and the adverse action taken thereafter. Even if the person who made the decision to impose the adverse action upon the employee did not have knowledge of the employee's involvement in protected activity, knowledge will still be found if the decision maker was acting on information provided by a supervisor, or other individual, who had knowledge of the protected activity. *Reeves v. Safeway Stores, Inc.* (2003) 121 Cal.App.4th 95. Once a prima facie case is established, as in discrimination cases, the burden shifts to the employer to state a legitimate non-retaliatory reason for its actions, and if the burden is discharged the burden shifts back to the employee to show pretext.

Once the employee has met her initial burden, the employer must articulate a non-discriminatory, non-retaliatory reason for its actions. The employer does not have to prove that its proffered business reason for the adverse action was good cause. The employer merely has to articulate some non-retaliatory, non-discriminatory reason for the action for the burden to shift back to the employee, as "employers must be given wide latitude to make independent, good-faith personnel decisions without the threat of a jury second-guessing their business judgments." *Gonzalez v. Metpath, Inc.* (1989 214 Cal.App.3d 422, 428. Once the employer has articulated a legitimate explanation for the adverse action, the presumption of retaliation, discrimination is rebutted and the burden shifts back to the employee to prove intentional discrimination or retaliation. *McDonnell-Douglas Corp. v. Green* (1973) 41 U.S. 792. The employee must prove, by "specific" and "substantial" evidence that the employer's stated reasons for taking adverse action are merely a pretext for retaliation. To do this, the employee must point to evidence which raises a rational inference that intentional retaliation or discrimination occurred. The evidence offered by the employee must be such that it could reasonably be concluded that the employer's articulated business reasons for acting were implausible, inconsistent, or baseless and, therefore, support a reasonable inference that the stated reasons were pretext. *Hersant v. Department of Social Services* (1997) 57 Cal.App.4th 997, 1009.

b. WHISTLEBLOWER LIABILITY

The California Whistleblower Protection Act (Gov. Code §§8547–8547.12), enacted in 1993, applies only to state employees, who should be free to report waste, fraud, abuse of authority, violation of law, or threat to public health without fear of retribution. Gov. Code §8547.1. The Whistleblower Protection Act (Gov. Code §§9149.20–9149.23), enacted in 1999, applies only to state and other public employees, who should

disclose, to the extent not expressly prohibited by law, improper governmental activities. Gov. Code §9149.21.

California Labor Code generally protects all workers who might have reason to fear retribution for reporting improper activities. Labor Code §§1101–1106. California law provides employees with whistleblower protections in Labor Code Section 1102.5 which is a general whistleblower statute applicable to both private and public workplaces. The most utilized section of this law is section 1102.5, subdivision (b), which states: "An employer may not retaliate against an employee for disclosing information to a government or law enforcement agency, where the employee has reasonable cause to believe that the information discloses a violation of state or federal statute, or a violation or noncompliance with a state or federal rule or regulation."

Put succinctly, section 1102.5, subdivision (b) protects an employee from retaliation by his employer for making a good faith disclosure of a violation of federal or state law. The protections of section 1102.5(b) are only available to employees. *Bennett v. Rancho California Water Dist*. (2019) 35 Cal.App.5th 908, 911. To avail oneself of Labor Code section 1102.5, subdivision (b), an employee must be able to articulate both a "protected activity" and a resulting "adverse employment action." Therefore, both prongs are analyzed below.

To engage in activity protected under section 1102.5(b), the employee must disclose reasonably based suspicions of illegality to a government employee, law enforcement employee, or a fellow employee who has authority over the disclosing employee or authority to investigate, discover or correct the violation. The information disclosed can be a potential violation of state or federal statute or of a local, state, or federal rule or regulation, regardless of whether disclosing the information is part of the employee's job duties. *Killgore v. SpecPro Professional Services, LLC*, (2022) 51 F.4th 973. The burden is fairly low for an employee, as an employee need not be correct in their belief, but rather must only prove that they held the belief in good faith, even if mistaken. *Diego v. Pilgrim United Church of Christ* (2014) 231 Cal.4th 913, 922.

"Protected activity" not only includes reports of an employer's unlawful activity but also includes reports of unlawful activity by third parties. *McVeigh v. Recology San Francisco* (2013) 213 Cal. App. 4th 443, 471. An employee engages in a "protected activity" even though the disclosure might fall within the employee's general job duties. *Id*. at 469. Further, the employee's motivation for reporting suspected illegality is irrelevant to the analysis of whether the disclosure is considered a "protected activity." *Mize-Kurzman v. Marin Comm. College Dist*. (2012) 202 Cal.4th 832, 850-852.

In addition, a disclosure does not need to be the first or only report of suspected illegal activity to qualify as "protected activity." *Hager v. County of Los Angeles* (2014) 228 Cal.4th 1538, 1551-1552 (disapproved on other grounds).) Unlike a *Tameny* claim, a "protected activity" need not implicate or concern a violation of public policy. See *Cardenas v. M. Fanaian, D.D.S., Inc*., 194 Cal.Rptr.3d 1, 9-10, review granted and opinion superseded sub nom. *Cardenas v. Fanaian*, 362 P.3d 431 (Cal. 2015), and review dismissed on Feb. 24, 2016.

California courts define "adverse employment action" as an action or course or pattern of conduct that, taken as a whole, materially and adversely affected the terms, conditions, or privileges of employment. *Yanowitz v. L'Oreal USA, Inc*. (2005) 36 Cal.4th 1028, 1052-1056. The most obvious adverse employment actions are termination and demotion. However, there is no requirement that an employer's retaliatory acts constitute one swift blow. Rather, a determination of whether an adverse employment action occurred must "take into consideration the unique circumstances of the affected employee as well as the workplace context of the claims." *Whitehall v. County of San Bernardino* (2017) 17 Cal.App.5th 352, 366-367. Therefore, a series of subtle actions, such as workplace harassment (*Kelley v. The Conco Companies* (2011) 196 Cal.App.4th 191, 212), a reduction of work hours (*Light v. Department of Parks & Recreation* (2017) 14 Cal.App.5th 75, 93), a reduction in support staff (W*ysinger v. Automobile Club of Southern California*

(2007) 157 Cal.App.4th 413, 424), or an undesirable reassignment (*Wysinger v. Automobile Club of Southern California* (2007) 157 Cal.App.4th 413, 424) has been regarded as an "adverse employment action" taking as a whole the unique facts of each case.

Whistleblower claims introduce a layer of legal complexity to workplace investigations because of the statutory protections that can convert otherwise routine investigative decisions, such as scope limitations or interview sequencing, into alleged acts of retaliation. Organizations can mitigate this risk by maintaining rigorous documentation concerning the legitimate business rationale for investigative decisions and maintaining strict separation between those managing the investigation and those with operational authority over the whistleblower. A clearly defined, consistently applied reporting structure that shields the investigator from management pressure is essential to both the integrity of the process and the defensibility of its outcome.

c. FIRST AMENDMENT PROBLEMS

First Amendment issues arise frequently in California public-sector employment disputes, where disciplinary decisions intersect with employee speech. Unlike private employers, public agencies must navigate constitutional constraints when responding to employee expression. Under controlling precedent, a public employee establishes a First Amendment retaliation claim by showing that they spoke as a private citizen on a matter of public concern and that the speech was a substantial or motivating factor in an adverse employment action. See *Garcetti v. Ceballos*, 547 U.S. 410 (2006). However, speech made pursuant to official job duties is not constitutionally protected, even if it concerns misconduct or public policy. California courts apply these principles in fact-intensive analyses, often focusing on the employee's role, the forum in which the speech occurred, and the employer's asserted justification for discipline. In practice, internal complaints, communications with elected officials, union advocacy, and public criticism of agency leadership can quickly implicate constitutional protections. As a result, investigative and disciplinary decisions in these contexts require careful evaluation of both the legal framework and the broader governance implications that follow.

d. UNION DISPUTES

In California public agencies, union-related disputes present a distinct layer of legal risk that often intersects with broader employment liability. The Meyers-Milias-Brown Act ("MMBA") (Gov. Code § 3500 et seq.) governs labor relations between local public agencies and employee organizations and protects employees' rights to engage in concerted activities for purposes of collective bargaining and mutual aid or protection. Gov. Code § 3502. It is unlawful for a public agency to interfere with, intimidate, restrain, coerce, or discriminate against employees because of their exercise of these protected rights. Gov. Code §§ 3503, 3506. As a result, disciplinary actions, workplace investigations, and management responses to employee conduct must be evaluated not only through a performance lens, but also through a labor-relations framework.

Union grievances and unfair practice charges frequently arise when employees or union representatives allege that an employer's actions were motivated, at least in part, by protected activity. These claims are adjudicated by the Public Employment Relations Board ("PERB"), the administrative agency charged with enforcing the MMBA and related public-sector labor statutes. PERB evaluates whether the employer's conduct would reasonably tend to chill protected activity and whether protected conduct was a motivating factor in the challenged action. Even where legitimate performance concerns exist, poorly timed or inadequately documented disciplinary decisions, particularly those following grievances, meet-and-confer disputes, or outspoken union advocacy, can trigger liability in the form of unfair practice findings, reinstatement orders, backpay awards, and remedial notices.

Carefully structured investigations can play a critical role in mitigating these risks. When allegations arise involving union stewards, employee advocates, or participants in protected concerted activity, an

investigation that clearly distinguishes between protected conduct and unprotected misconduct helps create a defensible record. For example, aggressive advocacy during bargaining or grievance proceedings may be protected under the MMBA, whereas threats, insubordination unrelated to protected activity, or violations of neutral workplace rules may not be. An impartial, well-documented inquiry focused on specific conduct rather than the employee's union role can demonstrate that any resulting discipline was based on legitimate, nondiscriminatory reasons rather than animus toward protected activity.

At the same time, investigative missteps can themselves become the basis for unfair practice charges. Denying representation rights during investigatory interviews, expanding the scope of an inquiry in response to protected activity, or appearing to single out union representatives for heightened scrutiny may be viewed by PERB as interference or retaliation. Accordingly, in unionized public workplaces, investigations must be designed not only to address the underlying complaint, but also to withstand review under the MMBA's protections. When properly structured, they serve as both a compliance mechanism and a safeguard against labor-relations liability.

e. CPRA CONSIDERATIONS

Finally, in the public sector, personnel matters, including employment investigations, do not occur in a vacuum. Unlike private employers, public agencies must evaluate investigative strategy against the backdrop of the CPRA. Gov. Code § 7920.000 *et seq*. Investigative reports, interview notes, communications regarding scope, and even preliminary drafts may be subject to disclosure unless a statutory exemption applies. As a result, the manner in which an investigation is structured, documented, and communicated can have significant implications beyond the immediate employment dispute.

The tension between transparency and confidentiality is particularly acute in high-profile matters involving allegations of misconduct by public officials or senior leadership. While agencies may assert exemptions for personnel records, investigative materials, or records protected by the attorney-client privilege and attorney work product doctrines, those exemptions are not absolute. Courts balance privacy interests against the public's right to access information concerning the conduct of public business. In *Bakersfield City School District v. Superior Court* (2004) 118 Cal.App.4th 1041, the court noted that the public has the right to know about well-founded, substantive complaints against public employees, even if the complaint has not been confirmed as true. In *BRV, Inc. v. Superior Court* (2006) 143 Cal. App. 4th 742, the court noted that a public official in an important and highly visible position, such as a school superintendent, has a lesser expectation of privacy in his or her personnel records when a well-founded complaint is involved.

In *Marken v. Santa Monica-Malibu Unified School District*, 202 Cal.App.4th 1250 (2012), the Court of Appeal built upon the precedent established in *Bakersfield* and *BRV* and addressed the disclosure of records arising from a teacher misconduct investigation. The court held that while certain personal information could be redacted, the public's interest in understanding how the district responded to allegations of misconduct weighed in favor of disclosure of significant portions of the investigative findings. While the *Bakersfield*, *BRV*, and *Marken* cases all occurred before the holding reached in the *City of Petaluma v. Superior Court* (2016) 248 Cal.App.4th 1023, these decisions underscore that investigative records in public agencies may ultimately become public documents, particularly where they concern substantiated misconduct or the performance of public duties by high-ranking officials and employees.

Accordingly, CPRA considerations should inform investigative design from the outset including, most notably, the decision of who should conduct the investigation. Agencies and counsel must anticipate that reports may be reviewed not only by litigants and adjudicators, but also by the press and the public. Careful attention to tone, factual clarity, separation of legal advice from factual findings, and compliance with statutory exemptions is essential. In high-visibility employment matters, the investigative file may serve a dual role: as evidence in potential litigation and as a public record subject to scrutiny. Thoughtful planning

at the front end can reduce the risk that the investigative process itself becomes an additional source of exposure.

Even when a workplace investigation is conducted by outside counsel, the organization may find itself in the difficult position of needing to waive, either in-part or wholly, the attorney-client privilege or work product protection that would otherwise shield the investigation report. This most commonly arises when the organization seeks to rely on the report itself as evidence of its good-faith response to a complaint, to demonstrate the reasonableness of its conclusions, or to establish an affirmative defense. Organizations must also be mindful that the election to disclose portions of a privileged report may trigger broader waiver of related communications and materials.

THE DETERMINATION OF WHEN, HOW AND WHO SHOULD INVESTIGATE

In California, an employer's duty to investigate workplace complaints arises both from statute and from the broader obligation to take reasonable steps to prevent and correct unlawful conduct. For example, under FEHA, it is unlawful for an employer to fail to take "all reasonable steps necessary to prevent discrimination and harassment from occurring." Gov. Code § 12940(k). California courts have interpreted this provision to require a prompt, thorough, and impartial investigation once the employer knows or reasonably should know of allegations of discrimination, harassment, or retaliation. An investigation that is delayed, biased, superficial, or pretextual may not only fail to shield the employer from liability but may itself become evidence of unlawful motive or indifference. That said, as the paper notes above, other allegations may trigger liability and while not legally required, an investigation may be helpful as a risk mitigation technique.

While FEHA does not prescribe a single investigative model, best practices have emerged through case law and administrative guidance: the investigator should be adequately trained, neutral, and vested with authority to gather relevant evidence; witnesses should be interviewed in a timely manner; findings should be based on credibility assessments and documentary support; and appropriate remedial action should follow. In public-sector settings especially, the scope and structure of the investigation can carry additional legal and political consequences, including Public Records Act exposure and heightened scrutiny by elected officials or the media.

When employers elect to retain an external investigator, California law imposes additional considerations. Under Business and Professions Code section 17200, individuals who conduct investigations on behalf of others for compensation may fall within the statutory definition of a private investigator, requiring licensure unless an exemption applies. Attorneys conducting investigations within the scope of their law practice are generally exempt from private investigator licensing requirements, but non-attorney investigators must ensure compliance with the statute's licensing framework. Selecting an external investigator, therefore, is not simply a matter of experience or cost; it implicates regulatory compliance and, in some instances, the admissibility and credibility of the investigative process itself.

Ethical boundaries also matter. In *Sabey v. City of Pomona*, 215 Cal.App.4th 489 (2013), the court addressed concerns arising from two attorneys from the same law firm who served in dual roles for the same employer. The case highlights the tension that can emerge when different attorneys from the same law firm serve in different roles, both as neutral and advocate. For example, when one attorney from a law firm serves as an advisor or litigation counsel and a separate attorney serves as an investigator for the same client, risks with the actual or perceived impartiality of an investigation will exist. Such was the case in *Sabey* where the court held that this conflict could not be mitigated by remedial measures such as the use of ethical walls and similar preventative measures.

Although dual roles are not categorically prohibited, they can raise questions about neutrality, credibility, and potential conflicts, particularly if the investigative report becomes central evidence in subsequent

proceedings. As a practical matter, employers and counsel must consider not only whether an investigation satisfies legal requirements, including FEHA's "reasonable steps" requirement, but whether the structure of the engagement will withstand judicial scrutiny and avoid undermining the very defense it was intended to support.

In high-risk matters, the duty to investigate is therefore not merely procedural, it is strategic. Who conducts the investigation, how it is scoped, and how its findings are integrated into employment decisions can significantly influence both liability exposure and the defensibility of the employer's response.

CONCLUSION

Public-sector employment disputes rarely begin in a courtroom. They begin with an email, a complaint, a meet-and-confer exchange, or a disciplinary decision that feels routine in the moment. Yet within public agencies, those routine moments often become governance events. An internal complaint can mature into a retaliation claim. A whistleblower allegation can draw council scrutiny, media attention, and Public Records Act requests. And an investigation launched reflexively, or without a clearly defined objective, can become the centerpiece of subsequent litigation.

As explored throughout this paper, high-profile employment matters in California public agencies do not arise in isolation. They emerge at the intersection of discrimination and retaliation law, whistleblower protections, First Amendment constraints, labor relations obligations, and transparency requirements. The investigative decisions made at the outset including whether to initiate an inquiry, how to structure it, who should conduct it, and how findings are framed and implemented, often shape legal exposure long before a complaint is filed. Ultimately, the investigation is not merely a procedural response to workplace conflict. It is a strategic inflection point. In public-sector settings, it frequently becomes the foundation upon which liability is argued, defenses are built, and public narratives are formed. For city attorneys and agency counsel, the critical question is not simply whether to investigate, but how investigative choices will define the record that follows.

Further, while workplace investigations are often deployed in response to legal risk, their strategic value extends well beyond liability mitigation. When conducted thoughtfully, investigations serve as a critical mechanism for ensuring policy compliance, reinforcing organizational values, and promoting a safe, productive work environment. At their core, workplace investigations provide leadership with a structured, fact-based means of assessing whether organizational practices align with established policies, legal obligations, and cultural expectations. This function is essential not only for addressing individual complaints, but also for maintaining institutional credibility and accountability.

Investigations allow agencies to evaluate whether employees, including those in leadership roles, are adhering to internal policies and procedures. Even where no unlawful conduct is substantiated, the investigative process frequently reveals important insights, such as inconsistent application of policies, gaps between written standards and actual practices, cultural norms that undermine compliance efforts, or breakdowns in supervision and accountability structures. Identifying these issues early allows organizations to take corrective action before they develop into systemic problems or give rise to legal exposure.

Beyond compliance, workplace investigations play an important role in promoting a safe and productive work environment. A workplace that is perceived as unresponsive to employee concerns, regardless of whether those concerns ultimately rise to the level of legal violations, may experience diminished morale, reduced productivity, and increased turnover. By contrast, a timely, thorough, and fair investigative response signals that the organization takes concerns seriously and is committed to a principled and transparent process. This, in turn, fosters trust among employees and reinforces clear behavioral expectations across the workforce. Workplace investigations also advance organizational accountability,

particularly in environments where power imbalances may otherwise discourage reporting or obscure misconduct. While investigations are often focused on individual behavior, they also serve to evaluate whether broader organizational systems, leadership decisions, or institutional practices contributed to the issue at hand. In this respect, investigations do more than assign individual responsibility; they create a mechanism for examining and reinforcing accountability at the organizational level.

In addition, investigations are a valuable and often underutilized source of organizational insight. When viewed collectively rather than as isolated events, investigative findings can inform meaningful improvements, including policy revisions and clarifications, the development of targeted training initiatives, leadership coaching, and enhancements to reporting mechanisms and complaint intake processes. Organizations that treat investigations as part of a broader feedback loop are better positioned to strengthen workplace effectiveness and prevent recurring issues.

To realize these benefits, investigations must be conducted with rigor, neutrality, and integrity. Confidentiality and thoroughness are essential to encouraging candid participation, protecting the integrity of the fact-finding process, and producing reliable, defensible findings. In turn, well-executed investigations enhance credibility not only with employees, but quite often the public at large.

In this way, workplace investigations are not merely reactive tools for managing risk, but proactive instruments of organizational governance that support compliance, reinforce culture, and drive continuous improvement over the long term.

Calm in The Chaos City Attorneys Facing Incivility

CALM IN THE CHAOS:
CITY ATTORNEYS FACING INCIVILITY

Essential Skills Subcommittee
Attorney Development & Succession Committee
May 15, 2026

INTRODUCTION

Upon admission to the State Bar and every year thereafter, California attorneys are required to take the following oath:

> As an officer of the court, I will strive to conduct myself at all times with dignity, courtesy and integrity.[1]

Collectively, these aspirational attributes offer a handy definition of civility. Unfortunately, this commitment to basic civility seems to be under fire from all quarters currently. What does this pledge mean for City Attorneys – and what steps can we take to promote civility more generally with city staff, other attorneys, city councils, committees, and the public?

BACKGROUND

California municipal law attorneys practice within a framework of legal principles, formal requirements, and professional obligations addressing civility. Some of these carry the force of law, while others are optional, but strongly encouraged. Guidance from the State Bar and the City Attorneys Department of Cal Cities provides a good starting point.

State Bar of California. The State Bar formally regulates the conduct of its members through its Rules of Professional Conduct, which are approved first by the State Bar Board of Trustees and subsequently via an order of the California Supreme Court. In May 2018, the Supreme Court issued an order approving 69 Rules of Professional Conduct, including many addressing civility. As noted at the time, this collection of rules "mark[ed] the first overhaul of ethics rules for attorneys licensed in California in nearly 30 years."[2]

Included in the 2018 Rules changes were modifications to Rule 8.4.1 ("Prohibited Discrimination, Harassment and Retaliation"). As explained in the comments to the Rule, "[t]his rule permits the imposition of discipline for conduct that would not necessarily result in the award of a remedy in a civil or administrative proceeding if such proceeding were filed." Thus, the State Bar may open an investigation into an attorney for violation of this Rule without a previous civil finding, thereby adding teeth to the requirement.

The 2018 changes were not the State Bar's first attempt to address ethics and civility. In 2007, the State Bar Board of Trustees adopted the *California Attorney Guidelines of Civility and Professionalism,*[3] a model set of guidelines for members, voluntary bar associations, and courts

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[1] California Rule of Court, Rule 9.7(b)
[2] Leah T. Wilson, Executive Director, State Bar of California
[3] Also available online at: https://www.calbar.ca.gov/sites/default/files/2026-01/Civility-Guidelines_Samples.pdf

to use and implement in a way that is effective for the legal community ("Guidelines," a copy of which is attached). This collection of norms addresses a broad spectrum of attorney behavior and practice, ranging from expansive declarations ("The dignity, decorum and courtesy that have traditionally characterized the courts and legal profession of civilized nations are not empty formalities." Section 1.) to much more focused concerns ("An attorney should serve papers on the attorney who is responsible for the matter at his or her principal place of work." Section 7.) As noted in their introduction, the Guidelines are not mandatory rules of professional conduct, rules of practice, or standards of care, and thus, they may not be used as an independent basis for disciplinary charges by the State Bar or claims of professional negligence. Taken together, however, they provide a framework for professionalism to which all attorneys should aspire.

In addition to the Guidelines, the State Bar has also attempted to bolster the civility of its members by working in cooperation with the California Civility Task Force ("Task Force"), a joint project of the California Judges Association and the California Lawyers Association consisting of some 40 leading lawyers and judges. In September 2021, the Task force published its first report, *Beyond the Oath: Recommendations for Improving Civility.*[4] It offered three suggestions germane to city attorneys:

1. "Require one hour of MCLE devoted to civility training, included in the total number of MCLE hours currently required. Approved civility MCLE programs should highlight the link between bias and incivility and urge lawyers to eliminate bias-driven incivility." This suggestion was adopted and took effect January 31, 2025.

2. "Require all lawyers, not just those who took the oath after the 2014 rule change, to affirm or reaffirm during the annual license renewal process that: 'As an officer of the court, I will strive to conduct myself at all times with dignity, courtesy and integrity.'" This was implemented through an amendment to California Rules of Court Rule 9.7, as cited above.

3. "Enact meaningful changes to State Bar disciplinary rules, prohibiting repeated incivility and clarifying that civility is not inconsistent with zealous representation." Among other things, the State Bar Rules now include Rule 2.3 ("Noncompliance with Attorney Civility Oath Requirement"), which addresses and establishes a fee for failures to adhere to the oath required by California Rules of Court Rule 9.7.

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[4] Available online at:
https://caljudges.org/docs/PDF/California%20Civility%20Task%20Force%20Report%209.10.21.pdf
See also: State Bar's Civility Toolkit - Attorney Civility and Professionalism | The State Bar of California

Taken as a whole, the State Bar's amendments to the Rules of Professional Conduct, adoption of the Guidelines, and enactment of Task Force recommendations on civility provide a clear message to the practitioner: far from being an antiquated notion, civility remains a relevant element of contemporary legal practice and will be treated accordingly by the profession's licensing body.

The City Attorneys Department of Cal Cities. The Cal Cities' City Attorneys Department ("Department") has likewise adopted its own *Ethical Principles for City Attorneys* ("Ethical Principles," a copy of which is attached).[5] These set forth a principle, explanation, and set of examples for 10 separate aspects of the municipal practitioner's work. As with the State Bar's Guidelines, the Ethical Principles are not "an effort to duplicate or interpret the State Bar's requirements or create additional regulatory standards," but seek instead to offer a framework of appropriate conduct specific to the field.[6]

Principle 5 ("Professionalism and Courtesy") of the Ethical Principles exhorts attorneys in the field to "conduct [themselves] 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." By way of explanation of this Principle, "the city attorney should be a role model of decorum and composure."

The civility structures put in place by the State Bar and Cal Cities do not comprise the entire edifice of decorous conduct municipal practitioners work within. But even limiting our attention to these two sources provides a more than sufficient model of professional behavior.

PUTTING CIVILITY ADMONITIONS INTO PRACTICE

Reading the admirable language of Rules of Professional Conduct, State Bar Rules, Guidelines, and Ethical Principles is important, but putting such urging into effect in trying times can test even the most dedicated practitioner. Often, the work of the City Attorney's Office includes interactions with individuals bound by no similar set of professional norms or requirements. And the social contract that previously been implicitly understood to dictate a base level of civility amongst all community members increasingly seems to have left such niceties behind.

With this reality in mind, the Essential Skills Subcommittee of the Attorney Development and Succession Committee offers the following practice tips on promoting civility when interacting with other attorneys, city staff, members of the public, and city council and commission members.

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[5] Available online at: https://www.cacities.org/Resources-Documents/Member-Engagement/Professional-Departments/City-Attorneys/Library/2011/5-2011-Spring-Michele-Beal-Bagneris-Ethical-Princi

[6] City Attorneys Department of the League of California Cities, *Ethical Principles* (October 2005), p. 1.

A. OTHER ATTORNEYS

1. **Do not disparage opposing counsel.** While attorneys are expected to vigorously advocate on behalf of their client, attorneys should focus on legal arguments rather than personal attacks and coercive threats. Disparaging opposing counsel's competence and threatening personal embarrassment generally does not help move legal disputes forward, and violates California's basic civility expectations. More seriously, threatening to weaponize public records requests may qualify as improper intimidation, and using the legal process as a cudgel rather than a remedy. A stronger, and more ethically sound, approach is to calmly and firmly identify the governing legal principles and articulate the consequences of non-compliance, while letting the strength of the legal position speak for itself. "The timbre of our time has become unfortunately aggressive and disrespectful. Language addressed to opposing counsel and courts has lurched off the path of discourse and into the ditch of abuse. This isn't who we are." (*In re Mahoney* (2021) 65 Cal.App.5th 376.)

2. **Do not make threats.** Maintaining a measured tone, declining to match insult with insult, and calling out improper conduct are not only appropriate but encouraged. However, a city attorney, in particular, should never threaten retaliation on unrelated applications or matters. Threatening improper action to gain advantage in a matter is potentially a violation of the rules of professional conduct and raises serious due process concerns. The State Bar's Guidelines provide in this regard:

   > An attorney should avoid negotiating tactics that are abusive; that are not made in good faith; *that threaten inappropriate legal action*; that are not true; that set arbitrary deadlines; that are intended solely to gain an unfair advantage or take unfair advantage of a superior bargaining position; or that do not accurately reflect the client's wishes or previous oral agreements.[7]

   Furthermore, linking the approval or denial of unrelated, independent permit applications to litigation leverage on a separate matter may arguably be an abuse of governmental authority.

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[7] The State Bar of California, *California Attorney Guidelines of Civility and Professionalism* (2007), Section 18, comment 'c', emphasis added, available online at: https://www.calbar.ca.gov/sites/default/files/2026-01/Civility-Guidelines_Samples.pdf

3. **Extend common courtesies.** Generally, requests for extensions of time and accommodations for scheduling difficulties should be considered routine and not addressed with an eye toward brinkmanship. Section 6 ('Scheduling, Continuances, and Extensions of Time') of the Guidelines reminds us that "[c]onsistent with existing law and court orders, an attorney should agree to reasonable requests for extensions of time that are not adverse to a client's interests." Moreover, "[u]nless time is of the essence, an attorney should agree to an extension without requiring motions or other formalities, regardless of whether the requesting counsel previously refused to grant an extension."

4. **Use the discovery process appropriately.** Any attorney who has worked in litigation has seen the abuse of the discovery process and the waste such conduct causes. The Guidelines are clear that "[a]n attorney should not use discovery to harass an opposing counsel, parties, or witnesses. An attorney should not use discovery to delay the resolution of a dispute." (Section 9.) Such advice would have behooved counsel in the matter of *La Jolla Spa MD, Inc. v. Avidas Pharmaceuticals, LLC*. After upholding over $28,000 in sanctions imposed for truly shocking conduct in the course of a deposition, including incessant interruptions, baseless objections, unrestrained rudeness, and even physical intimidation, the appellate court wrote in conclusion:

> Never before in this Court's nearly ten-year tenure have the sanctions the Court imposes today been more fitting and more deserved by an attorney. Chovanes's atrocious conduct at the Gardner deposition in particular fell far below the standard of professional conduct becoming an attorney practicing before this—or any other—Court. There may be a fine line between zealous advocacy and unprofessional conduct, but Chovanes trampled that line long before barreling past it.[8]

B. STAFF

1. **Be a role model with city staff when it comes to civility.** The Guidelines provide in relevant part that "[a]n attorney should treat clients with courtesy and respect, and represent them in a civil and professional manner." (See Section 3.) Similarly, the Ethical Principles provide that "[t]he city attorney should be a role model of decorum and composure." (See Ethical Principle 5.) Former City Manager Diane Kalen-Sukra says that "civility is the everyday ethic of honoring the dignity of others as we would wish our own to be honored - an active commitment to justice, respect, and mutual responsibility in shared civic life." Adopting this as one's default posture for working with staff sets a tone across the organization.

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[8] *La Jolla Spa MD, Inc. v. Avidas Pharmaceuticals, LLC*, 2019 US Dist., Lexis 148721.

2. **Avoid disparaging others, especially around city staff.** When it comes to dealing with an attorney who engages in uncivil conduct, avoid the temptation to do the same. The Guidelines provide in relevant part that ". . . an attorney should not allow clients to prevail upon the attorney to engage in uncivil behavior." (See Section 3.) The Ethical Principles provide that "[t]he 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." (Example 4 of Ethical Principle 5.) City attorneys should also ". . . not seem to endorse, by silence or otherwise, offensive comments made to him/her about others." (Example 5 of Ethical Priniciple 5.)

3. **When appropriate, help staff by playing the role of an 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 the public.[9] In any context, "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." (Example 2 of Ethical Principle 5.)

4. **Plan ahead with staff on how to best deal with the public.** 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 and conduct themselves free of bias. Benjamin Franklin's advice that "by failing to prepare, you are preparing to fail" can feel all too true in a high-stress public meeting when such planning has been overlooked.

5. **Be supportive of staff when they face incivility.** Staff are usually on the front line of City decision-making. Therefore, they may face public scrutiny, criticism, and backlash in meetings, on social media, or in the press. Be willing to listen to their concerns – sometimes they just need a sounding board. A Kenyan proverb tells us that "sticks in a bundle are unbreakable." Be that support when times are tough.

C. THE PUBLIC

1. **Familiarize yourself with Brown Act provisions regarding disruptions at public meetings.** The legislative body may adopt rules of procedure for members of the public

[9] See *Politically astute, but not political . . . Politics and the Role of the City Attorney*, Spring Conference, May 7, 2025, https://www.calcities.org/docs/default-source/city-attorneys-spring-conference/politically-astute-but-not-political-.-.-.-politics-and-the-role-of-the-city-attorney.pdf?sfvrsn=8c3a6f03_3.

to address the body, including regulations limiting the amount of time allocated for public testimony and for individual speakers (Government Code Section 54954.3(b)(1)). However, such bodies cannot prohibit criticism of the policies, procedures, programs, or services of the agency, or of the acts or omissions of the body (Government Code Section 54954.3(c)).

The Brown Act also authorizes the presiding officer of the legislative body to remove or cause to be removed an individual disrupting a meeting, including a teleconferenced meeting. Note that prior to removal, barring any actual true threat of force, the presiding officer must warn the individual that their behavior is disrupting the meeting and that failure to cease may result in removal. If the disruptive behavior continues, then the presiding officer or designee may remove the individual (Government Code Section 54957.95). (But see *Norse v. City of Santa Cruz* (9th Cir. 201) 629 F.3d 966 (silent and momentary Nazi salute directed toward mayor is not a disruption); *Acosta v. City of Costa Mesa* (9th Cir. 2013) 718 F.3d 800 (city council may not prohibit "insolent" remarks by members of the public absent actual disruption); but see *Kirkland v. Luken* (S.D. Ohio 2008), 538 F.Supp.2d 857 (finding no First Amendment violation by mayor for turning off microphone and removing speaker who used foul and inflammatory language that was deemed as "likely to incite the members of the audience during the meeting, cause disorder, and disrupt the meeting").

2. **Familiarize yourself with local rules of procedure**. Government Code Sections 36813 and 54954.3(b) authorize City Councils to establish rules of conduct for its proceedings. Many Councils have adopted such local rules that address conduct during a meeting. Such rules include allowable time for speakers at public comment, procedures for conducting a meeting, procedures for addressing disruptions at a meeting, and designation of a staff member to act as a sergeant at arms (such as a Police representative). The City Attorney should be familiar with the local rules of procedure, especially before a contentious meeting. The City Attorney should also review the rules in advance of a meeting to confirm they are up to date and consistent with current practice and current Brown Act regulations.

3. **Have a game plan**. If the City Attorney expects a contentious hearing, it is best to plan ahead and coordinate with the Mayor and other key staff such as the City Manager, the City Clerk, and/or the Police Chief. Decide who will take on roles at the meeting such as Timekeeper and Sergeant at Arms. Consider in advance what to do if speakers continue to speak past the allotted time or are disrupting the meeting: take a break, clear the room if necessary and authorized by rules of procedure and the Brown Act, remove disruptive persons if justified.

4. **Consider other arenas for public education and discourse.** If staff is aware that an issue may generate public interest, then consider agendizing a Study Session to educate the City Council and the public on the topic (such as a session on new streamlined ministerial requirements). Post resources on the City's website for the public's education.

D. CITY COUNCILS

1. **Have a good set of norms/civility policy.** Work with your City Council to establish or update an agreed-upon set of norms with a documented civility policy, code of conduct, or rules of decorum. These documents set expectations for how the city council will model the behavior it expects from the public. ILG has compiled a list of sample codes and policies.[10]

2. **Help your City Council understand the limits of the First Amendment and the requirements of the Brown Act when it comes to public meetings.** Educate your City Council, and especially your Mayor, on the legal "actual disruption" standard for limiting public speakers and the relevant provisions of the Brown Act.[11]

CONCLUSION

The rewards of civility go far beyond the mere satisfaction of the profession's mores. When faced with adversity, it can be tempting to stray from such obligations. Faithful adherence to the rules and guidelines set out above, however, elevate the profession and the practitioner, especially in the face of exasperation and irritation. Internalizing and practicing the aspirations to civility within with the municipal law community works can only serve to nurture 'the better angels of our nature' and so improve the communal work we do.

RESOURCES

1. Hon. Wendy Chang & Hon. Mary H. Strobel (Ret.), *Improving Civility* (2024 Annual Conference), available online at: https://www.calcities.org/docs/default-source/annual-conference---session-materials/improving-civility.pdf

[10] See ILG, Sample Civility Policies (Last Updated 2022), available online at: https://www.ca-ilg.org/civility

[11] See *Tips for Dealing With the Public*; see also Government Code §§ 54957.9 and 54957.95; and David Mehretu, *Balancing Acts: Constitutional Rights vs. Meeting Decorum in California Cities* (2024 Spring Conference), available online at: https://www.calcities.org/docs/default-source/city-attorneys-spring-conference/balancing-acts---constitutional-rights-v.-public-meeting-decorum-in-california-cities.pdf?sfvrsn=56d8cc96_3.

2. The State Bar of California, *The State Bar of California Civility Toolbox*, available online at: https://www.calbar.ca.gov/legal-professionals/legal-resource-center/ethics/attorney-civility-and-professionalism

3. California Civility Task Force, *Beyond the Oath: Recommendations for Improving Civility* (September 2021), available online at: https://caljudges.org/docs/PDF/California%20Civility%20Task%20Force%20Report%209.10.21.pdf

4. City Attorneys Department of the League of California Cities, *Cal Cities Ethical Principles for City Attorneys* (October 6, 2025), available online at: https://www.cacities.org/UploadedFiles/LeagueInternet/d6/d60445e6-7918-459b-9780-00a714616297.pdf

5. Rebecca Moon, James Ross, & Andrew Shen, *The Latest in Legal Ethics for Municipal Lawyers* (2025 Spring Conference), available online at: https://www.calcities.org/docs/default-source/city-attorneys-spring-conference/the-latest-in-legal-ethics-for-municipal-lawyers_new5.7.pdf?sfvrsn=7c443532_3

6. City Attorneys Department of the League of California Cities, *Counsel and Council: A Guide to Building a Productive City Attorney-City Council Relationship* (2022), available online at: cc-counsel-council-2022-ver4.pdf

7. Melissa Kuehne, *Breaking the Cycle: Steps for Reducing Negative Discourse and Incivility in Public Meetings,* Western City Magazine (January 1, 2022), available online at: https://www.westerncity.com/article/breaking-cycle-steps-reducing-negative-discourse-and-incivility-public-meetings

8. David Mehretu, *Balancing Acts: Constitutional Rights vs. Meeting Decorum in California Cities* (2024 Spring Conference), available online at: https://www.calcities.org/docs/default-source/city-attorneys-spring-conference/balancing-acts---constitutional-rights-v.-public-meeting-decorum-in-california-cities.pdf?sfvrsn=56d8cc96_3

9. David A. Grenardo, *Civility Rules: Debunking the Major Myths Surrounding Mandatory Civility for Lawyers and Five Mandatory Civility Rules That Will Work*, The Georgetown Journal of Legal Ethics (Vol. 37:167, 2024), available online at:

https://www.law.georgetown.edu/legal-ethics-journal/wp-content/uploads/sites/24/2024/09/GT-GJLE240010.pdf

10. Joseph Petta, Derek P. Cole, Dan Sodergren, & Jennifer Mizrahi, *Staffing a Public Meeting: From War Stories to Your Story* (2022 Spring Conference), available online at: 5-2022-Spring:-Staffing-a-Public-Meeting-From-War

CALIFORNIA ATTORNEY GUIDELINES OF CIVILITY AND PROFESSIONALISM

INTRODUCTION

As officers of the court with responsibilities to the administration of justice, attorneys have an obligation to be professional with clients, other parties and counsel, the courts and the public. This obligation includes civility, professional integrity, personal dignity, candor, diligence, respect, courtesy, and cooperation, all of which are essential to the fair administration of justice and conflict resolution.

These are guidelines for civility. The Guidelines are offered because civility in the practice of law promotes both the effectiveness and the enjoyment of the practice and economical client representation. The legal profession must strive for the highest standards of attorney behavior to elevate and enhance our service to justice. Uncivil or unprofessional conduct not only disserves the individual involved, it demeans the profession as a whole and our system of justice.

These voluntary Guidelines foster a level of civility and professionalism that exceed the minimum requirements of the mandated Rules of Professional Conduct as the best practices of civility in the practice of law in California. The Guidelines are not intended to supplant these or any other rules or laws that govern attorney conduct. Since the Guidelines are not mandatory rules of professional conduct, nor rules of practice, nor standards of care, they are not to be used as an independent basis for disciplinary charges by the State Bar or claims of professional negligence.

The Guidelines are intended to complement codes of professionalism adopted by bar associations in California. Individual attorneys are encouraged to make these guidelines their personal standards by taking the pledge that appears at the end. The Guidelines can be applicable to all lawyers regardless of practice area. Attorneys are encouraged to comply with both the spirit and letter of these guidelines, recognizing that complying with these guidelines does not in any way denigrate the attorney's duty of zealous representation.

SECTION 1
RESPONSIBILITIES TO THE JUSTICE SYSTEM

The dignity, decorum and courtesy that have traditionally characterized the courts and legal profession of civilized nations are not empty formalities. They are essential to an atmosphere that promotes justice and to an attorney's responsibility for the fair and impartial administration of justice.

SECTION 2
RESPONSIBILITIES TO THE PUBLIC AND THE PROFESSION

An attorney should be mindful that, as individual circumstances permit, the goals of the profession include improving the administration of justice and contributing time to persons and organizations that cannot afford legal assistance.

An attorney should encourage new members of the bar to adopt these guidelines of civility and professionalism and mentor them in applying the guidelines.

SECTION 3
RESPONSIBILITIES TO THE CLIENT AND CLIENT REPRESENTATION

An attorney should treat clients with courtesy and respect, and represent them in a civil and professional manner. An attorney should advise current and potential clients that it is not acceptable for an attorney to engage in abusive behavior or other conduct unbecoming a member of the bar and an officer of the court.

As an officer of the court, an attorney should not allow clients to prevail upon the attorney to engage in uncivil behavior.

An attorney should not compromise the guidelines of civility and professionalism to achieve an advantage.

SECTION 4
COMMUNICATIONS

An attorney's communications about the legal system should at all times reflect civility, professional integrity, personal dignity, and respect for the legal system. An attorney should not engage in conduct that is unbecoming a member of the Bar and an officer of the court.

For example, in communications about the legal system and with adversaries:

a. An attorney's conduct should be consistent with high respect and esteem for the civil and criminal justice systems.

b. This guideline does not prohibit an attorney's good faith expression of dissent or criticism made in public or private discussions for the purpose of improving the legal system or profession.

c. An attorney should not disparage the intelligence, integrity, ethics, morals or behavior of the court or other counsel, parties or participants when those characteristics are not at issue.

d. Respecting cultural diversity, an attorney should not disparage another's personal characteristics.

e. An attorney should not make exaggerated, false, or misleading statements to the media while representing a party in a pending matter.

f. An attorney should avoid hostile, demeaning or humiliating words.

g. An attorney should not create a false or misleading record of events or attribute to an opposing counsel a position not taken.

h. An attorney should agree to reasonable requests in the interests of efficiency and economy, including agreeing to a waiver of procedural formalities where appropriate.

i. Unless specifically permitted or invited by the court or authorized by law, an attorney should not correspond directly with the court regarding a case.

Nothing above shall be construed as discouraging the reporting of conduct that fails to comply with the Rules of Professional Conduct.

SECTION 5
PUNCTUALITY

An attorney should be punctual in appearing at trials, hearings, meetings, depositions and other scheduled appearances.

For example:

a. An attorney should arrive sufficiently in advance to resolve preliminary matters.

b. An attorney should timely notify participants when the attorney will be late or is aware that a participant will be late.

SECTION 6
SCHEDULING, CONTINUANCES AND EXTENSIONS OF TIME

An attorney should advise clients that civility and courtesy in scheduling meetings, hearings and discovery are expected as professional conduct.

For example:

a. An attorney should consider the scheduling interests of the court, other counsel or party, and other participants, should schedule by agreement whenever possible, and should send formal notice after agreement is reached.

b. An attorney should not arbitrarily or unreasonably withhold consent to a request for scheduling accommodations or engage in delay tactics.

c. An attorney should promptly notify the court and other counsel of problems with key participants' availability.

d. An attorney should promptly notify other counsel and, if appropriate, the court, when scheduled meetings, hearings or depositions must be cancelled or rescheduled, and provide alternate dates when possible.

In considering requests for an extension of time, an attorney should consider the client's interests and need to promptly resolve matters, the schedules and willingness of others to grant reciprocal extensions, the time needed for a task, and other relevant factors.

Consistent with existing law and court orders, an attorney should agree to reasonable requests for extensions of time that are not adverse to a client's interests.

For example:

a. Unless time is of the essence, an attorney should agree to an extension without requiring motions or other formalities, regardless of whether the requesting counsel previously refused to grant an extension.

b. An attorney should agree to an appropriate continuance when new counsel substitutes in.

c. An attorney should advise clients that failing to agree with reasonable requests for time extensions is inappropriate.

d. An attorney should not use extensions or continuances for harassment or to extend litigation.

e. An attorney should place conditions on an agreement to an extension only if they are fair and essential or if the attorney is entitled to impose them, for instance to preserve rights or seek reciprocal scheduling concessions.

f. If an attorney intends that a request for or agreement to an extension shall cut off a party's substantive rights or procedural options, the attorney should disclose that intent at the time of the request or agreement.

SECTION 7
SERVICE OF PAPERS

The timing and manner of service of papers should not be used to the disadvantage of the party receiving the papers.

For example:

a. An attorney should serve papers on the attorney who is responsible for the matter at his or her principal place of work.

b. If possible, papers should be served upon counsel at a time agreed upon in advance.

c. When serving papers, an attorney should allow sufficient time for opposing counsel to prepare for a court appearance or to respond to the papers.

d. An attorney should not serve papers to take advantage of an opponent's absence or to inconvenience the opponent, for instance by serving papers late on Friday afternoon or the day preceding a holiday.

e. When it is likely that service by mail will prejudice an opposing party, an attorney should serve the papers by other permissible means.

SECTION 8
WRITINGS SUBMITTED TO THE COURT, COUNSEL OR OTHER PARTIES

Written materials directed to counsel, third parties or a court should be factual and concise and focused on the issue to be decided.

For example:

a. An attorney should not make ad hominem attacks on opposing counsel.

b. Unless at issue or relevant in a particular proceeding, an attorney should avoid degrading the intelligence, ethics, morals, integrity, or personal behavior of others.

c. An attorney should clearly identify all revisions in a document previously submitted to the court or other counsel.

SECTION 9
DISCOVERY

Attorneys are encouraged to meet and confer early in order to explore voluntary disclosure, which includes identification of issues, identification of persons with knowledge of such issues, and exchange of documents.

Attorneys are encouraged to propound and respond to formal discovery in a manner designed to fully implement the purposes of the Civil Discovery Act.

An attorney should not use discovery to harass an opposing counsel, parties, or witnesses. An attorney should not use discovery to delay the resolution of a dispute.

For example:

a. As to Depositions:

1. When another party notices a deposition for the near future, absent unusual circumstances, an attorney should not schedule another deposition in the same case for an earlier date without opposing counsel's agreement.

2. An attorney should delay a scheduled deposition only when necessary to address scheduling problems and not in bad faith.

3. An attorney should treat other counsel and participants with courtesy and civility, and should not engage in conduct that would be inappropriate in the presence of a judicial officer.

4. An attorney should remember that vigorous advocacy can be consistent with professional courtesy, and that arguments or conflicts with other counsel should not be personal.

5. An attorney questioning a deponent should provide other counsel present with a copy of any documents shown to the deponent before or contemporaneously with showing the document to the deponent.

6. Once a question is asked, an attorney should not interrupt a deposition or make an objection for the purpose of coaching a deponent or suggesting answers.

7. An attorney should not direct a deponent to refuse to answer a question or end the deposition without a legal basis for doing so.

8. An attorney should refrain from self-serving speeches and speaking objections.

b. As to Document Demands:

1. Document requests should be used only to seek those documents that are reasonably needed to prosecute or defend an action.

2. An attorney should not make demands to harass or embarrass a party or witness or to impose an inordinate burden or expense in responding.

3. If an attorney inadvertently receives a privileged document, the attorney should promptly notify the producing party that the document has been received.

4. In responding to a document demand, an attorney should not intentionally misconstrue a request in such a way as to avoid disclosure or withhold a document on the grounds of privilege.

5. An attorney should not produce disorganized or unintelligible documents, or produce documents in a way that hides or obscures the existence of particular documents.

6. An attorney should not delay in producing a document in order to prevent opposing counsel from inspecting the document prior to or during a scheduled deposition or for some other tactical reason.

c. As to Interrogatories:

1. An attorney should narrowly tailor special interrogatories and not use them to harass or impose an undue burden or expense on an opposing party.

2. An attorney should not intentionally misconstrue or respond to interrogatories in a manner that is not truly responsive.

3. When an attorney lacks a good faith belief in the merit of an objection, the attorney should not object to an interrogatory. If an interrogatory is objectionable in part, an attorney should answer the unobjectionable part.

SECTION 10
MOTION PRACTICE

An attorney should consider whether, before filing or pursuing a motion, to contact opposing counsel to attempt to informally resolve or limit the dispute.

For example:

a. Before filing demurrers, motions to strike, motions to transfer venue, and motions for judgment on the pleadings, an attorney should engage in more than a pro forma effort to resolve the issue.

b. In complying with any meet and confer requirement in the California Code of Civil Procedure, an attorney should speak personally with opposing counsel and engage in a good faith effort to resolve or informally limit an issue.

c. An attorney should not engage in conduct that forces an opposing counsel to file a motion and then not oppose the motion.

d. An attorney who has no reasonable objection to a proposed motion should promptly make this position known to opposing counsel, who then may file an unopposed motion or avoid filing a motion.

e. After opposing a motion, if an attorney recognizes that the movant's position is correct, the attorney should promptly advise the movant and the court of this change in position.

f. Because requests for monetary sanctions, even if statutorily authorized, can lead to the destruction of a productive relationship between counsel or parties, monetary sanctions should not be sought unless fully justified by the circumstances and necessary to protect a client's legitimate interests and then only after a good faith effort to resolve the issue informally among counsel.

SECTION 11
DEALING WITH NONPARTY WITNESSES

It is important to promote high regard for the profession and the legal system among those who are neither attorneys nor litigants. An attorney's conduct in dealings with nonparty witnesses should exhibit the highest standards of civility.

For example:

a. An attorney should be courteous and respectful in communications with nonparty witnesses.

b. Upon request, an attorney should extend professional courtesies and grant reasonable accommodations, unless to do so would materially prejudice the client's lawful objectives.

c. An attorney should take special care to protect a witness from undue harassment or embarrassment and to state questions in a form that is appropriate to the witness's age and development.

d. An attorney should not issue a subpoena to a nonparty witness for inappropriate tactical or strategic purposes, such as to intimidate or harass the nonparty.

e. As soon as an attorney knows that a previously scheduled deposition will or will not, in fact, go forward as scheduled, the attorney should notify all counsel.

f. An attorney who obtains a document pursuant to a deposition subpoena should, upon request, make copies of the document available to all other counsel at their expense.

SECTION 12
EX PARTE COMMUNICATION WITH THE COURT

In a social setting or otherwise, an attorney should not communicate ex parte with a judicial officer on the substance of a case pending before the court, unless permitted by law.

SECTION 13
SETTLEMENT AND ALTERNATIVE DISPUTE RESOLUTION

An attorney should raise and explore with the client and, if the client consents, with opposing counsel, the possibility of settlement and alternative dispute resolution in every matter as soon as possible and, when appropriate, during the course of litigation.

For example:

a. An attorney should advise a client at the outset of the relationship of the availability of informal or alternative dispute resolution.

b. An attorney should attempt to evaluate a matter objectively and to de-escalate any controversy or dispute in an effort to resolve or limit the controversy or dispute.

c. An attorney should consider whether alternative dispute resolution would adequately serve a client's interest and dispose of the controversy expeditiously and economically.

d. An attorney should honor a client's desire to settle the dispute quickly and in a cost-effective manner.

e. An attorney should use an alternative dispute resolution process for purposes of settlement and not for delay or other improper purposes, such as discovery.

f. An attorney should participate in good faith, and assist the alternative dispute officer by providing pertinent and accurate facts, law, theories, opinions and arguments in an attempt to resolve a dispute.

g. An attorney should not falsely hold out the possibility of settlement as a means for terminating discovery or delaying trial.

SECTION 14
CONDUCT IN COURT

To promote a positive image of the profession, an attorney should always act respectfully and with dignity in court and assist the court in proper handling of a case.

For example:

a. An attorney should be punctual and prepared.

b. An attorney's conduct should avoid disorder or disruption and preserve the right to a fair trial.

c. An attorney should maintain respect for and confidence in a judicial office by displaying courtesy, dignity and respect toward the court and courtroom personnel.

d. An attorney should refrain from conduct that inappropriately demeans another person.

e. Before appearing in court, an attorney should advise a client of the kind of behavior expected of the client and endeavor to prevent the client from creating disorder or disruption in the courtroom.

f. An attorney should make objections for legitimate and good faith reasons, and not for the purpose of harassment or delay.

g. An attorney should honor an opposing counsel's requests that do not materially prejudice the rights of the attorney's client or sacrifice tactical advantage.

h. While appearing before the court, an attorney should address all arguments, objections and requests to the court, rather than directly to opposing counsel.

i. While appearing in court, an attorney should demonstrate sensitivity to any party, witness or attorney who has requested, or may need, accommodation as a person with physical or mental impairment, so as to foster full and fair access of all persons to the court.

SECTION 15
DEFAULT

An attorney should not take the default of an opposing party known to be represented by counsel without giving the party advance warning.

For example an attorney should not race opposing counsel to the courthouse to knowingly enter a default before a responsive pleading can be filed. This guideline is intended to apply only to taking a default when there is a failure to timely respond to complaints, cross-complaints, and amended pleadings.

SECTION 16
SOCIAL RELATIONSHIPS WITH JUDICIAL OFFICERS, NEUTRALS AND COURT APPOINTED EXPERTS

An attorney should avoid even the appearance of bias by notifying opposing counsel or an unrepresented opposing party of any close, personal relationships between the attorney and a judicial officer, arbitrator, mediator or court-appointed expert and allowing a reasonable opportunity to object.

SECTION 17
PRIVACY

An attorney should respect the privacy rights of parties and nonparties.

For example:

a. An attorney should not inquire into, attempt or threaten to use, private facts concerning any party or other individuals for the purpose of gaining an advantage in a case. This guideline does not preclude inquiry into sensitive matters relevant to an issue, as long as the inquiry is pursued as narrowly as possible.

b. If an attorney must inquire into an individual's private affairs, the attorney should cooperate in arranging for protective measures, including stipulating to an appropriate protective order, designed to assure that the information revealed is disclosed only for purposes relevant to the pending litigation.

c. Nothing herein shall be construed as authorizing the withholding of information in violation of applicable law.

SECTION 18
NEGOTIATION OF WRITTEN AGREEMENTS

An attorney should negotiate and conclude written agreements in a cooperative manner and with informed authority of the client.

For example:

a. An attorney should use boilerplate provisions only if they apply to the subject of the agreement.

b. If an attorney modifies a document, the attorney should clearly identify the change and bring it to the attention of other counsel.

c. An attorney should avoid negotiating tactics that are abusive; that are not made in good faith; that threaten inappropriate legal action; that are not true; that set arbitrary deadlines; that are intended solely to gain an unfair advantage or take unfair advantage of a superior bargaining position; or that do not accurately reflect the client's wishes or previous oral agreements.

d. An attorney should not participate in an action or the preparation of a document that is intended to circumvent or violate applicable laws or rules.

In addition to other applicable Sections of these Guidelines, attorneys engaged in a transactional practice have unique responsibilities because much of the practice is conducted without judicial supervision.

For example:

a. Attorneys should be mindful that their primary goals are to negotiate in a manner that accurately represents their client and the purpose for which they were retained.

b. Attorneys should successfully and timely conclude a transaction in a manner that accurately represents the parties' intentions and has the least likely potential for litigation.

c. With client approval, attorneys should consider giving each party permission to contact the employees of the other party for the purpose of promptly and efficiently obtaining necessary information and documents.

SECTION 19
ADDITIONAL PROVISION FOR FAMILY LAW PRACTITIONERS

In addition to other applicable Sections of these Guidelines, in family law proceedings an attorney should seek to reduce emotional tension and trauma and encourage the parties and attorneys to interact in a cooperative atmosphere, and keep the best interest of the children in mind.

For example:

a. An attorney should discourage and should not abet vindictive conduct.

b. An attorney should treat all participants with courtesy and respect in order to minimize the emotional intensity of a family dispute.

c. An attorney representing a parent should consider the welfare of a minor child and seek to minimize the adverse impact of the family law proceeding on the child.

SECTION 20
ADDITIONAL PROVISION FOR CRIMINAL LAW PRACTITIONERS

In addition to other applicable Sections of these Guidelines, criminal law practitioners have unique responsibilities. Prosecutors are charged with seeking justice, while defenders must zealously represent their clients even in the face of seemingly overwhelming evidence of guilt. In practicing criminal law, an attorney should appreciate these roles.

For example:

a. A prosecutor should not question the propriety of defending a person accused of a crime.

b. Appellate counsel and trial counsel should communicate openly, civilly and without rancor, endeavoring to keep the proceedings on a professional level.

SECTION 21
COURT PROCEEDINGS

Judges are encouraged to become familiar with these Guidelines and to support and promote them where appropriate in court proceedings.

California Attorney Guidelines of Civility and Professionalism

ATTORNEY'S PLEDGE

I commit to these Guidelines of Civility and Professionalism and will be guided by a sense of integrity, cooperation and fair play.

I will abstain from rude, disruptive, disrespectful, and abusive behavior, and will act with dignity, decency, courtesy, and candor with opposing counsel, the courts and the public.

As part of my responsibility for the fair administration of justice, I will inform my clients of this commitment and, in an effort to help promote the responsible practice of law, I will encourage other attorneys to observe these Guidelines.

_____ _____

(Signature) (Date)

_____

(Print Name)

Sample Resolution

RESOLUTION OF [_____]
APPROVING AND ADOPTING CALIFORNIA ATTORNEY GUIDELINES OF CIVILITY AND PROFESSIONALISM

RECITALS

A. As officers of the court with responsibilities to the administration of justice, attorneys have an obligation to be professional with clients, other parties and counsel, the courts and the public. This obligation includes civility, professional integrity, personal dignity, candor, diligence, respect, courtesy, and cooperation, all of which are essential to the fair administration of justice and conflict resolution.

B. Civility and professionalism have been affected by a number of factors, as a result of which there is a need for attorneys to recommit themselves to the principles of civility and professionalism.

C. On July 20, 2007, the Board of Governors of the State Bar of California adopted California Attorney Guidelines of Civility and Professionalism (the "Civility Guidelines").

D. The Board of Directors of [_____] are of the unanimous opinion that the Civility Guidelines will be of significant assistance in encouraging members of [_____] to continue to enhance their reputation and commitment to civility and professionalism.

RESOLUTION

The Board of Directors of [_____] hereby approves and endorses the California Attorney Guidelines of Civility and Professionalism and recommends that all members of [_____] commit to and agree to be guided by such guidelines.

Dated: _____

[_____]

By: _____

California Attorney Guidelines of Civility and Professionalism

Sample Court Order

1. The Court expects counsel to be familiar with and follow the California Attorney Guidelines of Civility and Professionalism (the "Civility Guidelines").

2. A copy of the Civility Guidelines may be obtained on the web at the following URL:

   https://www.calbar.ca.gov/Attorneys/Conduct-Discipline/Ethics/Attorney-Civility-and-Professionalism

3. Uncivil or unprofessional behavior will not be tolerated.

4. The Court expects parties to resolve all disputes regarding scheduling or time extensions without the necessity of Court involvement.

Ethical Principles for City Attorneys

Thursday, May 5, 2011 General Session; 2:00 – 4:15 p.m.

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Notes...

Ethical Principles for City Attorneys[1]

Adopted October 6, 2005

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. Rules of particular interest to a City Attorney include: Rules 1-100 (general application of rules), 2-100 (communication with a represented party), 2-400 (discriminatory conduct),3-100 (confidential information), 3-110 (competence), 3-120(sexual relations with client), 3-210 (advising violation of law), 3-310 (adverse interests), 3-500 (communication), 3-510 (settlement offer), 3-600 (organization as client), 5-100 (threatening charges), 5-110 (filing criminal charges), 5-210 (witness at trial), and 5-220 (suppression of evidence)[2]. 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.

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[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).

[2] The listing of certain Rules of Professional Conduct particularly relevant to City Attorneys was added to the adopted report for the session on "Professional Responsibility Challenges for Today's City Attorney" at the 2011 City Attorneys Spring Conference.

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.

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.

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 knowledgeably 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.

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 need 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.[3]

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").

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[3] This example does not affect contributions to the League or its subsidiary bodies for educational or any other purpose, including any League educational programs designed to prepare officials for higher office.

2. The city attorney should provide advice without a focus on garnering personal support or avoiding personal criticism.

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.*

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 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.

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.