



2022 City Attorneys Spring Conference

Westin Carlsbad

May 4-6, 2022

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**To restore and protect local control for cities
through education and advocacy to enhance
the quality of life for all Californians.**

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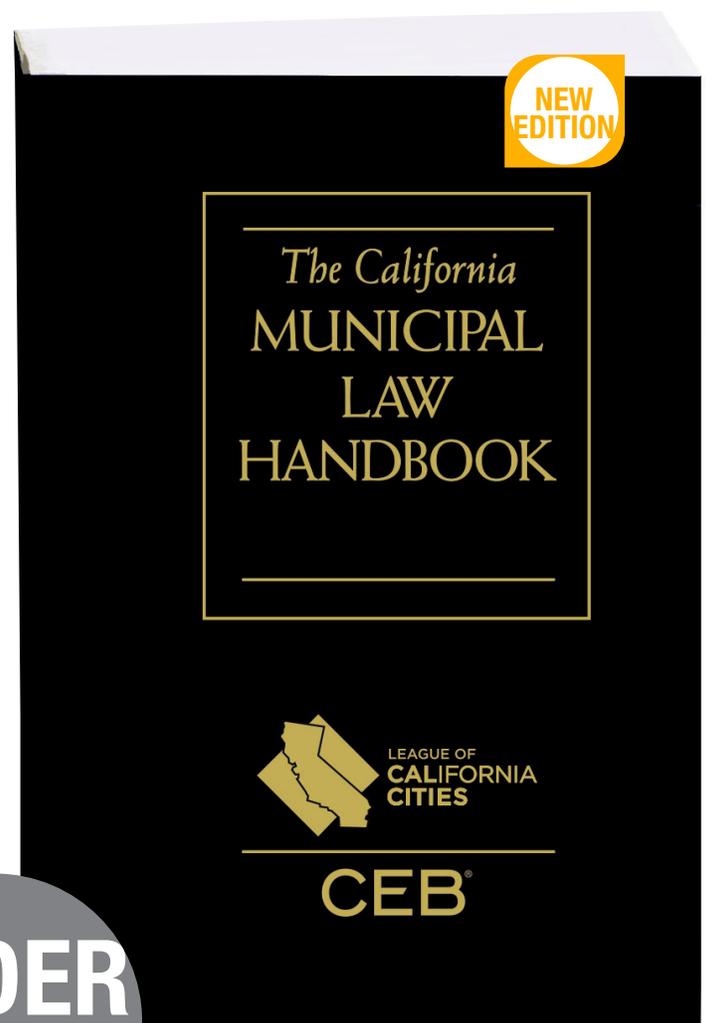
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2022 City Attorneys Spring Conference

Papers Table of Contents

	Page
I. MCLE Information	7
II. Program	8
III. Program Materials	
a. Municipal Tort and Civil Rights Litigation Update <i>Timothy T. Coates, Partner, Greines, Martin, Stein & Richland</i>	13
b. Police Reform: Legal Challenges and Solutions <i>Jonathan Holtzman, Founding Partner, Renne Public Law Group</i> <i>Jenica Maldonado, Partner, Renne Public Law Group</i> <i>Yuval Miller, Arbitrator/Mediator, Law Offices of Yuval Miller</i>	43
c. The Tension Between the Right to Privacy and Police Technology <i>James E. "Jeb" Brown, Senior Counsel, Liebert Cassidy Whitmore</i> <i>Neil Okazaki, Assistant City Attorney, Riverside</i>	57
d. Peace Officer Personnel Records and the California Public Records Act <i>Geoffrey Sheldon, Partner, Liebert Cassidy Whitmore</i>	66
e. Staffing a Public Meeting: From War Stories to Your Story <i>Joseph (Seph) Petta, Partner, Shute, Mihaly & Weinberger</i> <i>Derek P. Cole, City Attorney, Oakley and Sutter Creek, Partner, Cole Huber</i> <i>Daniel Sodergren, City Attorney, Pleasanton</i> <i>Jennifer Mizrahi, City Attorney, Desert Hot Springs, Stream Kim Hicks Wrage & Alfaro</i>	80
f. Practical Tips When Partnering with Outside Investigators <i>Eli Makus, Managing Partner, Van Dermeyden Makus</i> <i>Christina "Tina" Ro-Connolly, Partner, Oppenheimer Investigations Group</i> <i>Vida Thomas, Partner, Oppenheimer Investigations Group</i>	90
g. Labor and Employment Litigation Update <i>Geoffrey S. Sheldon, Partner, Liebert Cassidy Whitmore</i>	99



III. Program Materials (*continued*)

h.	Frequent FLSA Liability Risks in Public Agencies	123
	<i>Brian Walter, Partner, Liebert Cassidy Whitmore</i>	
i.	Public Contracting: Purchasing Requirements and Renewable Energy/ Energy Efficient Projects.....	135
	<i>Andrew Jared, Senior Counsel, Colantuono Highsmith & Whatley</i> <i>Ephraim Margolin, Associate Attorney, Colantuono Highsmith & Whatley</i>	
j.	FPPC Committee Update on Providing Conflict of Interest Advice	158
	<i>Teresa Stricker, City Attorney, San Pablo</i> <i>Rebecca Moon, Senior Assistant Attorney, Sunnyvale</i>	
k.	New Housing Laws: Navigating & Implementing SB 8, 9, 10.....	160
	<i>Claire Lai, Of Counsel, Meyers Nave</i> <i>Alex Mog, Of Counsel, Meyers Nave</i> <i>Scott Porter, Assistant City Attorney, Whittier and Encinitas, Deputy City Attorney, Fullerton, Jones & Mayer</i>	
l.	Land Use and CEQA Litigation Update.....	180
	<i>William Ihrke, City Attorney, La Quinta, Cerritos, Partner, Rutan & Tucker</i>	
m.	The Mitigation Fee Act's Five-Year Findings Requirement: Beware Costly Pitfalls.....	285
	<i>Glen Hansen, Senior Counsel, Abbott & Kindermann</i> <i>Rick Jarvis, Managing Partner, Jarvis, Fay & Gibson</i>	
n.	General Municipal Litigation Update	295
	<i>Pamela K. Graham, Senior Counsel, Colantuono Highsmith & Whatley</i>	
o.	Update on Counsel & Council Publication - A Focus on Ethics...318	
	<i>Valerie Armento, Chair, Ad Hoc Counsel and Council Committee, Interim City Attorney/General Counsel, East Palo Alto/Santa Clara County Habitat Agency</i> <i>Glen Googins, City Attorney, Chula Vista</i> <i>Inder Khalsa, City Attorney, Davis, Mill Valley, Richards, Watson & Gershon</i>	
p.	Rules of Professional Conduct for City Attorneys.....	320
	<i>Heather Linn Rosing, Shareholder and CEO, Klinedinst</i>	
III.	Speakers' Biographies	339



MCLE Information

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Evaluations

PLEASE TELL US WHAT YOU THINK! We value your feedback. An electronic version of the evaluation is available by scanning the below QR code or entering the link to the evaluation. The link will also be emailed after the conference. Please tell us what you liked, what you didn't, and what we can do to improve this learning experience.

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2022 CITY ATTORNEYS SPRING CONFERENCE

Wednesday, May 4 – Friday, May 6

Westin Carlsbad

2021-2022 City Attorneys Department Officers

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Dave Fleishman, City Attorney, Pismo Beach and Solvang, Richards, Watson & Gershon

First Vice President

Eric Danly, City Attorney, Petaluma

Second Vice President

Joseph Montes, City Attorney, Alhambra, San Marino, and Santa Clarita, Burke, Williams & Sorensen

Department Director

Michael Colantuono, City Attorney, Grass Valley, Colantuono, Highsmith & Whatley

WEDNESDAY, MAY 4

10:30 a.m. – 6:30 p.m. **REGISTRATION OPEN**

Grand Pacific Foyer

11:45 a.m. – 1:00 p.m. **LUNCH ON YOUR OWN**

1:00 – 3:00 p.m. **GENERAL SESSION**

Grand Pacific Ballroom

Moderator: Dave Fleishman, City Attorney, Pismo Beach and Solvang,
Richards, Watson & Gershon

Welcoming Remarks

Speaker: Celia Brewer, City Attorney, Carlsbad

Municipal Tort and Civil Rights Litigation Update

Speaker: Timothy T. Coates, Partner, Greines, Martin, Stein & Richland

Police Reform: Legal Challenges and Solutions

Speakers: Jonathan Holtzman, Founding Partner, Renne Public Law Group
Jenica Maldonado, Partner, Renne Public Law Group
Yuval Miller, Arbitrator/Mediator, Law Offices of Yuval Miller

3:00 - 3:15 p.m. **BREAK**

WEDNESDAY, MAY 4

3:15 – 5:00 p.m.

GENERAL SESSION

Grand Pacific Ballroom

Moderator: Michael Colantuono, City Attorney, Grass Valley,
Colantuono, Highsmith & Whatley

The Tension Between the Right to Privacy and Police Technology

Speakers: James E. "Jeb" Brown, Senior Counsel, Liebert Cassidy
Whitmore
Neil Okazaki, Assistant City Attorney, Riverside

Peace Officer Personnel Records and the California Public Records Act

Speaker: Geoffrey Sheldon, Partner, Liebert Cassidy Whitmore

5:00 – 6:00 p.m.

New Lawyers Meet and Greet *(Fewer than 10 years of municipal law practice)*

Grand Pacific Ballroom

Meet colleagues, learn about the City Attorneys Department, share ideas about municipal law, and engage with the Attorney Development and Succession Committee.

6:30 – 8:30 p.m.

LEGOLAND BLOCK PARTY

Legoland

Enjoy hors d'oeuvres and no host beverages inside Legoland at Miniland USA. *Note: attendees will not have full access to the park.*



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- Once on Friday during morning sessions.

THURSDAY, MAY 5

8:00 a.m. – 4:00 p.m.

REGISTRATION OPEN

Grand Pacific Foyer

8:00 – 9:00 a.m.

BREAKFAST

Sunset Ballroom

9:00 – 10:30 a.m.

GENERAL SESSION

Grand Pacific Ballroom

Moderator: Eric Danly, City Attorney, Petaluma

Staffing a Public Meeting: From War Stories to Your Story

Speakers: Joseph (Seph) Petta, Partner, Shute, Mihaly & Weinberger
Derek Cole, Partner, Cole Huber
Daniel Sodergren, City Attorney, Pleasanton
Jennifer Mizrahi, City Attorney, Desert Hot Springs, Stream Kim
Hicks Wrage & Alfaro
Attorney Development and Succession Committee

Practical Tips When Partnering with Outside Investigators

Speakers: Eli Makus, Managing Partner, Van Dermyden Makus
Christina "Tina" Ro-Connolly, Partner, Oppenheimer
Investigations Group
Vida Thomas, Partner, Oppenheimer Investigations Group

10:30 – 10:45 a.m.

BREAK

10:45 a.m. – 12:15 p.m.

GENERAL SESSION

Grand Pacific Ballroom

Moderator: Joseph Montes, City Attorney, Alhambra, San Marino, and
Santa Clarita, Burke, Williams & Sorensen

Labor and Employment Litigation Update

Speaker: Geoffrey S. Sheldon, Partner, Liebert Cassidy Whitmore

Frequent FLSA Liability Risks in Public Agencies

Speaker: Brian Walter, Partner, Liebert Cassidy Whitmore

12:30 – 1:30 p.m.

NETWORKING LUNCHEON

Sunset Ballroom

1:45 – 3:30 p.m.

GENERAL SESSION

Grand Pacific Ballroom

Moderator: Dave Fleishman, City Attorney, Pismo Beach and Solvang,
Richards, Watson & Gershon

Department Business Meeting and Colleague Recognition

- *President's Report – Dave Fleishman*
- *Director's Report – Michael Colantuono*
- *Colleague Recognition – Department Officers*

THURSDAY, MAY 5

(Cont.) 1:45 – 3:30 p.m.

Public Contracting: Purchasing Requirements and Renewable Energy/ Energy Efficient Projects

Speakers: Andrew Jared, Senior Counsel, Colantuono Highsmith & Whatley
Ephraim Margolin, Associate Attorney, Colantuono Highsmith & Whatley

FPPC Committee Update on Providing Conflict of Interest Advice

Speakers: Teresa Stricker, City Attorney, San Pablo
Rebecca Moon, Senior Assistant Attorney, Sunnyvale

3:30 - 3:45 p.m.

BREAK

3:45 – 4:45 p.m.

GENERAL SESSION

Grand Pacific Ballroom

Moderator: Dave Fleishman, City Attorney, Pismo Beach and Solvang,
Richards, Watson & Gershon

New Housing Laws: Navigating & Implementing SB 8, 9, 10

Speakers: Claire Lai, Of Counsel, Meyers Nave
Alex Mog, Of Counsel, Meyers Nave
Scott Porter, Assistant City Attorney, Whittier and Encinitas,
Deputy City Attorney, Fullerton, Jones & Mayer

5:00 – 6:00 P.M.

CONCURRENT GROUP DISCUSSIONS

Diversity, Equity and Inclusion Town Hall

Carlsbad A

Moderator: Eric Casher, City Attorney, Pinole, Principal, Meyers Nave

Coastal Cities

Cardiff

Moderator: Cindie McMahon, Assistant City Attorney, Carlsbad

Homelessness

Grand Pacific Ballroom

Moderator: Andrew Jared, Senior Counsel, Colantuono Highsmith &
Whatley

Solo and Small City Attorney Offices

Encinitas

Moderator: Heather Stroud, City Attorney, South Lake Tahoe

FRIDAY, MAY 6

7:00 – 7:45 a.m.

FUN RUN

*Sponsored by Best Best & Krieger
The Westin Lobby*

7:45 – 9:00 a.m.

BREAKFAST

Sunset Ballroom

7:45 – 10:30 a.m.

REGISTRATION

Grand Pacific Foyer

9:00 – 10:15 a.m.

GENERAL SESSION

Grand Pacific Ballroom

Moderator: Eric Danly, City Attorney, Petaluma

Land Use and CEQA Litigation Update

Speaker: William Ihrke, City Attorney, La Quinta, Cerritos, Partner,
Rutan & Tucker

The Mitigation Fee Act's Five-Year Findings Requirement: Beware Costly Pitfalls

Speakers: Glen Hansen, Senior Counsel, Abbott & Kindermann
Rick Jarvis, Managing Partner, Jarvis, Fay & Gibson

10:15 - 10:30 a.m.

BREAK

10:30 a.m. – 12:30 p.m.

GENERAL SESSION

Grand Pacific Ballroom

Moderator: Joseph Montes, City Attorney, Alhambra, San Marino, and
Santa Clarita, Burke, Williams & Sorensen

General Municipal Litigation Update

Speaker: Pamela K. Graham, Senior Counsel, Colantuono Highsmith
& Whatley

(MCLE Specialty Credit for Ethics)

Update on Counsel & Council Publication - A Focus on Ethics

Speaker: Valerie Armento, Chair, Ad Hoc Counsel and Council
Committee, Interim City Attorney/General Counsel, East Palo
Alto/Santa Clara County Habitat Agency
Glen Googins, City Attorney, Chula Vista
Inder Khalsa, City Attorney, Davis, Mill Valley, Richards, Watson
& Gershon

(MCLE Specialty Credit for Ethics)

Rules of Professional Conduct for City Attorneys

Speaker: Heather Linn Rosing, Shareholder and CEO, Klinedinst

Closing Remarks / Evaluations / Adjourn



Municipal Tort and Civil Rights Litigation Update

Wednesday, May 4, 2022

Timothy T. Coates, Partner, Greines, Martin, Stein & Richland

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I. CIVIL RIGHTS—LAW ENFORCEMENT LIABILITY

A. *Rivas-Villegas v. Cortesluna*, __U.S.__, 142 S.Ct. 4 (2021)

- **Officer entitled to qualified immunity from excessive force claim arising from placing knee against suspect's back during handcuffing.**

In *Rivas-Villegas v. Cortesluna*, __U.S.__, 142 S.Ct. 4 (2021) Union City police officers responded to a 911 call reporting that a woman and her two children were barricaded in a room for fear that Ramon Cortesluna, the woman's boyfriend, was going to hurt them with a chain saw. Officer Rivas-Villegas knocked on the door and commanded the Cortesluna to come out. Cortesluna came out, carrying a metal tool in one hand, with a large knife visible in his pocket. Cortesluna was ordered to drop the tool and raise his hands, which he did, only to start to lower his hands towards the knife, prompting an officer to shoot him twice in rapid succession with beanbag rounds. Rivas-Villegas then pushed Cortesluna to the ground, and straddled Cortesluna, placing his right foot on the ground next to Cortesluna's right side with his right leg bent at the knee. He placed his left knee on the left side of Cortesluna's back, near where Cortesluna had a knife in his pocket. He raised both of Cortesluna's arms up behind his back for approximately eight seconds, as another officer handcuffed the suspect.

Cortesluna sued the officers, asserting that the two beanbag rounds, as well as Officer Rivas-Villegas knee on his back, constituted excessive force in violation of the Fourth Amendment. The district court granted summary judgment to the officers based on qualified immunity, but the Ninth Circuit reversed in part, and affirmed in part in a 2-1 decision. A majority concluded that there was no liability for use of the beanbag rounds, but that Officer Rivas-Villegas's placement of his knee against plaintiff's back could constitute excessive force. The majority held that there was no qualified immunity,

because in *LaLonde v. County of Riverside*, 204 F. 3d 947 (9th Cir. 2000) the court had held that an officer could be held liable for excessive force for digging a knee into the back of a prone, compliant suspect, causing severe injuries.

The Supreme Court reversed in a per curiam opinion. The Court held that Rivas-Villegas was entitled to qualified immunity, because no clearly established law would have suggested that placing his knee against Cortesluna's back could give rise to an excessive force claim. The Court noted that even assuming that Circuit Court opinions could clearly establish the law, the *LaLonde* case was not sufficiently similar to the situation confronted by Rivas-Villegas. In *LaLonde*, officers were responding to a mere noise complaint, whereas here they were responding to a serious alleged incident of domestic violence possibly involving a chainsaw. Moreover, LaLonde was unarmed. Cortesluna, in contrast, had a knife protruding from his left pocket for which he had just previously appeared to reach. Further, here video evidence shows that Rivas-Villegas placed his knee on Cortesluna for no more than eight seconds and only on the side of his back near the knife that officers were in the process of retrieving. LaLonde, in contrast, testified that the officer deliberately dug his knee into his back when he had no weapon and had made no threat when approached by police.

Rivas-Villegas is important for several reasons. First, after two years without an opinion granting qualified immunity to police officers, it represents a clear statement by the Court that the doctrine of qualified immunity remains strong, notwithstanding greater public scrutiny of the doctrine and widespread academic criticism. Second, from a practical standpoint, the case reaffirms that because of the fact bound nature of excessive force claims, a plaintiff must cite case law with highly analogous facts, in order to overcome qualified immunity. Finally, the case should be helpful in defending use of force case arising from relatively minor applications of force.

B. *City of Tahlequah v. Bond*, __U.S.__, 142 S.Ct. 9 (2021)

- **Officers entitled to qualified immunity for shooting suspect threatening them with a hammer.**

City of Tahlequah v. Bond, __U.S.__, 142 S.Ct. 9 (2021) arose from a 911 call to City of Tahlequah Police by a woman who reported that her ex-husband was intoxicated and refusing to leave the premises. Three officers arrived and briefly spoke with the agitated ex-husband, who refused to submit to a pat down search and instead walked back into the garage. The officers followed, keeping a distance of at least seven feet and calling for him to stop and come back. He instead grabbed a hammer from a tool rack and raised it as if he was going to swing it like a bat, prompting the officers to draw their weapons. Ignoring commands to drop the hammer, he then moved to the side to give himself unobstructed access to one of the officers, and brought the hammer back as if he was going to throw it. The officers fired, killing him.

The ex-husband's estate sued the officers and the City for excessive force. The district court granted the defendants' motion for summary judgment, finding that the use of force was reasonable, and that in any event the officers were entitled to qualified immunity given the absence of clearly established law addressing a similar factual scenario. However, the Tenth Circuit reversed. The court noted that under Tenth Circuit case law, an officer can be held liable for creating the circumstances that ultimately caused the need to use force, and here a jury could find that the officers improperly prompted the encounter by following the suspect into the garage. The panel also held that immunity was not available because it was clearly established by Tenth Circuit authority that officers could be held liable for prompting the need to use force.

The Supreme Court reversed in a per curiam opinion. The Court found it unnecessary to determine whether the force was excessive, because it concluded that the officers were entitled to qualified immunity. The Court noted that none of the cases cited

by the Tenth Circuit as clearly establishing the law, was even remotely similar to the situation presented here.

Like *Cortezluna*, *City of Tahlequah* is important in that it reaffirms the Supreme Court's commitment to applying the clearly established law test to excessive force cases with rigor.

C. ***Thompson v. Clark*, __U.S.__, 142 S.Ct. 1332 (2022)**

- **Malicious prosecution claim falls within Fourth Amendment and only requires plaintiff to show favorable termination of criminal proceeding, not indication of innocence.**

Thompson v. Clark, __U.S.__, 142 S.Ct. 1332 (2022) addresses a long-standing open issue in section 1983 actions: Is there a constitutional claim for malicious prosecution, and if so, what are its elements?

In *Thompson*, the plaintiff was accused of child abuse by an unstable relative, and refused to cooperate with officers when they came to investigate. Examination of the child disclosed no signs of abuse, though plaintiff was arrested, charged with obstruction and detained in custody for two days. The charges were dropped prior to trial with no statement by either a prosecutor or judge as to why.

Plaintiff sued for malicious prosecution under the Fourth Amendment. The district court dismissed the action, noting that under Second Circuit authority plaintiff could only show a favorable termination of the criminal proceeding if the record revealed that charges were dropped because he was innocent, and there was no such indication here. The Second Circuit affirmed.

The Supreme Court reversed, 6-3. Writing for the majority, Justice Kavanaugh observed that while the Supreme Court had never articulated a constitutional basis for a malicious prosecution claim, the lower federal appellate courts had come to a consensus

that the Fourth Amendment provided a basis for the claim. The Court therefore held that such claims fell within the Fourth Amendment. Looking to the elements of malicious prosecution as they existed in 1871 when section 1983 was enacted, Justice Kavanaugh noted that for purposes of showing a favorable termination, a plaintiff need only show that he was not convicted. As a result, the plaintiff here did not need to show that any dismissal was the result of innocence –it was enough that the charges had been dismissed.

Thompson is an extremely significant case, as it is the first time the Supreme Court has expressly recognized, and articulated a constitutional claim for malicious prosecution. In some respects, it may not have an impact in many Circuits which had already recognized such claims. However, as Justice Alito noted in his dissenting opinion, joined by Justices Thomas and Gorsuch, the Court’s opinion leaves many questions open and may spawn greater confusion. For example, the Court does not explain why the Fourth Amendment supports such a claim, instead deferring to the consensus of the lower courts. The Fourth Amendment requires a “seizure.” Is filing a criminal complaint, without an arrest, the equivalent of a seizure? Malicious prosecution requires a showing of malice, while subjective intention has no relevance to Fourth Amendment seizures. Does a constitutional malicious prosecution claim do away with the malice requirement, or is subjective motivation now part of some Fourth Amendment claims? *Thompson* will clearly spawn additional litigation to resolve these questions.

D. *Estate of Aguirre v. County of Riverside*, 29 F.4th 624 (9th Cir. 2022)

- **Officer not entitled to qualified immunity for shooting suspect who was holding a baseball bat sized stick, because suspect did not present immediate threat of harm to the officer or bystanders.**

In *Estate of Aguirre v. County of Riverside*, 29 F.4th 624 (9th Cir. 2022) Sergeant Ponder of the Riverside Sheriff's Department received radio reports that someone in Lake Elsinore, California, was destroying property with a baseball bat-like object, and had threatened a woman with a baby. Arriving at the scene he confronted the suspect, who was holding a baseball bat sized stick and waving it about. After unsuccessfully attempting to pepper spray the suspect, the officer ordered him to drop the stick, and when he failed to do so, drew his firearm. Believing he was being attacked, the officer fired six shots from approximately 15 feet away, ultimately killing the suspect. The suspect's estate filed suit, asserting that the use of force was excessive, and violated the Fourth Amendment. The district court denied the officer's motion for summary judgment based on qualified immunity and the officer appealed.

The Ninth Circuit affirmed. The court held that there was a material issue of fact as to whether the suspect posed a threat to the officer or bystanders at the time the shots were fired. While some witnesses testified that the suspect was holding the stick as if to swing it at the officer, others testified that the suspect was holding the tip of the stick downward in a non-threatening manner. In addition, two of the six shots had entered through the suspect's back, indicating that he was turning away from the officer. The panel noted that because the underlying constitutional violation was "obvious" it was not necessary to identify closely analogous case law, but nonetheless observed that prior case law did establish that officers could not use deadly force against a suspect who was merely holding a weapon, and posed no immediate threat to the officer or others.

Estate of Aguirre is a troubling decision, in that the Ninth Circuit’s suggestion that the underlying constitutional violation was “obvious,” will no doubt be cited by plaintiffs opposing motions for summary judgment in an attempt to avoid having to point to clearly established law in order to escape application of qualified immunity. Moreover, the fact that the panel saw a need to nonetheless identify existing “clearly established law” belies the court’s characterization of the violation as “obvious.” In addition, the court’s analysis of existing case law is at a very high level of generality, with no discussion of specific factual similarities and is precisely the approach the Supreme Court has repeatedly decried.

E. *Williamson v. City of National City*, 23 F.4th 1146 (9th Cir. 2022)

- **Officers entitled to qualified immunity for use of minimal force against protestor who passively resists commands.**

After six protesters disrupted a city council meeting and refused to leave, police officers were summoned to remove them. Per their advance plans, the protestors went limp and required the officers to lift and carry them out of the meeting. One of the protestors filed suit for excessive force under 42 U.S.C. section 1983, as well as under the Bane Act, asserting she suffered a torn rotator cuff as a result of the officers having pulled on her arm while carrying her out of the meeting. The district court denied summary judgment based on qualified immunity, finding that the severity of the plaintiff’s injury indicated the force might have been excessive. The officers appealed.

The Ninth Circuit reversed, finding that the application of force was reasonable as a matter of law. The court noted that the officers had used the minimal amount of force necessary to remove plaintiff and the other protestors, and plaintiff did not suggest any less intrusive means by which the officers could have removed her and the other

protesters. The panel did not discount the severity of plaintiff’s injury, but emphasized that it was not dispositive on whether the level of force was reasonable. The court observed: “There can be situations in which the risk of harm presented is objectively less significant than the actual harm that results. And if a person reacts more adversely to a use of force than would be expected objectively, that does not itself establish that ‘a reasonable officer on the scene’ failed to appreciate the risks presented and act accordingly.”

Williamson is an extremely helpful case that provides a thorough analysis of the case law concerning use of force against protestors. It also clarifies that just because a plaintiff suffers a more severe reaction to the level of force than anticipated, that does not mean that the force is excessive.

F. *Hyde v. City of Wilcox*, 23 F.4th 863 (9th Cir. 2022)

- **Officers entitled to qualified immunity for initial use of force against combative detainee, but no immunity for application of similar level of force after detainee was restrained.**

Luke Ian Hyde—a 26-year-old man with mental health issues, including bipolar disorder, schizophrenia, and attention deficit hyperactivity disorder—managed his condition through prescription medications. One night around midnight he was pulled over by a City of Wilcox detective who thought he was driving under the influence. He was booked around 1:30 a.m. and submitted to a blood draw. He tested negative for alcohol but positive for amphetamines, a finding consistent with his Adderall prescription. Over the next five and a half hours, Hyde napped, ate, talked to officers on duty, and requested a phone to contact a lawyer.

Hyde did not receive his prescribed medication, and by 7:30 a.m., he became restless. Minutes later, he charged toward the door, fell to the floor, and injured his head. Deputy Robinson and Sergeant Pralgo opened Hyde's cell, while a medic waited in the booking area to examine Hyde's head wound. Hyde first emerged from his cell calmly, but then sprinted through the booking area and into the female cell area while Robinson, Pralgo, and Detention Officer Bohlender unsuccessfully tried to tackle him. Hyde reached a dead end in the female cell area, where he stood with his back against the wall, facing Robinson, Pralgo, and Bohlender. At this point, Pralgo, and Robinson deployed their Tasers at Hyde in a fast sequence three times. A scuffle ensued with Pralgo, Robinson, and Bohlender heaping onto Hyde, and trying to handcuff him to the door handle. Two other officers entered the fray, and with Hyde lying on the ground, Robinson delivered 11 close-fisted strikes to Hyde's legs while other officers fastened leg irons on him. Pralgo again used his Taser twice on Hyde's thigh for about five seconds each time.

At 8:02 a.m., Hyde was dragged to his feet and collapsed to his knees as at least six officers lifted his body and handcuffed his hands behind his back. At 8:03 a.m., Pralgo retrieved the restraint chair, and four officers hoisted Hyde's body into it with his hands cuffed behind his back and his legs fastened in leg irons. At 8:05 a.m., Pralgo again used his Taser on Hyde's thigh for about five seconds, while officer Callahan-English used her arms to force Hyde's head into a restraint hold as four officers fastened Hyde into the chair. Hyde was "fully restrained" in the chair at 8:06 a.m.

Shortly thereafter he began gasping for air and passed out. Attempts to revive him were unsuccessful and he died in the hospital several days later.

Hyde's parents filed suit against various officers, the County Sheriff and Wilcox City Police Chief, as well as the City and County, asserting claims for excessive force and failure to provided necessary medical care to their son. The individual defendants moved to dismiss the complaint based on qualified immunity, and the municipal

defendants argued that the complaint failed to allege facts showing any improper conduct by policymakers for purpose any claim under *Monell v. Dep't of Soc. Servs.*, 436 U.S. 658 (1978). The district court denied the motions to dismiss and defendants appealed.

The Ninth Circuit affirmed in part and reversed in part. The court held that the force applied by all of the officers prior to Hyde finally being handcuffed and restrained, was reasonable as a matter of law. Hyde was being combative, and the use of intermediate levels of force, i.e., the Taser, arm holds and hand strikes, was appropriate. However, the court held that force applied by Praglo and Callahan-English two minutes after Hyde was restrained and no longer actively resisting, was excessive, and the officers were not entitled to qualified immunity because it is clearly established that officers cannot use an intermediate level of force against a restrained, compliant individual.

The court also held that plaintiffs had failed to allege specific facts as to how the named defendants denied Hyde medical care, or how any training deficiency purportedly caused Hyde's death for purposes of supervisory and municipal liability under *Monell*.

Hyde provides useful guidance on application of force over the course of a lengthy incident, making it clear that once a suspect is no longer resisting, officers can no longer employ significant levels of force. The opinion is also helpful in clarifying that conclusory allegations about lack of training are insufficient to support a *Monell* claim. *Hyde* also underscores one of the drawbacks to litigating qualified immunity by way of a motion to dismiss instead of summary judgment. The officers maintained that Hyde continued to struggle even after restrained, which could be seen in a video of the incident. But the court noted that the video was not part of the record, and hence it had to accept the allegations of the complaint at face value.

G. *J.K.J v. City of San Diego*, 17 F.4th 1247 (9th Cir. 2021)

- **Officers entitled to qualified immunity for failure to discern that arrestee had ingested drugs and required immediate medical care.**

J.K.J v. City of San Diego, 17 F.4th 1247 (9th Cir. 2021) arose from the death of plaintiff's mother, Aleah Jenkins, while in police custody. San Diego police officers Nicholas Casciola and Jason Taub stopped a Cadillac with an expired registration. A third officer, Lawrence Durbin, arrived to provide backup. Inside the Cadillac there were two men in the front, and Jenkins in the back. The two men had prior convictions for drug offenses. The officers knew or became aware of these prior convictions as they investigated. Durbin questioned Jenkins, who spoke coherently and showed no signs of distress. When the officers discovered that she was subject to arrest based on a warrant involving a prior methamphetamine offense, they handcuffed her and put her in Durbin's cruiser.

The officers searched the Cadillac and found "a saran wrap-like plastic ... known to law enforcement officers ... as being commonly used for narcotics sale." They also found two wallets, one of which was full of cash. They did not find any drugs.

Inside Durbin's cruiser, Jenkins vomited. Taub called for paramedics and asked Jenkins if she was detoxing. Durbin asked if she was withdrawing. Jenkins responded: "No, I'm sick[,] my stomach is turning." She then added, "I'm pregnant." Hearing this explanation, Durbin told Taub, "Don't worry about it," indicating that paramedics were not needed. Taub approached Jenkins and asked: "Did you eat something, just for our knowledge?" She responded, "Mmm-mm," while shaking her head slightly from side to side. Taub replied, "Alright, that's fine. We just wanna make sure you're gonna be ok." Durbin then remarked: "She says she's pregnant." The call to paramedics was canceled.

Durbin drove Jenkins to a police station for fingerprinting. The trip took over an hour. En route, Jenkins told Durbin she did not want to go to jail. She requested water and a bathroom break. And on several occasions, she groaned and screamed. When Durbin spoke to her, Jenkins sometimes responded and sometimes remained silent. At one point she screamed loudly, “[P]lease help me, please help me!” and “[O]h my [G]od, please, stop, stop, stop!” Durbin asked, “What's going on?” When Jenkins remained silent for about ten minutes, Durbin stopped the car to check on her. He opened the rear door and patted her, saying, “I need you to stay awake.” Jenkins then said, “I'm sick.” When she again screamed, Durbin told her to “[k]nock it off.” Jenkins shouted, “[H]elp me[,] please.” Durbin responded, “[Y]ou're fine,” and continued driving to the police station.

On arrival, about three minutes later, Durbin opened the rear door and again patted Jenkins, who was lying face down across the backseat. Jenkins screamed and took several quick, audible breaths, to which Durbin responded: “Stop hyperventilating ... you are doing [that] to yourself.” Durbin then removed Jenkins from the cruiser to the pavement. Jenkins screamed and asked for help, and Durbin remarked to an approaching officer: “She doesn't want to go to jail.” Durbin and the other officer fingerprinted Jenkins as she lay on her side, handcuffed. Durbin asked Jenkins if she still wanted water, and she responded at a normal volume: “Yes, please.” After confirming Jenkins' identity, Durbin and the other officer placed her back inside the cruiser.

About eleven minutes later, Durbin opened the rear door of his cruiser. Jenkins was unconscious. Durbin immediately removed her from the car and radioed for paramedics. Soon, another officer arrived with a breathing tool, and Durbin began CPR. He remarked to the gathering officers that Jenkins had a narcotics warrant, but that this was not a narcotics arrest. He then added, “She may have ingested something,” telling the

other officers that he had Narcan in his trunk. Paramedics arrived. Despite their efforts, Jenkins fell into a coma. Nine days later, she died.

Her minor son filed suit against the officers and the City, alleging that the officers had failed to summon needed medical care for Jenkins and that the failure was the result of inadequate training. The defendants moved to dismiss the complaint, and after granting plaintiff leave to amend, the district court eventually granted the motion and dismissed the action. Based on the allegations of the complaint, and review of video of the incident that had been incorporated by reference in the complaint, the court found that none of officers had acted improperly.

The Ninth Circuit affirmed. The court noted that the district court had properly exercised its discretion in considering the video, as it had been incorporated by reference in the complaint. The video indicated that the officers asked Jenkins whether she had ingested any drugs and she told them she had not. Nor were any drugs found in the car or on any passenger. Though Jenkins acted erratically, she was also calm at times, and as a result, none of the officers could be said to have acted unreasonably in failing to immediately call paramedics prior to her passing out. The court also noted that the complaint failed to allege any facts showing a lack of training.

J.K.J. is a very helpful case that properly defines the limitations on a law enforcement officer's obligation to summon medical care for arrestees. It is particularly useful in setting out the circumstances in which a district court can consider video in the context of deciding a motion to dismiss, which may allow officers to raise qualified immunity at the pleading stage, instead of on summary judgment.

H. ***Murchison v. County of Tehama*, 69 Cal.App.5th 867 (2021)**

- **Officers not entitled to qualified immunity where they entered plaintiff's property without a warrant or exigent circumstances, and prompted the use of force by failing to identify themselves as police officers.**

The plaintiff in *Murchison v. County of Tehama*, 69 Cal.App.5th 867 (2021) lived in a rural area and a road passed through his property. Plaintiff viewed the portion of the road on his property to be private, and strung a rope across with a sign stating that the road was closed. A real estate agent and client attempted to use the road and plaintiff confronted them. The client thought he saw a handgun in plaintiff's pocket, but was not certain.

The agent reported the encounter to the Sheriff's Department, trying to confirm that the road was a public roadway. It was determined that plaintiff was a convicted felon, who could not lawfully possess firearms. As a result, Sergeant Knox and Deputy Garrett decided to investigate. Their plan was to see if they could prompt plaintiff to brandish a firearm, at which point they would arrest him.

The officers were in plainclothes, driving an unmarked SUV. When they reached plaintiff's property, Garrett started walking towards the closed road. Plaintiff told Knox and Garrett the road was closed, and that if they crossed over the rope they would be trespassing. Garrett stepped over the rope and plaintiff, who did not know they were law enforcement officers, went into his house and called 911.

Knox and Garrett decided to leave. As they turned their vehicle around in plaintiff's driveway, Garrett saw a bolt-action rifle on a table in an outbuilding on plaintiff's property and told Knox. Although they acknowledged there was no emergency, they decided to get the rifle and confront plaintiff. Knox began to walk quickly

towards the outbuilding and rifle. Plaintiff who was on the phone with the 911 operator, saw Knox and thought that he was going to steal the rifle. Plaintiff then began running towards the outbuilding. Seeing plaintiff run, the officers became concerned he would reach and load the rifle, so they began running as well. Knox reached the outbuilding first, but ran past it and intercepted plaintiff., Knox drew his service weapon and pointed it at plaintiff's head from a distance of nine inches while identifying himself as a Sheriff's officer and commanding plaintiff to get on the ground. As plaintiff tried to get on the ground he was slammed from behind and his face ground into the earth. He was eventually handcuffed, but then released when it was determined that his criminal conviction had been expunged and he could lawfully own firearms.

Plaintiff filed suit asserting claims for excessive force and unlawful entry in violation of the Fourth Amendment under section 1983 and the Bane Act, as well as claims for wrongful arrest and battery. The trial court granted defendants' motion for summary judgement, finding that the officers had acted properly, and that in any event they would be entitled to qualified immunity.

The Court of Appeal reversed. The court held that plaintiff could proceed on his unlawful entry claim because the officers had entered his property to secure the rifle without a warrant, and there were no exigent circumstances justifying the entry. The court also held that plaintiff could proceed on his excessive force claim, because even though the officers could reasonably perceive that plaintiff might pose a threat once he started running towards the rifle, plaintiff's actions were prompted by the officers own improper action in entering his property and failing to identify themselves as officers earlier. Finally, the court found that the officers were not entitled to qualified immunity because the basic principles concerning warrantless entries were well established and several cases from various federal appellate courts had found officers liable for excessive

force based on their having provoked a confrontation by failing to identify themselves as law enforcement officers.

Murchison is a prime example of the adage, “bad facts make bad law.” The court’s discussion of the unlawful entry issue is certainly correct. However, the analysis of the excessive force claim is problematic insofar as it suggests that tactical decisions by officers that prompt the use of force can be considered as part of the reasonable force analysis. The Supreme Court has suggested that such an approach is improper, even though it has emphasized that it has not yet squarely decided the issue, and the federal appellate courts are divided on the question. In addition, the court’s analysis of clearly established law for purposes of the qualified immunity inquiry deals largely with generalities, an approach repeatedly repudiated by the Supreme Court.

I. *Ochoa v. City of Mesa*, 26 F.4th 1050 (9th Cir. 2022)

- **To maintain due process claim based on excessive force, family members of suspect killed by law enforcement officers must show that use of force was unrelated to any legitimate law enforcement purpose.**

In *Ochoa v. City of Mesa*, 26 F.4th 1050 (9th Cir. 2022) the plaintiffs asserted a Fourteenth Amendment claim against a city and several law enforcement officers, arguing that the officers had used excessive force in killing a family member. The officers moved for summary judgment based on qualified immunity, arguing, among other grounds, that there had been no excessive force as officers had shot the decedent because he was wielding two knives, threatening officers and acting erratically as they attempted to arrest him. The district court granted summary judgment, finding that the use of force was proper.

The Ninth Circuit affirmed. The court noted that the plaintiffs' due process claim for injury to familial rights was subject to a much higher standard than a Fourth Amendment claim that could be brought by the person who was subjected to the alleged excessive force. To make out a Fourth Amendment claim, an individual need only show that an officer's use of force was not reasonable. In contrast, a due process claim by family members requires proof that the officers' conduct "shocks the conscience," and in the context of rapidly evolving events, such a showing can only be made where the officers' actions are unrelated to any legitimate law enforcement purpose, and undertaken solely with the purpose to inflict harm. Here the officer's actions were plainly related to the legitimate law enforcement purposes of effecting an arrest and protecting the officers and public from the dangerous conduct of a suspect.

Ochoa provides an excellent discussion of the differences between Fourth Amendment claims and Fourteenth Amendment claims, and is a reminder that even if a decedent's estate has a viable Fourth Amendment claim based on unreasonable use of force, any Fourteenth Amendment claim by family members faces an uphill battle because of the much more rigorous standard for such claims.

II. FIRST AMENDMENT --RLUIPA

A. *Houston Community College System v. Wilson*, __ U.S __, 142 S.Ct. 1253 (2022)

- **Community College Board did not violate First Amendment rights of member by issuing a censure condemning the member's actions which did not impair member's ability to perform duties.**

Houston Community College System v. Wilson, __ U.S __, 142 S.Ct. 1253 (2022) arose from an internal dispute among members of the governing body of a community college. Over several years the plaintiff had accused the Board of wasting money and had filed several lawsuits challenging the Board's actions. The Board eventually passed a resolution censuring the plaintiff, characterizing his conduct as "not only inappropriate, but reprehensible." The plaintiff sued the Board, arguing that the censure was in retaliation for his exercise of his First Amendment rights. The district court dismissed his action, but the Fifth Circuit reversed, holding that plaintiff had stated a proper First Amendment claim.

The Supreme Court reversed. Writing for a unanimous court, Justice Gorsuch noted that "elected bodies in this country have long exercised the power to censure their members," and there is no reason to believe that the First Amendment was intended to change that practice. Moreover, the Board's action in adopting the resolution was itself a communicative act, and allowing plaintiff's suit to proceed would mean plaintiff could use his right to free speech "as a weapon to silence other representatives seeking to do the same." Justice Gorsuch emphasized that the censure did not impair plaintiff's ability to perform his duties, and that the Court did "not mean to suggest that verbal reprimands or censures can never give rise to a First Amendment retaliation claim."

Houston Community provides guidance on the degree to which political bodies may censure members without running afoul of the First Amendment. In issuing such declarations a City Council must be careful to confine its actions to a simple statement, and avoid taking collateral action such as barring participation in sessions or voting, that may impair a member’s ability to perform their duties.

B. *New Harvest Christian Fellowship v. City of Salinas*, 29 F.4th 596 (9th Cir. 2022)

- **City ordinance barring religious assemblies in ground floor of buildings in downtown area violates RLUIPA insofar as ordinance allows similar secular gatherings in places such as theatres.**

In *New Harvest Christian Fellowship v. City of Salinas*, 29 F.4th 596 (9th Cir. 2022) a church challenged a City zoning ordinance prohibiting “[c]lubs, lodges, places of religious assembly, and similar assembly uses” from operating on the “ground floor of buildings facing Main Street within the Downtown Core Area.” The church asserted that the provision violated the Religious Land Use and Institutionalized Persons Act (“RLUIPA”), 42 U.S.C. §§ 2000cc et seq., by imposing a substantial burden on religious exercise, and by treating churches less favorably than similar secular facilities, such as theatres. The district court granted summary judgment to the City and the church appealed.

The Ninth Circuit affirmed in part and reversed in part. The court held that the ordinance did not substantially burden the exercise of religion by church members. The court noted that (1) the church could have conducted worship services in the building had it been willing to hold services on the second floor or reconfigure the first floor; (2) the

church was not precluded from using other sites within the City and at least one suitable property has come on the market during the course of this litigation; and (3) at the time it purchased the building, the church was on notice that the zoning restrictions would prohibit it from conducting worship services on the first floor.

However, the court reversed summary judgment on the equal terms provision of RLUIPA, noting that the record demonstrated that other nonreligious assemblies, such as theatres, which were permitted to operate on the first floor of the Main Street Restricted Area, were similarly situated to religious assemblies with respect to the City's stated purpose and criterion. Because the City prohibited the church from hosting worship services on the ground floor of the Main Street Restricted Area but permitted theatres to operate on the ground floor in that area, it impermissibly treated religious assemblies on less than equal terms with nonreligious assemblies.

New Harvest is very helpful in terms of providing clear guidelines on defending RLUIPA claims based on substantial burden arguments, as well as reaffirming the need to review any restriction on religious activity very carefully, to make certain that similar secular activities are treated in a like manner.

C. *Riley's America Heritage Farms v. Elasser*, 29 F.4th 484 (9th Cir. 2022)

- **School official entitled to qualified immunity for terminating school contractor for posting controversial remarks on personal social media account.**

In *Riley's America Heritage Farms v. Elasser*, 29 F.4th 484 (9th Cir. 2022) a school field trip vendor and its principal shareholder brought a section 1983 action against public school officials, alleging a violation of their First Amendment rights after the school district severed its longstanding business relationship with the vendor due to

postings which shareholder made on his personal social media account and about which the parents of several school children complained. The trial court granted summary judgment to the individual defendants based on qualified immunity and dismissed injunctive relief claims against the school district.

The Ninth Circuit reversed the district court with respect to the claims for injunctive relief, but affirmed the dismissal of the damages claims against the individual defendants based on qualified immunity. The court found that there were triable issues of fact as to whether the defendants had retaliated against plaintiffs for expressing their political views, but held that qualified immunity applied because no clearly established law would have put the defendants on notice that plaintiffs' speech was protected by the First Amendment so as to give rise to a retaliation claim. The court emphasized that the right to be free from First Amendment retaliation cannot be framed as the general right to be free from retaliation for one's speech. Instead, the right must be defined at a more specific level tied to the factual and legal context of a given case. Applying these principles, the court noted that when the underlying events occurred, it was not clearly established that a school district could not cease patronizing a company providing historical reenactments and other events for students because the company's principal shareholder had posted controversial tweets that led to parental complaints.

Riley's represents one of the Ninth Circuit's most stringent applications of the clearly established law prong of qualified immunity. It provides strong support for application of the immunity in most First Amendment retaliation cases based on public employee speech, where the line between protected and unprotected speech is not easy to discern.

III. MUNICIPAL TORT LIABILITY

A. *Perez v. City and County of San Francisco*, 75 Cal.App.5th 826 (2022)

- **City may be liable for injuries caused by off duty officer's failure to prevent theft of personal firearm that was sometimes used in the course of employment.**

In *Perez v. City and County of San Francisco*, 75 Cal.App.5th 826 (2022) the plaintiff's son was shot and killed with a firearm that had been stolen from an off duty police officer's personal vehicle. The weapon was not the officer's primary service weapon, but a personal secondary weapon that he would sometimes carry both on and off duty. The trial court granted summary judgment to the officer's municipal employer on the grounds that respondeat superior did not apply because the theft of the firearm and subsequent shooting were unrelated to the officer's performance of his official duties.

The Court of Appeal reversed. The court noted that the employer was aware of an encouraged use of personal secondary weapons, and even had regulations specifying that weapons were never to be left unsecured in an unattended vehicle. The weapon was in the vehicle because the officer had carried it to a training program that was part of his official duties, and regularly carried it even when off duty because he might be called upon at any time to perform his law enforcement duties. The court emphasized that law enforcement officers were unique in that their duties require them to carry firearms, and they have the right to carry them even when off duty, which means police departments should contemplate potential liability when formulating and enforcing regulations concerning firearm usage and storage by officers. In so holding, the court acknowledged that its holding was inconsistent with *Henriksen v. City of Rialto* (1993) 20 Cal.App.4th 1612, where the court had held that a city could not be held liable for injuries caused by an off-duty officer's accidental discharge of a weapon.

Perez is concerning, because its broad statement of principles of respondeat superior as applied to law enforcement officers effectively erases any distinction between on duty and off duty conduct. It greatly expands potential municipal liability for off duty conduct by officers, and will require police departments to more scrupulously regulate off duty conduct by officers, which will likely lead to friction with unions or other associations representing law enforcement personnel.

B. *DePaul Industries v. Miller*, 14 F.4th 1021 (9th Cir. 2021)

- **City attorney entitled to qualified immunity from due process claim based on decision not to renew contract with vendor, because no clearly established law that vendor had any protectible property interest in the contract..**

Oregon law requires that in some circumstances municipalities must contract with qualified nonprofit agencies for individuals with disabilities, what are known as QRFs. The plaintiff was a QRF that contracted with a city to provide unarmed security guards at various city facilities for several years. The city decided that it wanted armed security personnel and therefore did not renew the contract with the QRF. The QRF sued, among others, the City Attorney, arguing that the QRF statute created a property interest in the municipal contract, and that the City Attorney had violated its due process rights in refusing to renew the contract. The district court denied the City Attorney's motion for summary judgment based on qualified immunity.

The Ninth Circuit reversed. The court held that the City Attorney was entitled to qualified immunity because no case had interpreted the QRF statute as creating a property right in public contracts, and as a result there was no clearly established law that would have put the City Attorney on notice of any potential due process claim.

DePaul Industries is a reminder that qualified immunity applies to the actions of all public employees, and not just police officers. The case is very helpful because the court rigorously applies the clearly established law prong of qualified immunity and should be particularly useful in cases where the challenged conduct involves application or interpretation of a statute or regulation.

C. ***Mubanda v. City of Santa Barbara*, 74 Cal.App.5th 256 (2022)**

- **Hazardous recreational activity immunity of Government Code section 831.7 applies to wrongful death suit arising from paddle board accident.**

In *Mubanda v. City of Santa Barbara*, 74 Cal.App.5th 256 (2022), the plaintiff filed a wrongful death suit against the City, asserting that her son had drowned after falling off a paddle board due to the dangerous condition of the harbor. The City moved for summary judgment, arguing, among other grounds, that paddle boarding was a hazardous recreation activity within the meaning of Government Code section 831.7 and hence the City was immune from liability. The trial court agreed and granted the motion.

The Court of Appeal affirmed. The court noted that paddle boarding was akin to boating, which is expressly cited as a type of hazardous recreational activity in section 831.7. The panel also rejected the plaintiff's argument that the City's conduct could be characterized as falling within the gross negligence exception to the immunity. The court observed that the City taken numerous actions to promote the safety of paddle boarding within the harbor, including the posting of signs within the harbor regarding preferred paddling areas, distributing maps and lanyards to paddle boarders with paddling tips, providing training to rental facilities, requiring paddle boarders to wear personal flotation devices and to have whistles, actively patrolling the harbor for paddle boarder violations,

airing and posting public service announcements regarding paddle board safety and publishing paddle boarding safety tips in a City newsletter. The court held that declaration of plaintiff's expert to the effect that the City had been grossly negligent was insufficient to create an issue of fact as it was simply an expert's expression of his general belief as to how the case should be decided and not admissible for that purpose.

The court also rejected plaintiff's contention that the immunity did not apply because the City was aware of a hidden danger that would not necessarily be known by one participating in the activity. The court noted that plaintiff had not identified any hidden condition of the harbor causing the accident, and that the risk of falling off a stand-up paddle board and drowning in a harbor is inherent in that type of hazardous recreational activity.

The court similarly rejected the plaintiff's argument that the exception applicable to activities for which a fee is charged by a public entity had any relevance here. The decedent had rented the paddle board from a private vendor, and while the City received rent and a portion of revenue from the vendor, the City itself was not charging the decedent to use the paddle board in the harbor.

Mubanda is an excellent case that provides clear guidance on application of the hazardous recreational activity immunity and its exceptions. The discussion concerning the inadmissibility of conclusory expert testimony is also extremely helpful.

D. *Martinez v. City of Beverly Hills*, 71 Cal.App.5th 508 (2021)

- **For purposes of dangerous condition liability, different standards apply to sidewalks than to alleys in determining whether a defect is so obvious as to give rise to constructive notice of a dangerous condition.**

In *Martinez v. City of Beverly Hills*, 71 Cal.App.5th 508 (2021) plaintiff worked at a law firm that occupies three offices within walking distance of each other in the City of Beverly Hills. The law firm's main office is located at 361 South Robertson Boulevard, and can be accessed from the rear by an alley that runs parallel to the boulevard. The alley is "relatively flat" and paved with asphalt, and has a drainage channel (a "swale") made of concrete that runs down its center. The law firm's employees used the alley to walk between its offices. Plaintiff parked in a space in the alley near the satellite office where she worked, and walked through the alley's center to get to the main office only once a month. One morning plaintiff was walking through the alley from the law firm's main office to her satellite office. She was wearing soft-bottomed flip-flops and as she walked toward the alley's center, the front edge of her flip-flop hit the edge of the swale and she fell. The asphalt that is normally flush against the edge of the swale had worn away, creating a divot that was approximately 1.75 inches in depth. The divot had been there for at least two years.

Plaintiff sued the City, asserting that that divot in the swale constituted a dangerous condition of public property. The City successfully moved for summary judgment on the ground that it had neither actual, nor constructive notice of the divot and the plaintiff appealed.

The Court of Appeal affirmed. The court held that there was no evidence that the City had actual notice of the divot. The City had not received any complaints about the alley's divot in the six years preceding plaintiff's accident and had not been presented

with any claims or lawsuits concerning the alley in the preceding 15 years. The court rejected plaintiff's contention that a jury could somehow infer that the City had actual notice because the City did not produce a declaration from every possible City employee who may have been in the alley in the past specifically denying having seen the divot.

The court observed that a public entity can be deemed to have constructive notice of a dangerous condition if it is "obvious." However, the court emphasized that a defect is not obvious just because it is visible, or just because it is non-trivial. The court noted that whether a particular defect was sufficiently obvious to impart constructive notice depends upon the location, extent, and character of the use of the public property. As a result, the small divot at issue here might have been obvious for purposes of constructive notice had it been located on a sidewalk, because the City would have been aware of regular, heavy pedestrian traffic on a sidewalk, thus making frequent and routine inspection of the sidewalk a reasonable burden to impose on the City. In contrast, since it was located in an alley way not designed for regular pedestrian use, nor regularly inspected for such use, the divot would not be so obvious to the City so as to have imposed an obligation to inspect for and rectify the condition. In short, because the cost of keeping alleys as defect-free as sidewalks for foot traffic has greater cost and less benefit, public entities may reasonably elect to apply less rigorous scrutiny when inspecting alleys for defects (as compared with sidewalks). In other words, the universe of "obvious defects" for alleys is smaller than the universe of "obvious defects" for sidewalks. In so holding, the court rejected the opinion of plaintiff's expert that the divot was sufficiently obvious to impart constructive notice, because it constituted a legal conclusion.

Martinez is an extremely helpful case, in that it clarifies the standards for determining when a defective condition is so obvious as to give rise to constructive notice for purposes of dangerous condition liability. It also clarifies that municipalities have a

lesser duty to inspect alleys for potential hazards to pedestrian, while emphasizing the duty to inspect and repair sidewalks. The case also contains helpful language rejecting expert testimony that is ultimately nothing more than a legal conclusion, which is all too commonly found in oppositions to motions for summary judgment in dangerous condition cases.

E. *Coble v. Ventura County Health Care Agency*, 73 Cal.App.5th 417 (2021)

- **Governor’s Executive Order N-35-20 only extended time to file claims, not late claim applications.**

The central issue in *Coble v. Ventura County Health Care Agency*, 73 Cal.App. 5th 417 (2021) was whether the Governor’s Covid-19 Executive Order N-35-20 which extended the time to file claims under Government Code section 911.2, also extended the time to file late claim applications. Plaintiff had submitted her late claim application to the County more than one year after accrual of her cause of action. When the County denied the late claim application, she sought relief from the claim statute under Government Code section 946.6. The trial court denied late claim relief because the late claim application had been submitted beyond the one- year period of Government Code section 911.4.

The Court of Appeal affirmed. The court held that the language of Executive Order N-35-20 was not ambiguous. The Order specifically stated that: “The time for presenting a claim pursuant to Government Code section 911, et seq., is hereby extended by 60 days.” The court noted that the claim statutes specifically distinguish between claims and applications for late claim relief, and hence the Governor’s use of the term claim meant that the claim period was extended, not the late claim application period.

Coble provides guidance on an issue that will likely crop up over the course of the next year or so as pandemic era suits move through the judicial system.

F. *Andrews v. Metropolitan Transit System*, 74 Cal.App.5th 597 (2022)

- **Two- year statute of limitation applies to plaintiff's lawsuit where claim rejection notice failed to give statutorily required notice to consult an attorney.**

In *Andrews v. Metropolitan Transit System*, 74 Cal.App.5th 597 (2022) the plaintiff was injured on a bus and submitted a timely claim for damages within the six-month period specified by Government Code section 911.2. The Transit System denied the claim, advising the plaintiff that any suit had to be filed within six months, and that a shorter statute of limitations might apply as to any federal claim. Plaintiff filed suit eight months after the denial notice was sent and the trial court granted summary judgment to the Transit System on the ground that suit had been filed beyond the six- month period set out in Government Code section 945.6 (a)(1).

The Court of Appeal reversed. The Court held that denial notice served by the Transit System failed to substantially comply with the requirements of Government Code section 913, because it did not inform plaintiff that she could consult an attorney and should do so immediately. As a result, the defective denial notice was ineffective, and the default two-year limitation period applied to plaintiff's action.

Andrews is a reminder that the claims statutes are strictly construed, and denial notices should be drafted to closely adhere to, if not outright copy, the statutory language to avoid waiver issues.



Police Reform: Legal Challenges and Solutions

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POSITION PAPER ON POLICE REFORM

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INTRODUCTION

Public interest in law enforcement reform has grown in recent years, bringing new calls for revisions to use-of-force policies, performance evaluation and discipline procedures, additional officer training, civilian oversight agencies, shifts in responsibilities assigned to police departments, and even the demand to “defund” police departments. Accordingly, police reform is a priority in many localities. Indeed, there are good reasons for all stakeholders to endorse police reform—in the interest of the public, local government, and officers themselves.

But police reform faces numerous legal and policy hurdles. The primary legal constraints on local agencies reforming their police departments are as follows: the statutory protections afforded to peace officers by laws such as the Public Safety Officers Procedural Bill of Rights Act (“POBOR”), Penal Code 832 *et seq.* (“*Pitchess*”), and labor rights conferred to peace officer unions by the Meyers-Milias-Brown Act (“MMBA”). These legal constraints can obstruct or delay police reform. Some, such as the MMBA, prevent an agency from implementing certain policy changes over the police union’s objections absent lengthy negotiations and exhaustion of impasse procedures. Others, such as POBOR, can prohibit certain reforms. Additionally, laws such as *Pitchess* and POBOR can operate as structural impediments to certain reforms—for example, by preventing public hearings on disciplinary matters. The extent to which these laws constrain legal reform is continuously developing as police reform efforts are litigated.

The Legislature has also been active in reforming policing in recent years. 2021 alone saw eight new laws on the subject. Although these laws will impact policing in California and have important implications for local agencies, they do not on the whole materially change fundamental protections afforded to police officers under state law.

Below, we explain some of the key legal obstacles to police reform in California. We illustrate these obstacles by considering three core areas of police reform which are often debated among stakeholders:

1. *Use-of-Force Policies*: Changes to the standards governing when and how officers can apply force in the course of their duties.

2. *Performance Evaluation and Discipline*: Changes to how officer performance is evaluated and the consequences and procedures for disciplining deviation from those standards and other misconduct.
3. *Oversight*: Altering the processes that provide for police department transparency and provide for civilian participation in their operation.

LEGAL CONSTRAINTS

As set forth above, the three primary state laws that a local agency must consider before embarking in police reform are POBOR, *Pitchess*, and the MMBA. This list is not exhaustive of the legal protections afforded to police officers in the performance of their duties. Police officers—like other public sector employees—are afforded certain constitutional rights in the workplace, including the right to due process (i.e., the right to a *Skelly* hearing) and the right to privacy under the state and federal constitutions. (See Cal. Const. art. I, § 1; U.S. Const. amend. IV.) While these baseline protections can become relevant in the face of certain proposed reforms, this paper focuses on the specific impact of POBOR, *Pitchess*, and the MMBA in this context.

I. POBOR

POBOR “provides a catalog of basic rights and protections that must be afforded all peace officers by the public entities which employ them.” (*California Correctional Peace Officers Assn. v. State of California* (2000) 82 Cal.App.4th 294, 304.) The law is codified at Government Code sections 3300–3313.

Government Code section 3303 grants officers a variety of rights in the context of investigations or interrogations that could lead to “punitive action.” The term “punitive action” is construed broadly and “means any action that may lead to dismissal, demotion, suspension, reduction in salary, written reprimand, or transfer for purposes of punishment.” (Gov. Code § 3303.)

The protections of Government Code section 3303 include the following:

- The right to have an interrogation occur at a reasonable hour when an officer is on duty, unless the seriousness of the investigation requires otherwise. (Gov. Code § 3303(a).)
- The right to not be interrogated by more than two individuals at one time. (Gov. Code § 3303(b).)
- The right to be informed of the nature of the investigation prior to being interrogated. (Gov. Code § 3303(c).)

- The right to obtain any materials (e.g., written reports or recordings) from an initial interrogation prior to any subsequent interrogations. (Gov. Code § 3303(g).)
- The right to have an officer’s personnel file remain free of notes or reports that are deemed confidential. (Gov. Code § 3303(g).)
- The right to have a representative present at all times during an interrogation where the interrogation is likely to result in punitive action. (Gov. Code § 3303(i).)

Government Code section 3304 sets forth certain due process rights for peace officers who are subject to discipline or denied promotion. Such rights include the right to administratively appeal punitive actions and the application of a one-year statute of limitations period for the agency to investigate disciplinary matters, absent an applicable statutory exception. (See Gov. Code § 3304(b) & (d)(1).)¹

POBOR’s protections thereby limit a police department’s ability to discipline and evaluate its officers and the scope of police reform measures, especially those concerning oversight, performance evaluation, and discipline.

A. Discipline

POBOR imposes limitations on reforming procedures for disciplining officers. Some of these limitations are relatively straightforward. For example, POBOR may constrain a civilian review board from holding a hearing with a target officer, or an auditor from joining and asking questions of an officer during an investigatory interview, because Government Code section 3303 limits the number of interrogators that can be present. (See *Berkeley Police Assn. v. City of Berkeley* (2007) 167 Cal.App.4th 385, 410).

Other limitations are more complex. For instance, a document like a civilian review board’s disciplinary recommendation may trigger POBOR administrative appeal rights where there is evidence that the document may be used for disciplinary purposes or making other personnel decisions. (See *Caloca v. County of San Diego* (1999) 72 Cal.App.4th 1209, 1223; *Hopson v. City of Los Angeles*, 139 Cal.App.3d 347 (1983).) In *Caloca v. County of San Diego*, the court held that a civilian oversight committee’s recommendation for discipline, even if purely advisory, constituted punitive action under POBOR because there was evidence that it could lead to adverse employment consequences. (*Caloca, supra*, 72 Cal.App.4th at p. 1222–23.) The

¹ These provisions provide the following: “no punitive action, nor denial of promotion on grounds other than merit, shall be undertaken by any public agency against any public safety officer . . . without providing the public safety officer with an opportunity for administrative appeal” (Gov. Code § 3304(b)); and “no punitive action, nor denial of promotion on grounds other than merit, shall be undertaken for any act, omission, or other allegation of misconduct if the investigation of the allegation is not completed within one year of the public agency’s discovery by a person authorized to initiate an investigation of the allegation” (Gov. Code § 3304(d)(1)).

officer was therefore entitled to an administrative appeal.² (*Id.* at 1222.) However, where a document issued by a civilian review board will *not* lead to discipline or inform other personnel decisions, POBOR rights likely are not implicated. (See *Conger v. County of Los Angeles* (2019) 36 Cal.App.5th 262, 265; *Los Angeles Police Protective League v. City of Los Angeles* (2014) 232 Cal.App.4th 136, 146.)

In addition to POBOR, almost every locality has a separate disciplinary process set forth in the memorandum of understanding (MOU) between the locality and the police union—a contract negotiated in accordance with the MMBA. As such, disciplinary procedure reform must account not only for POBOR’s due process requirements, but also the contractual commitments that a locality has made to the police union via the parties’ MOU. The terms of the MOU, of course, can be revisited when the contract is open for negotiation, but changes are subject to good faith meet-and-confer and impasse procedures under the MMBA.

B. Performance

POBOR also impacts performance evaluations. Government Code section 3305 provides that “[n]o public safety officer shall have any comment adverse to his interest entered in his personnel file, or any other file used for any personnel purposes by his employer, without the public safety officer having first read and signed the instrument containing the adverse comment[.]” Similarly, Government section 3306 grants peace officers 30 days to respond to the adverse comments in their personnel files, and section 3306.5 states that “[e]very employer shall, . . . upon the request of a public safety officer . . . permit that officer to inspect personnel files that are used or have been used to determine that officer’s qualifications for employment, promotion, additional compensation, or termination or other disciplinary action.” The purpose of all three provisions “is to facilitate the officer’s ability to respond to adverse comments potentially affecting the officer’s employment status.” (*McMahon v. City of Los Angeles* (2009) 172 Cal.App.4th 1324, 1332, citing *County of Riverside v. Superior Court* (2002) 27 Cal.4th 793, 799.)

“Adverse comments” can include comments that fall short of discipline. (See *id.* at p. 925 “[t]he events that will trigger an officer’s rights under those statutes are not limited to formal disciplinary actions, such as the issuance of letters of reproof or admonishment or specific findings of misconduct. Rather, an officer’s rights are triggered by the entry of any adverse comment in a personnel file or any other file used for a personnel purpose”]; see also *Aguilar v. Johnson* (1988) 202 Cal.App.3d 241, 249 [“As relevant here, Webster defines comment as ‘an observation or remark expressing an opinion or attitude[.]’ ‘Adverse’ is defined as ‘in opposition to one’s interest: DETRIMENTAL, UNFAVORABLE.’ ” [citations omitted].) Local agencies must therefore use caution in revising their performance evaluation processes to ensure that police officers have the right to review and respond to comments that may be adverse.

² “[T]he procedural details” of this appeal can be “formulated by [a] local agency.” (*Crupi v. City of Los Angeles* (1990) 219 Cal.App.3d 1111, 1120.) At a minimum, though, they must allow an evidentiary hearing before a neutral factfinder. (*Morgado v. City and County of San Francisco* (2017) 13 Cal.App.5th 1, 7.)

II. *Pitchess* Protections

Codifying the protections articulated in *Pitchess v. Superior Court* (1974) 11 Cal.3d 531, Penal Code section 832.7(a) makes two categories of public safety officer records confidential—“personnel records” and “records maintained by any state or local agency pursuant to Section 832.5.” The latter references records pertaining to the investigation of complaints made by members of the public against peace officers. (*Copley Press, Inc. v. Superior Court* (2006) 39 Cal.4th 1272, 1283 [quoting Penal Code §§ 832.7(a) & 832.5].) Courts have held that the privilege imbued by Penal Code section 832.7(a) “is held both by the individual officer involved and by the police department.” (*Davis v. City of Sacramento* (1994) 24 Cal.App.4th 393, 401.)

Under Penal Code section 832.5, agencies and departments employing police officers must investigate complaints made by members of the public against those officers and must retain the records of those complaints for five years. (*Copley Press, Inc., supra*, 39 Cal.4th at p. 1288 [citing Penal Code § 832.5(a) & (b)].) The statute also “provides that complaints ‘determined by the peace . . . officer’s employing agency to be frivolous . . . or unfounded or exonerated . . . shall not be maintained in that officer’s general personnel file’ and ‘shall be removed from’ that file ‘prior to any official determination regarding promotion, transfer, or disciplinary action.’” (*Ibid.* [quoting Penal Code § 832.5(b) & (c)].)

A “personnel record” protected from disclosure under section 832.7(a) is defined as any file maintained under the employee’s name by the employer containing records relating to any of the following: (1) personal data, including marital status, family members, educational and employment history, home addresses, or similar information; (2) medical history; (3) election of employee benefits; (4) employee advancement, appraisal, or discipline; (5) complaints, or investigations of complaints, concerning an event or transaction in which he or she participated, or which he or she perceived, and pertaining to the manner in which he or she performed his or her duties; and (6) any other information the disclosure of which would constitute an unwarranted invasion of personal privacy. (Penal Code § 832.8(a).)

The Court in *Pasadena Police Officers Assn.* explained the operation of these *Pitchess* statutes:

[D]isciplinary records of peace officers are protected by privilege under the [*Pitchess*] statutes no matter where those records are generated . . . Information which is not itself a personnel record is nevertheless protected if it was obtained from a peace officer’s personnel record. . . Only records generated in connection with an administrative appraisal or discipline qualify as [*Pitchess*] protected personnel records; records generated as part of an internal or administrative investigation of the officer generally are confidential, but other records about an incident are not.

(*Pasadena Police Officers Assn., supra*, 240 Cal.App.4th at p. 288 [quotations and citations omitted].)

The Legislature has twice amended Penal Code section 832.7 in the past few years to allow for greater disclosure of personnel records. In 2018, SB 1421 amended the law to remove protection for reports, investigations, or findings related to incidents involving the discharge of a firearm, use of force causing serious bodily injury, sexual misconduct, and untruthfulness by a peace officer. (Penal Code § 832.7(b)(1).)³

In 2021, SB 16 amended section 832.7 to allow disclosure of records related to sustained findings of: an officer’s use of unreasonable or excessive force; an officer’s failure to intervene against another officer using clearly unreasonable or excessive force; unlawful arrests and unlawful searches; and conduct involving prejudice or discrimination. (Pen. Code § 832.7(b)(1)(A), (C)–(E).) Note that, aside from incidents relating to the discharge of a firearm or use of force causing great bodily injury, these exceptions only apply where there is a sustained finding against the officer. (See *id.* at § 832.7(b)(1)(A)(i)–(ii).)

The confidentiality conferred by the *Pitchess* statutes pose a serious obstacle to public participation in police discipline. For example, the court in *Berkeley Police Assn.* held that the hearing of a civilian oversight agency regarding individual officer disciplinary matters was confidential under the *Pitchess* statutes, and thus could not be held in public, because the hearing would discuss the content of records confidential under *Pitchess*. (*Berkeley Police Assn.*, *supra*, 167 Cal.App.4th at 404–405.) As such, *Pitchess* can erect substantial barriers to the public’s participation in police disciplinary matters.

III. The Meyers-Milias-Brown Act

A. Legal Standard

The MMBA “gives local government employees the right to organize collectively and to be represented by employee organizations and obligates employers to bargain with employee representatives about matters that fall within the ‘scope of representation[.]’” (*Building Material & Construction Teamsters’ Union v. Farrell* (1986) 41 Cal.3d 651, 660 (“*Building Material*”) [citations omitted].) Whether the MMBA poses a significant obstacle to police reform depends on the subject matter of the reform; some areas of reform are bargainable while others are not. Certain subjects, such as revision to use-of-force policies, are management decisions that can be

³ The Penal Code section 832.7(b)(1) exceptions are as follows: (1) any record relating to the report, investigation, or findings of: (a) “An incident involving the discharge of a firearm at a person by a peace officer or custodial officer”; or (b) “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”; (2) “Any record relating to an incident in which a sustained finding was made by any law enforcement agency or oversight agency that a peace officer or custodial officer engaged in sexual assault involving a member of the public”; and (3) “Any record relating to an incident in which a sustained finding was made by any law enforcement agency or oversight agency of dishonesty by a peace officer or custodial officer directly relating to the reporting, investigation, or prosecution of a crime, or directly relating to the reporting of, or investigation of misconduct by, another peace officer or custodial officer, including, but not limited to, any sustained finding of perjury, false statements, filing false reports, destruction, falsifying, or concealing of evidence.”

adopted over a police union’s objection, whereas other issues, such as discipline, must be negotiated with a police union beforehand.

Under Government Code section 3505, “the public employer and recognized employee organization have a ‘mutual obligation personally to meet and confer promptly upon request by either party . . . and to endeavor to reach agreement on matters within the scope of representation[.]’” (*Claremont, supra*, 39 Cal.4th at p. 631.) Government Code section 3504 defines which matters fall within the scope of representation:

The scope of representation shall include all matters relating to employment conditions and employer-employee relations, including, but not limited to, wages, hours, and other terms and conditions of employment, except, however, that the scope of representation shall not include consideration of the merits, necessity, or organization of any service or activity provided by law or executive order.

(Gov. Code § 3504.)

The California Supreme Court has resolved some of the ambiguities in Government Code section 3504. Regarding the first phrase, “to require an employer to bargain, [the] action or policy must have ‘a *significant and adverse* effect on the wages, hours, or working conditions of the bargaining-unit employees.’” (*Claremont Police Officers Assn. v. City of Claremont* (2006) 39 Cal.4th 623, 631, quoting *Building Material*, 41 Cal.3d at pp. 659–60.) The second phrase, an exception to the first, forestalls “any expansion of the language of wages, hours and working conditions” from applying to an agency’s management decisions. (*Claremont, supra*, 39 Cal.4th at p. 631, quoting *Fire Fighters Union v. City of Vallejo* (1974) 12 Cal.3d 608, 616 [internal quotations omitted].)

Management decisions are those that “‘lie at the core of entrepreneurial control’ or are ‘fundamental to the basic direction of a corporate enterprise.’”⁴ (*Building Material, supra*, 41 Cal.3d p. 655, quoting *Fibreboard Corp. v. Labor Board* (1964) 379 U.S. 203, 223.) Even when a management decision falls within the scope of representation, it is subject to meet and confer obligations only if “the benefit, for labor-management relations and the collective-bargaining process, outweighs the burden placed on the conduct of the business.” (*Int’l Assn. of Fire Fighters, supra*, 51 Cal.4th at p. 273, quoting *First National Maintenance Corp. v. NLRB* (1981) 452 U.S. 679, 668.)

In *Claremont*, the California Supreme Court established a three-part inquiry to determine whether an employer’s decision is subject to meet and confer under the MMBA:

First, does the action have “a significant and adverse effect on the wages, hours, or working conditions of the bargaining-unit employees.” If not, there is no duty

to meet and confer. Second, does the “significant and adverse effect arise from the implementation of a fundamental managerial or policy decision.” If not, there is a duty to meet-and-confer. Third, if both factors are present, the court applies a balancing test. The action “is within the scope of representation only if the employer’s need for unencumbered decision making in managing its operations is outweighed by the benefit to employer-employee relations of bargaining about the action in question.” In balancing the interests, a court may also consider whether the “transactional cost of the bargaining process outweighs its value.”

(*Claremont, supra*, 39 Cal.4th at p. 638 [citations omitted].)

While the MMBA does not require an employer to meet and confer over a management decision that passes the *Claremont* test, courts have held that the employer must negotiate over the “effects” of such a decision. (See *Int’l Assn. of Fire Fighters, supra*, 51 Cal.4th at p. 273.) For example, “although ‘an employer has the right unilaterally to decide that a layoff is necessary, [it] must bargain about such matters as the timing of the layoffs and the number and identity of employees affected.’” (*Claremont*, 39 Cal.4th at pp. 633–34 [quoting *Los Angeles County Civil Service Com. v. Superior Court* (1978) 23 Cal.3d 55, 64].) As one court has explained, “[t]he public employer’s duty to bargain arises under two circumstances: (1) when the decision itself is subject to bargaining, and (2) when the effects of the decision are subject to bargaining, even if the decision, itself, is nonnegotiable.” (*El Dorado County Deputy Sheriff’s Assn. v. County of El Dorado* (2016) 244 Cal.App.4th 950, 956.)

Courts have differed over when “effects bargaining” is required. Some opinions suggest that if an action is a management decision, and the employer’s prerogative outweighs the benefit to labor relations, then the implementation of that decision is not subject to effects bargaining. (*Claremont, supra*, 39 Cal.4th at pp. 637–38; *San Francisco Police Officers’ Assn. v. San Francisco Police Com.* (2018) 27 Cal.App.5th 676, 690.) Other decisions, specifically in the context of layoffs, suggest the opposite—that implementation of the management decision can be restrained by bargaining over effects. (See *Int’l Assn. of Fire Fighters, supra*, 51 Cal.4th at p. 277.) In contrast, PERB has taken a strong position in insisting that effects bargaining must be completed before decisions are implemented and requiring that impasse procedures (including factfinding) be completed even in the context of effects bargaining. (See, e.g., *Santa Clara County Correctional Peace Officers’ Assn v. County of Santa Clara* (2013) PERB No. 2321-M.)⁵

B. The MMBA and Use-of-Force Policies

It is now firmly established that a local agency does *not* have a duty to meet and confer over revisions to these policies. In *San Francisco Police Officers’ Assn. v. San Francisco Police Commission* (2018) 27 Cal.App.5th 676, San Francisco formed a commission to, among other things, revise the SFPD’s use-of-force policy. (*Id.* at pp. 680–81.) San Francisco negotiated with

the SPOA regarding the reforms proposed by the Police Commission (the two sides met nine times in five months), but the City consistently asserted that the reforms were managerial and thus outside the scope of representation. (*Ibid.*) After several months of negotiations that failed to achieve agreement on several policies—particularly the use of the carotid (choke) restraint and a prohibition on police officers shooting at moving vehicles—San Francisco declared an impasse, and the SFPOA filed a grievance under the MOU to bring it back to the bargaining table. (*Id.* at pp. 681–82.) Thereafter, the City changed course and asserted its managerial rights, voting to approve the use-of-force reforms and prompting the SPOA to file a petition to compel the City to arbitration. (*Id.* at p. 682.) In the interim, the two parties reached an agreement regarding training and discipline. (*Id.* at p. 681.)

In considering the action, the Court of Appeal squarely held that use-of-force policies are not subject to mandatory bargaining. (*Id.* at p. 688.) It rejected the SFPOA’s assertion that the City was required to negotiate the effects of the policy changes. The court determined that, under step three of the *Claremont* test, the use-of-force policy changes were not within the scope of representation because the employer’s need for unencumbered decision making in managing its operations vis-à-vis a use-of-force policy outweighed the benefit to employer-employee relations of bargaining over the decision. (*Id.* at pp. 687–88.) Further, the court explained that requiring an employer to negotiate the effects of a use-of-force policy could bog down the implementation of the policy itself, effectively subjecting it to meet and confer obligations. (*Id.* at p. 690) Finally, the court acknowledged that the two parties had already reached an agreement regarding training and discipline, and thus “there were no outstanding pre-implementation issues related to the effects of the use-of-force policy on working conditions regarding which the City had refused to meet and confer.” (*Ibid.*)

C. The MMBA and Oversight Boards

The law regarding the MMBA’s application to civilian police oversight boards and their procedures is still developing, not least because PERB only recently began exercising its jurisdiction over claims brought by police unions under the MMBA. PERB’s decision in *County of Sonoma* (2021) PERB Decision No. 2772-M is instructive on the current state of the law.

In November 2020, Sonoma County voters overwhelmingly adopted a ballot measure that expanded the powers of its sheriff oversight agency. (*Id.* at p. 14.) The initiative allowed the County’s oversight agency, the Independent Office of Law Enforcement Review and Outreach (“IOLERO”), to investigate sheriff employees and make recommendations for their discipline, to access sources of evidence obtained as part of internal affairs investigations, to receive and review confidential peace officer personnel files, and to post body-worn camera video footage online. (See *id.* at pp. 14–19.) The peace officer associations challenged the measure before PERB. (*Id.* at p. 23.) PERB granted the unions’ motion to expedite their unfair practice charges, bypassing a decision by an administrative law judge and assigning the case to the Public Employment Relations Board itself. (*Ibid.*)

PERB then issued a lengthy decision in which it concluded that the County violated the MMBA by failing to meet and confer over certain aspects of the ballot measure before

submitting it to the voters. Specifically, PERB concluded that many of the ballot measure’s amendments relating to procedures for investigating and recommending discipline of employees were subject to decision bargaining and that other amendments were subject to effects bargaining. (*Id.* at p. 3)

PERB held that several policy changes in the ballot measure concerning investigation and discipline were subject to meet and confer: those granting IOLERO authority to conduct independent investigations of Sheriff’s Office employees and recommending discipline of those employees; those allowing IOLERO to subpoena records or testimony in investigations and review an officer’s discipline record, including all prior complaints; and those allowing the IOLERO Director to personally sit in and observe investigative interviews. (*Id.* at pp. 39–40.) PERB ruled that, while these changes were management decisions for the County, the benefit to labor-management relations under the *Claremont* inquiry outweighed the County’s interests and thus the decisions themselves were subject to bargaining. (*Id.* at pp. 38–39 [“for those Measure P amendments aimed in material part at investigation and discipline of employees, the benefits of collective bargaining outweigh the County’s interest. Indeed, because such issues lie at the core of traditional labor relations, they are particularly amenable to collective bargaining.”].)

PERB’s analysis of whether these changes were subject to meet and confer is difficult to follow. It stated that the associations had a right to meet and confer before the “County subjects employees they represent to such a parallel investigatory process for the first time, especially since IOLERO’s procedures may deviate from the investigations conducted by the Sheriff’s Office. These amendments thus directly affect employment by changing—or at least creating ambiguity about—disciplinary procedures and standards.” (*Id.* at p. 40.) At some parts of the decision, PERB suggested that changes merely affecting an investigation or disciplinary process are subject to meet and confer. (*Id.* at p. 41 [“Measure P further impacts disciplinary procedures by expanding the types of evidence the County could use as a basis for discipline”]; see also *id.* at p. 42 [“Given the potential impact an investigative interview may have on an officer’s career, procedures at such an interview are an important subject of collective bargaining requiring negotiation before making a change”].) In others, PERB stated that the ambiguity created by the amendments regarding these issues was what was objectionable. (*Id.* at p. 41 [“It thus is possible that an officer could still be under investigation by IOLERO more than one year after the officer’s misconduct was discovered.”].)

As to the remaining challenged provisions, PERB found that they were not subject to decision bargaining. According to PERB, the County’s managerial interest outweighed the benefits to labor-management relations because the provisions were “not part and parcel of Measure P’s attempt to create a parallel investigatory track.” (*Id.* at p. 44.) These amendments included the following: a provision authorizing IOLERO to publicly post body worn camera video footage; a provision authorizing IOLERO to directly contact and interview complainants and witnesses; and a provision granting IOLERO access to investigative evidence and Sheriff’s Office databases.

PERB nevertheless found that some of these provisions were subject to meet and confer for bargainable effects. The provision regarding IOLERO’s ability to post footage from body

work cameras was subject to effects bargaining because it was not clear whether the decision to post such footage would be done “on a case-by-case basis to the extent allowed by law, in consideration of victim privacy rights and active investigations.” (*Id.* at p. 45.) Similarly, the provision allowing IOLERO to contact witnesses was subject to effects bargaining because the provision did not specify whether officers or supervisors accused of wrongdoing were included as witnesses who were subject to interviews and whether they would be paid for the time spent during the interview. (*Id.* at p. 46.) By contrast, PERB ruled that the provision granting IOLERO “unfettered access to investigative evidence and Sheriff’s Office databases” did not create any effects within the scope of representation because the existing operational agreement provided access to the Sheriff’s Office AIM database. (*Id.* at p. 47.)

It is hard to glean much from the *County of Sonoma* other than that a local agency, with the exception of use-of-force policies, must exercise caution in attempting to implement police reforms over a police union’s objection, especially with matters relating to discipline. While the decision focused on reforms related to discipline and investigation, a similar analysis could apply to reforms concerning issues such as shifts in services (i.e., transferring duties out of police departments) or training.

LEGISLATIVE CHANGES

On September 30, 2021, Governor Newsom signed eight new police reform bills into law. These were:

- **SB 2 (Bradford):** The primary focus of SB 2 is the certification and eligibility of peace officers throughout the state. It prohibits persons from serving as peace officers if they have been convicted of specified felonies or have engaged in certain misconduct. It has a similar prohibition on service if officers have had their certification denied or revoked by the Commission on Peace Officer Standards and Training (“POST”) or had their name listed on other decertification indexes due to misconduct. SB 2 also mandates that the Department of Justice provide the POST Commission with the power to investigate and determine the fitness of any person to serve as a peace officer in the state. Finally, it eliminates certain immunities for peace officers under the Bane Act.
- **SB 16 (Skinner):** SB 16 expands public access to law enforcement records, including records concerning sustained findings of an officer’s use of unreasonable or excessive force, an officer’s failure to intervene against another officer using clearly unreasonable or excessive force, unlawful arrests and unlawful searches, and conduct involving prejudice or discrimination. These records were previously confidential under the Penal Code. SB 16 also requires an agency hiring a peace officer to review a file containing records relating to any misconduct the officer has engaged in prior to hiring that peace officer.
- **AB 26 (Holden):** AB 26 bolsters the legal duty of peace officers to report instances of excessive uses of force by their colleagues and requires that officers

who fail to intercede during their colleagues' use of excessive force be disciplined in the same manner as the officer who engaged in the excessive force.

- **AB 48 (Gonzalez):** AB 48 limits and provides standards for law enforcement agencies' use of certain projectiles or chemical agents in responding to public gatherings.
- **AB 89 (Jones Sawyer):** AB 89 requires the Chancellor of California Community Colleges to develop a program for a modern policing degree, along with recommendations for creating financial assistance for students of historically underserved and disadvantaged communities. It also raises the minimum age of eligibility to serve as a police officer to twenty-one years old.
- **AB 481 (Chiu):** AB 481 provides that law enforcement agencies must obtain approval from the agency's governing body prior to taking certain actions relating to the funding, acquisition, or use of military equipment.
- **AB 490 (Gipson):** AB 490 prohibits law enforcement agencies from using restraints or transportation techniques that could result in positional asphyxia.
- **AB 958 (Gipson):** AB 958 targets law enforcement "gangs" among peace officers. Among other things, it requires law enforcement agencies to maintain a policy that prohibits participation in a law enforcement gang and that makes violation of that policy grounds for termination. Such termination must be disclosed to another law enforcement agency conducting a preemployment background investigation of that former peace officer.

While this new legislation will have a large effect on reforming policing in California, it will have a lesser impact on the obstacles facing local agencies described above. The only bill that specifically addresses any of the laws that form the focus of this paper is SB 16, which expands the categories of records subject to disclosure under *Pitchess*. However, as described above, most of the new exceptions require a sustained finding that the officer engaged in misconduct as a prerequisite to disclosure. (See Pen. Code § 832.7(b)(1)(A)(iii-iv), (b)(1)(C)-(E).) Thus, while the statute will allow for greater transparency post-hoc, it does not generate much additional flexibility for local governments seeking to boost participation or oversight in the disciplinary process.

The new bills will also generate challenges for local agencies. As with any new laws, agencies will have to grapple with statutory language absent guidance from the courts. Moreover, many of the laws require policy changes which local agencies will have to negotiate with their peace officer unions pursuant to the MMBA.

CONCLUSION

Many communities remain committed to police reform efforts. Municipal governments in these jurisdictions will continue to serve as the bridge between community stakeholders and police unions in these discussions. It is the role and the challenge of public agencies to facilitate the development of effective reforms and navigate their implementation in compliance with state law, including the legal hurdles discussed here.



The Tension Between the Right to Privacy and Police Technology

Wednesday, May 4, 2022

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The Tension Between the Right to Privacy and Police Technology

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Labor and Employment Litigation Update

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Technology has continued to evolve at light speed. Technology touches all aspects of life, including policing. At a time when police budgets are tight and recruitment for police departments is challenging, technology can be used to make policing more efficient.

Technology can be used in a multitude of ways to enhance police work. It can be used as a force multiplier to allow investigations to be conducted more quickly and more accurately. It can be used to monitor events and demonstrations. It can be used to augment traffic collision investigations. However, technology can also be misused to invade privacy rights of citizens.

The Fourth Amendment governs searches and seizures. The law, as always, trails behind technology. This leaves cities and police departments to navigate the use of technology while respecting the Fourth Amendment rights of individuals. This paper will explore these issues to assist cities and police departments in balancing these competing interests.

POLE CAMERAS

Pole cameras can be typically mounted for long term use or can be a mobile, such as a pole camera on a trailer for more temporary uses. Both cameras can have the same functionality to provide opportunities for law enforcement to monitor activity at a particular location.

Pole cameras can be used to conduct remote surveillance anywhere in a city. They can be used in high crime areas or to help monitor a special event like a street fair, concert or carnival. With sufficient planning and intelligence, they can be placed to monitor marches or demonstrations. As with many types of technology, they act as a force multiplier, allowing law enforcement to observe a large area with a single officer.

Information gathered in real time is transmitted to officers on-scene. This helps in the deployment of officers, finding suspects and/or victims and allowing a more efficient use of resources. Ideally, the use of pole cameras enhances public safety.

The use of pole cameras is not without controversy. While there is no right of privacy while one is in public, courts have held that certain uses of pole cameras can have significant Fourth Amendment impacts.

In *United States v. Tuggle* (2021) 4 F. 4th 505, the Seventh Circuit considered the government's use of a pole camera. The court set the scene by stating that:

[W]e are steadily approaching a future with a constellation of ubiquitous public and private cameras accessible to the government that catalog the movements and activities of all Americans. Foreseeable expansion in technological capabilities and the pervasive use of ever watching surveillance will reduce Americans' anonymity, transforming what once seemed like science fiction into fact. Constitutionally and statutorily mandated protections stand as critical bulwarks in preserving individual privacy vis-à-vis the government in this surveillance society. *Id.* at 509

Here, Tuggle had been previously prosecuted for conspiracy to distribute large amounts of methamphetamine. To further their investigation, the government installed three pole cameras near Tuggle's residence in order to monitor the activity at his house. The government did not obtain a warrant to place or monitor the cameras.

The three cameras were installed over a period of 13 months, from August, 2014 through September of 2015. The cameras were removed in March, 2016. The cameras recorded 24 hours a day the entire time they were installed. The cameras did not have infrared or audio capabilities. The government could pan, tilt and zoom the cameras and observe activity in real time.

The use of the cameras was successful. They captured over 100 alleged instances of deliveries of methamphetamine to Tuggle's home. Officers believed Tuggle's conspiracy distributed over twenty kilograms of pure methamphetamine.

Based on this information, officers obtained search warrants for several locations and Tuggle was indicted on multiple counts arising from his alleged conduct. Tuggle filed a motion to suppress the evidence asserting that the video obtained from the pole cameras was a warrantless search. The trial court denied his motion and an appeal followed.

The Court analyzed whether the government infringed on Tuggle's expectation of privacy. The court started with the two-part *Katz* test. (See *Katz v. United States* (1967) 389 U.S. 347.) Specifically, "[H]as the individual manifested a subjective expectation of privacy in the object of the challenged search? Second, is society willing to recognize that expectation as reasonable?" Tuggle bore the burden of establishing that he had a reasonable expectation of privacy in what was searched.

The Court held that the Fourth Amendment did not preclude officers from the isolated use of pole cameras on public property without a warrant. Tuggle did not erect a fence or try to shield his yard or driveway from public view. The Court stated that the expectation of privacy does not extend to what a person knowingly exposes to the public, even in his own home or office.

The Court then analyzed the more challenging question of the prolonged use of the cameras. The Court held that this use of the pole cameras did not violate the Fourth Amendment. Despite this holding, the Court had significant concerns. The Court said:

[W]e conclude by sounding a note of caution regarding the current trajectory of Fourth Amendment jurisprudence. As technological capabilities advance, our confidence that the Fourth Amendment (as currently understood by the courts) will adequately protect individual privacy from government intrusion diminishes. Once a technology is widespread, the Constitution may no longer serve as a backstop preventing the government from using that technology to access massive troves of previously inaccessible private information because doing so will no longer breach society's newly minted expectations. With the advent of digital, cloud-based, and smart capabilities, these new technologies will seldom contravene the traditional limitations imposed by the Fourth Amendment on physical invasions. *Katz, supra*, 397 U.S. at 527.

While the use of pole cameras remains popular among law enforcement, it is clear from this opinion that courts may begin to question the use of these cameras, including the data collected from their use, when applying the Fourth Amendment in the future.

DRONES

There are as many types of drones as one can imagine. From large drones that can deliver supplies to “micro drones” that can enter a home through an open door or window, the variety is vast. These varied types of drones can assist law enforcement in a multitude of ways.

Drones provide a distinct advantage over pole cameras in that their location can be flexible. Drones can provide real time visual data in a critical incident, can be used to plan a dynamic entry for SWAT, can fly inside a structure to determine the status and location of suspects and victims, can monitor demonstrations or protests, can assist in traffic accident reconstruction or merely provide surveillance. The use of drones is limited only by the imagination.

The use of drones, given their dynamic nature, can create additional Fourth Amendment concerns. They have the capability to observe places that may be protected from public view, potentially invading a legitimate expectation of privacy.

In an en banc hearing, the Fourth District addressed some of these issues in *Leaders of a Beautiful Struggle, et. al. v. Baltimore Police Department, et. al.* (4th Cir. 2021) 2 F. 4th 330 where the Court analyzed an aerial surveillance program instituted by the Baltimore

Police Department (BPD). In August 2016, the public learned that BPD was going to use planes equipped with high-tech cameras to surveil Baltimore. BPD contracted with a third party vendor, Persistent Surveillance Systems (PSS) to conduct the surveillance. Based on public opposition to the program, it was discontinued.

Three years later, after a series of townhall style meetings, the program was revived, and the City of Baltimore executed a new contract with PSS on April 1, 2020. Planes flew at least 40 hours per week and were able to capture roughly 32 square miles per image per second. The planes transmit their photographs to PSS “ground stations” where contractors use the data to “track individuals and vehicles from a crime scene and extract information to assist BPD in the investigation of Target Crimes”. Target Crimes are serious crimes including homicide, armed robbery and carjacking. The data is not designed to provide real-time analysis.

Community groups filed suit seeking injunctive relief, challenging the program and alleging violations of the Fourth Amendment. By the time the matter was brought to court, the program had ended under the terms of the agreement. BPD therefore argued that the action was moot since the program had terminated.

The Fourth Circuit determined the matter was not moot because BPD retained and continued to use PSS data even though the planes were no longer flying overhead.

Turning to the Fourth Amendment merits of the case, the Court held that plaintiffs are likely to succeed and reversed the trial court’s dismissal of the case. The court, in citing *Carpenter v. United States* (2018) 138 S. Ct. 2206, stated that:

Because the data is retained for 45 days—
at least—it is a “detailed, encyclopedic,” record of where
everyone came and went within the city during daylight hours
over the prior month-and-a-half. See *id.* Law enforcement
can “travel back in time” to observe a target’s movements,
forwards and backwards. See *id.* at 2218. Without technology,
police can attempt to tail suspects, but AIR data is more
like “attach[ing] an ankle monitor” to every person in the
city. See *id.* “Whoever the suspect turns out to be,” they
have “effectively been tailed” for the prior six weeks.
See *id.* (“[P]olice need not even know in advance whether
they want to follow a particular individual, or when.”). Thus,
the “retrospective quality of the data” enables police to

“retrace a person's whereabouts,” granting access to otherwise “unknowable” information. See *id.*

Leaders of a Beautiful Struggle, supra, 2 F.4th at pp. 341–342. The Court further held that the surveillance was not “short-term” and transcended “mere augmentation of ordinary police capabilities.” “Capturing everyone’s movements outside during daytime for 45 days goes beyond that ordinary capability.” *Id.* at 345. Finally, the Court stated that while not opposed to policing innovation and the use of technology to advance public safety, “the role of the warrant requirement remains unchanged as new search capabilities arise.” *Id.* at 347.

This case can be applied to the use of drones. While the Supreme Court has upheld the use of flyovers without a warrant (see *California v. Ciraolo* (1986) 476 U.S. 207), the use of drones in a prolonged way that develops a library of data allowing “officers to walk back in time” may be problematic under the Fourth Amendment. Future use of drones by law enforcement will need to analyze their intended application while keeping these competing concepts in mind.

AUTOMATIC LICENSE PLATE READERS (ALPRS)

ALPRs can be mounted on vehicles or can be stationary. The government will frequently install ALPRs on police units or other vehicles. Stationary ALPRs can be used at airports, convention centers or other locations where traffic is funneled through specific locations.

The data obtained through ALPRs may then be compared to license plates of stolen vehicles or vehicles belonging to criminal suspects. That information is then used to further criminal investigations. ALPRs can also obtain vast amounts of data on where and when vehicles are present in certain locations. That data can be kept for a period of time, allowing the government to create a database of the locations of vehicles and by extension, their owners. This data then could be misused.

The California Legislature continues to attempt to regulate the use of ALPRs and more significantly, the use of the data obtained. In the last legislative session, multiple bills were introduced that would severely limit the retention period of ALPR data. Those bills mostly failed. Other bills are still pending in the Legislature addressing the sharing and/or selling of ALPR data, security regarding geolocation data, placing notice on a website when a data breach occurs and data security. Bills that were passed in 2021 and are now law (AB 474, AB 825 and AB 917) covered the security and privacy of the data.

While the Fourth Amendment does not apply to the gathering of the data, the use and retention of the data will continue to be an area where the Legislature will continue to regulate.

FACIAL RECOGNITION

Facial Recognition can be placed anywhere a camera can be placed. These cameras can be used to substitute for some security checks and in place of keys or key cards. They can also be used to identify and track a particular target, particularly where there is a network of cameras covering a wide area. Some cameras can determine emotions of targets.

Facial recognition is an emerging technology that has reliability issues. Specifically, there are issues with accuracy when attempting to identify people of color.

As seen with the cases above, the use of this type of data, particularly when collected and stored, can create Fourth Amendment issues. Many states are struggling with regulating how the technology should be used.

SHADOWDRAGON

ShadowDragon is a proprietary and new software tool. Little is known about its capabilities beyond information provided by the vendor.

ShadowDragon pulls data from social media accounts, data apps, the dark web and shopping sites like Amazon to identify a person of interest. It searches 120 different online platforms, which the company says allows it to speed up profiling work from “months to minutes”. ShadowDragon also claims that its software can predict “unrest and potential violence”.

It has been purchased by the U.S. Immigration and Customs Enforcement agency, the State of Michigan and the Massachusetts State Police.

Concerns regarding the use of this technology include the possible chilling effect on social media speech when there is monitoring by the government. Further, ShadowDragon can use the collected data to determine who a target may correspond with on social media. This could create a scenario where innocent people could become involved as potential suspects in a criminal investigation.

CONCLUSION

As technology continues to evolve, courts will continue to struggle to apply the Fourth Amendment to the current technologies used by the government. The courts have expressed concern that advancing technology could erode Fourth Amendment protections as we know them.

The use of this information to further public safety is critical to police agencies in light of current decreased staffing levels and tightening budgets. The Fourth Amendment will continue to play a role in the use of this technology. The best way to protect this information and allow its use in a criminal prosecution is to obtain a warrant. When the warrantless use of technology is conducted by law enforcement, there will always be a risk

whether courts will allow its introduction into evidence. This tension between the law and police technology will continue to evolve as courts catch up to the various technological advances adopted by law enforcement.



Peace Officer Personnel Records and the California Public Records Act

Wednesday, May 4, 2022

Geoffrey Sheldon, Partner, Liebert Cassidy Whitmore

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Peace Officer Personnel Records and the CPRA

Geoffrey S. Sheldon, Partner, Liebert Cassidy Whitmore

I. Introduction

The California Public Records Act (“CPRA” or “the Act”) is found in Gov. Code section 6250, et seq. The general policy of the Act cuts in favor of disclosure; however, the Act contains numerous exemptions to the duty to disclose public records that practitioners and others charged with responding to CPRA requests must be aware of. At the same time, practitioners and those that are tasked with responding to CPRA requests must also be familiar with California law that has historically afforded a higher degree of confidentiality for peace officer personnel records, i.e., Penal Code section 832.7 and Evidence Code section 1043, et seq. (“the Pitchess statutes”).¹

Until recently, the exemptions that regulate responses to CPRA requests for personnel records were relatively easy to implement, i.e., peace officer records were deemed to be strictly confidential and an agency was obligated to advise the requester that the records could not be produced absent a court order following what is commonly referred to as a “Pitchess motion.” However, since January 1, 2019, responding to CPRA requests for peace officer personnel records has become a bit more complex – and costly and time consuming – for public agencies. Senate Bill 1421 (“SB 1421”)² was a response to calls for increased transparency for law enforcement departments in the wake of a number of high-profile police use of force and misconduct incidents, such as the 2014 shooting of Michael Brown that occurred in Ferguson, Missouri. More recently, Senate Bill 16 (“SB 16”), along with Senate Bill 2 (“SB 2”)³, were passed to assure more transparency and more oversight of the policing industry. While these new laws stripped away confidentiality for records regarding certain types of police incidents (e.g., shootings at persons) and “serious misconduct” by officers, the CPRA’s exemptions and

¹ The Pitchess statutes were codified by the California Legislature following the California Supreme Court’s decision in *Pitchess v. Superior Court* (1974) 11 Cal.3d 531.

² The bill was signed into law by then-governor Jerry Brown on September 30, 2018 and took effect on January 1, 2019.

³ SB 16 and SB 2 were both signed into law by Governor Gavin Newsom on September 30, 2021. SB 16 takes effect on January 1, 2022, but public agencies will have a one-year grace period — until January 1, 2023 — to make public the newly disclosable records for incidents that occurred before January 1, 2022.

Pitchess statutes still make some types of records confidential and subject only to disclosure through a court order, and these provisions require that certain information be redacted from those records that must be disclosed. Moreover, these new laws have altered the timing of an agency's obligation to respond to CPRA requests for law enforcement personnel records, i.e., agencies generally have less time to respond and they have duties to provide requesters with frequent status updates. This paper will discuss these issues and what we believe are some best practices for assisting agencies who are the custodians of these records.

II. CPRA Basics

While the general policy of the CPRA is to favor disclosure of records to the public, the Act does contain numerous statutory exemptions. Those exemptions are, generally speaking, narrowly construed and the public agency has the burden of establishing an exemption is applicable.

The exemptions germane to the issues raised in this paper are found in Government Code section 6254(c) [which exempts "Personnel, medical, or similar files, the disclosure of which would constitute an unwarranted invasion of personal privacy"] and section 6254(k) [which exempts "[r]ecords, 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."] The latter is the bridge to the Pitchess statutes discussed throughout this paper.

The CPRA also has a catchall or "general balancing" exemption, Government Code section 6255(a), that authorizes the nondisclosure of a record when a determination is made by the public agency (or the court if the agency's determination is challenged) that "on the facts of the particular case the public interest served by not disclosing the record clearly outweighs the public interest served by disclosure of the record." The catchall exemption can, in certain circumstances, allow for the non-production of public records based on fiscal and administrative concerns, including the expense and inconvenience involved in segregating nonexempt from exempt information. (*Bertoli v. City of Sebastopol* (2015) 233 Cal.App.4th 353, 372; *Becerra v. Superior Court of City and County of San Francisco (First Amendment Coalition, et al.* (2020) 44 Cal.App.5th 897, 928 [citations omitted].) The public agency will have the burden of establishing was amounts to an undue burden defense (through detailed declarations explaining

the time and expense agency employees must expend to search for, redact and produce responsive records), and generally speaking the courts set a high bar for public agencies to establish this defense. (See, e.g., *Getz v. Superior Court* (2021) 72 Cal.App.5th 637, 651-652 [holding a review of approximately 47,000 emails for privileges and exemptions was not unduly burdensome].)

III. Pitchess Basics

Under the Pitchess statutes, i.e., Penal Code sections 832.5, 832.7 and 832.8 and Evidence Code sections 1043 through 1047, each law enforcement department or agency is required to have a procedure to investigate complaints by members of the public and to make a written description of that procedure available to the public. Recognizing that peace officers are subject an unusually high number of complaints because they have to deal with members of the public under difficult or unpleasant circumstances, the Legislature made peace officer personnel records – and information contained therein – confidential and not subject to disclosure absent a court order. Such a court order is obtained through a Pitchess motion’s two-step process, i.e., (1) a noticed motion must be brought, supported by affidavits, declarations and other evidence establishing “good cause” for discovery of the personnel records; and (2) if good cause is established, then only the documents and/or information that will be released are those that the court deems relevant or material to the underlying proceeding based on an *in camera* inspection of the records. The party opposing a Pitchess motion cannot ask the Court to identify documents not disclosed after the *in camera* inspection; the Court need only rule that the information not ordered produced was not subject to disclosure. (See *Herrera v. Superior Court* (1985) 172 Cal.App.3d 1159, 1060-1063.)

The Pitchess motion process was primarily developed for criminal cases, but it applies in State civil cases (*Haggerty v. Superior Court* (2004) 117 Cal.App.4th 1079) and administrative cases (*Riverside County Sheriff’s Department v. Stiglitz* (2014) 60 Cal.4th 624) as well. The Pitchess motion process does not apply in federal litigation or as to federal agencies since it is based on a State statutory scheme, nor does it apply to investigations of an officer being conducted by entities such as the local district attorney’s office, the California Attorney

General’s office, a grand jury or California’s peace officer regulatory agency — POST. (See Penal Code § 832.7(a).)

Penal Code section 832.8 broadly defines “personnel records,” and usually the most sought after records are those relating to complaints against an officer, investigations of those complaints, and resulting discipline against officers or other corrective action taken. Discoverable personnel records can also include records relating to promotions or lack thereof (even of non-party officers) provided those records are material to a claim or defense at issue in litigation. (*Riske v. Superior Court* (2016) 6 Cal.App.5th 647, 662-664.) “Information” from confidential personnel records is likewise confidential, including seemingly innocuous information such as an officer’s address, telephone number and similar contact information. (Penal Code § 8323.7(a).)

Evidence Code section 1045(e) provides that records disclosed pursuant to a Pitchess motion shall be subject a protective order, i.e., they cannot be used in a different case absent a court order.

IV. SB 1421 and SB 16

Under growing demand for accountability of law enforcement agencies, California enacted Senate Bill 1421, making several types of previously confidential peace officer personnel records publicly accessible effective January 1, 2019. The Legislature continued this trend in 2021 with the passage of SB 16, which took effect January 1, 2022.

SB 1421 removed Pitchess protection from four types of peace officer records: (1) those pertaining to officer-involved shootings, (2) those pertaining to uses of force resulting in death or great bodily injury, (3) those pertaining to sustained findings of certain types of dishonesty, and (4) those pertaining to sustained findings of sexual assault against members of the public.⁴ With the passage of SB 1421, these four categories of records now must be produced pursuant to a CPRA request, and the records that must be disclosed are broadly defined. The records that must be produced include all investigative reports; audio, photo and video evidence; interviews; autopsy reports; all materials presented to a prosecutor for review to determine whether to file

⁴ The first two categories do not require “sustained” findings, whereas the second two categories do.

criminal charges against an officer; and documents concerning potential discipline, actual discipline or settlement of discipline relating to a disclosable incident.

The passage of SB 1421 led to a wave of CPRA requests by individuals, press organizations and public interest groups. Many California law enforcement agencies received requests for “all” SB 1421 records in their possession, and responding to these request was, and in some cases still is, extremely time consuming and burdensome. This is particularly true for larger agencies with thousands of officers/former officers and decades’ of records for each.⁵ These requests are more time consuming to process because (1) the universe of responsive records is vast, (2) legal and factual analysis is required to ascertain whether each record is actually subject to disclosure under SB 1421, and (3) redactions must be made to many responsive documents, which (particularly for video and audio) can take considerable time and resources. For example, while records regarding shootings at persons are relatively easy to locate, determining whether a use of force resulted in “great bodily harm” requires a close inspection of medical reports and perhaps photos of the injury. Further, Penal Code section 832.7(b)(6) states that agencies “shall” redact (1) personal data or information, such as a home address, telephone number, or identities of family members, other than the names and work-related information of peace and custodial officers; (2) information necessary to preserve the anonymity of whistleblowers, complainants, victims, and witnesses; (3) information required to protect confidential medical, financial, or other information disclosure of which is prohibited by federal law or would cause an unwarranted invasion of personal privacy that clearly outweighs the strong public interest in records about possible misconduct and use of force by peace officers and custodial officers; and (4) when there is a specific, articulable, and particularized reason to believe that disclosure of the record would pose a significant danger to the physical safety of the peace officer or another person. Such redactions are necessary, they require record-by-record analysis, and prolong record production.⁶

⁵ SB 1421 has been held to apply retroactively to peace officer records created prior to January 1, 2019. (*Ventura County Deputy Sheriffs’ Association v. County of Ventura* (2021) 61 Cal.App.5th 585.) As a result, some agencies have been requested, and ordered, to produce decades’ of personnel records.

⁶ The CPRA provides that “[a]ny reasonably segregable portion of a record shall be available for inspection by any person requesting the record after deletion of the portions that are exempted by law.” (Gov. Code § 6253(a).) That said, if segregating exempt from non-exempt materials and making appropriate redactions would be particularly burdensome, that can – in certain situations – support a claim that the balance of public interest favors non-disclosure under Government Code section 6255. (*American Civil Liberties Union Foundation v. Deukmejian* (1982)

SB 16, which took effect January 1, 2022, removes Pitchess protections from four additional categories peace officer records: (1) records of sustained findings involving complaints alleging unreasonable or excessive use of force, (2) records of sustained findings that an officer failed to intervene against another officer using force that was clearly unreasonable or excessive, (3) records of sustained findings that an officer engaged in conduct involving prejudice or discrimination on the basis of race, religious creed, color, national origin, ancestry, physical or mental disability, medical condition, genetic information, marital status, sex, gender, or gender identity, and (4) records of sustained findings that an officer made an unlawful arrest or conducted an unlawful search.⁷ SB 16 also provides that agencies are required to release records relating to a covered incident even if the officer resigned before the agency concluded its investigation. (Penal Code § 832.7(b)(3).) Given that most of the covered categories of incidents require a “sustained” finding, which is defined as “a final determination . . . following an investigation and opportunity for an administrative appeal pursuant to Sections 3304 and 3304.5 of the Government Code,” it is not clear how this provision will apply in practice. (Penal Code § 832.8(b).) For example, if an officer resigns before an internal affairs investigation is complete they will not be issued a notice of intent to terminate or a notice of termination, and in that situation they will not have been given the opportunity for an administrative appeal since the termination never occurred.

Agencies and CPRA practitioners should also be aware that SB 16 creates rigid timelines for the release of documents, which go into effect on January 1, 2023. Generally speaking, responsive records must be produced no later than 45 days from the date of a CPRA request; however, there are statutory exceptions for pending criminal and administrative investigations. (See Penal Code § 832.7(b)(8) and (11).)

SB 16 also disallows use of the attorney-client privilege to deny release of information provided to or discovered by lawyers in these investigations, and some legal billing records. (Penal Code § 832.7(b)(12).) SB 16 also establishes that if an officer committed misconduct

32 Cal.3d 440, 453, fn. 13; *County of Santa Clara v. Superior Court* (2009) 170 Cal.App.4th 1301, 1321.) An agency should be prepared to establish undue burden with declarations and affidavits that describe, in detail, the time (in terms of employee hours) and effort (in terms of number of staff and hourly rate) needed to make the redactions and the methodology used to arrive at those numbers. In our experience, courts are reluctant to find undue burden given the Legislature’s recent focus on peace officer personnel records transparency.

⁷ All four categories require “sustained” findings to be subject to disclosure under the CPRA.

within Pitchess protection, information about those allegations would remain confidential; however, factual information about that officer relevant to a finding that is not Pitchess-protected against another officer must be released. (Penal Code § 832.7(b)(5).) Distinguishing the two may not always be easy.

Earlier law required agencies to establish procedures to investigate complaints by the public, and to keep any records of these complaints for five years, including related findings or reports regarding the complaints. SB 16 extends the records retention requirement for peace officer personnel records as well, i.e., complaints and any reports or findings relating to complaints of officer misconduct shall be retained for a period of no less than 5 years for records where there was not a sustained finding of misconduct and for not less than 15 years where there was a sustained finding of misconduct. (Penal Code § 832.5(b).) For records existing as of January 1, 2022, these five and 15-year clocks began running on that date, rather than when the records were created.

SB 16 also prohibits agencies from destroying any records while a request related to the record is pending, or while any process or litigation is ongoing to determine whether that record should be released. SB 16 also eliminates the previous Pitchess motion requirement that courts exclude evidence of complaints concerning conduct by officers that occurred more than five years before the event that is the subject of litigation.

Finally, SB 16 now obligates agencies, to request and review any lateral officer's personnel file from any previous employing agency before hiring him or her.

V. Important Points

There are a few somewhat unique issues that public agencies and the practitioners that represent them in connection with peace officer personnel records should note.

A. CPRA Requests Can Lead to Attorney's Fees

An agency's failure to comply with the CPRA, whether due to alleged non-disclosure because of a dispute about whether an exemption applies, due to perceived over-redaction of responsive documents, or due to allegations that the agency is simply taking too long to locate and produce documents, can lead to litigation (usually a Petition for Writ of Mandate under Code

of Civil Procedure section 1085.) While the remedy is usually in the form of injunctive relief (e.g., an order to produce public records, there is also a monetary cost to an agency – namely reasonable attorney’s fees and costs plus the cost of defense. Attorney’s fees are usually determined via the loadstar method, although attorneys representing CPRA requesters are sometimes awarded a multiplier.⁸ (See *Galbiso v. Orosi Public Utility District* (2013) 167 Cal.App.4th 1063, 1088.)

B. Discovery in CPRA Litigation is Uniquely Limited

CPRA cases have a somewhat unique scope of discovery. In *City of Los Angeles v. Superior Court (“Anderson-Barker”)* (2017) 9 Cal.App.5th 272, the Second District Court of Appeal held, as an issue of first impression, that the Civil Discovery Act applies to CPRA cases. However, *Anderson-Barker* held that a different standard applies for discovery conducted in CPRA actions, explaining that “the CPRA is intended to ‘permit the expeditious determination’ of a narrow issue: whether a public agency has an obligation to disclose the records that the petitioner has requested.” (*Id.* at 289.) Therefore, the Court reasoned, when a party to CPRA litigation seeks to compel discovery, “the trial court must determine whether the discovery sought is necessary to resolve whether the agency has a duty to disclose, and to additionally consider whether the request is justified given the need for an expeditious resolution.” (*Id.* at 289.)

C. An Agency Must Bring a Pitchess Motion to Use its Own Peace Officer Personnel Records in Litigation

In *Michael v. Gates* (1995) 38 Cal.App.4th 737, the Court of Appeal suggested (but did not directly hold) that an agency that wants to use in litigation (e.g., in the agency’s defense of an employment law claim) peace officer personnel records of which it is the custodian must nevertheless file a Pitchess motion. More recently, in *Towner v. County of Ventura* (2021) 63 Cal.App.5th 761, the Court of Appeal held that an agency can violate an officer’s privacy rights by using confidential personnel records in litigation without first bringing a Pitchess motion.

⁸ A trial court has discretion to deny attorney fees under the CPRA. The minimal or insignificant standard is applicable when the requester obtains only partial relief under the CPRA. (*Riskin v. Downtown Los Angeles Prop. Owners Ass’n*, No. B309814, 2022 WL 805377, (Cal. Ct. App. Mar. 17, 2022.)

In *Towner*, the County of Ventura terminated a peace officer employee (Towner) who worked in the County's District Attorney's Office. Mr. Towner appealed the termination to the County's Civil Service Commission and, in response, the County filed a petition for writ of mandate requesting that the court enjoin the Commission from hearing the appeal due to an alleged conflict of interest. The County filed unsealed exhibits to its petition, including what were clearly peace officer personnel records (portions of an investigation report and notices of discipline). Towner then sued the County for negligence and violations of the Public Safety Officers Procedural Bill of Rights Act ("POBR"). As to the negligence claim, the employee alleged that the County violated Penal Code section 832.7 by publicly disclosing his confidential personnel records without appropriate judicial review (i.e., without bringing a Pitchess motion). As to the POBR claim, Towner alleged the County intentionally disclosed his confidential personnel records in violation of the statute.

The County moved to strike Towner's POBR and negligence claims under the anti-SLAPP statute, Code of Civil Procedure section 425.16, et seq., which allows for the early dismissal of a case that seeks to penalize constitutionally protected speech. The trial court granted the County's motion to strike, finding the County's writ petition and exhibits fell within the scope of the anti-SLAPP statute as a written statement submitted in a judicial proceeding. The Court of Appeal reversed, noting that Penal Code Section 832.7 states that confidential peace officer records may be disclosed only following a Pitchess motion. The Court of Appeal also noted that Government Code Section 1222 makes a public officer's "willful omission to perform any duty enjoined by law" a misdemeanor. The Court of Appeal held that the County willfully failed to treat the peace officer's personnel documents as confidential. Since the County's actions violated both Penal Code Section 832.7 and Government Code Section 1222, the Court of Appeal held that the peace officer employee adequately showed that the County's conduct was illegal as a matter of law and therefore was not protected activity under the anti-SLAPP statute.

In light of *Towner*, agencies and their attorneys should take great care before intentionally disclosing records which are clearly Pitchess protected. Public employers sued by peace officers for employment law violations, for example, should especially take care to bring Pitchess motions before publicly disclosing peace officer personnel records in court filings or the like (unless, of course, the records in question are no longer confidential because of SB 1421 or SB 16).

D. Strategies for Gray Area or “Wobbler” Records

Sometimes it is not clear whether or not an officer’s records are confidential under the Pitchess statutes or public under SB 1421 or SB 16. In such cases, an agency is faced with a potential CPRA legal action by the requester, on the one hand, and the officer’s potential legal action for privacy violations, on the other hand. One strategy is to advise the officer (and perhaps his or her union) of the agency’s intent to disclose the record pursuant to the CPRA and invite the officer to bring a “reverse PRA” action. (See, e.g., *Pasadena Police Officers’ Assn. v. Superior Court* (2015) 240 Cal.App.4th 268.) In such a case, the employee or their association intervene and litigate against the CPRA requester rather than the public agency having to take a position on whether the records must be disclosed.

Alternatively, if the agency decides not to invite a reverse-PRA action and the records are disclosed in good faith pursuant to a CPRA request, the agency can claim that the disclosure was protected activity under California’s anti-SLAPP statute.⁹ (See *Collondrez v. City of Rio Vista* (2021) 61 Cal.App.5th 1039 [reversing denial of SLAPP motion filed in defense of officer’s action for wrongful disclosure of personnel records on media’s CPRA request.]

VI. Non-Sworn Personnel Records

Law enforcement departments, of course, do not employ only sworn personnel. While the Pitchess statutes do not apply to non-sworn employees, these employees records can be exempt from disclosure pursuant to Government Code section 6254(c)¹⁰, the provision that exempts

⁹ Disclosing records pursuant to a CPRA request is different than the situation in *Towner v. County of Ventura* since the disclosure is per a legal duty vis-à-vis a voluntary disclosure to further the County’s interests in litigation against an officer.

¹⁰ Gov’t Code § 6254, subd. (c)

“Personnel, medical, or similar files, the disclosure of which would constitute an unwarranted invasion of personal privacy.” However, this exemption does not automatically shield non-sworn employee personnel records from disclosure. Courts apply a balancing test to see to what records this exemption applies to—weighing public interest in disclosure against privacy interest of the employee. This exemption is highly dependent on the nature of the records sought and the facts and circumstances of a case, but successful assertion of the exemption will usually depend on whether (1) the agency can establish that the employee has a reasonable expectation of privacy; and (2) the public’s interest in information about the particular employee’s performance is not significant.

Examples of personnel records that usually must be disclosed include employee names, job titles, and salaries; pension amounts; and employment and severance agreements. While many agencies previously refused to disclose these records under Government Code section 6254(c), the courts have ruled that such records are subject to disclosure because they pertain to public expenditures. That is, taxes paid by the community pay for agency employees’ salaries, and therefore courts have held that there is a strong presumption that the public should be able to see how tax dollars are spent. (See, e.g., *Sonoma County Employees’ Retirement Ass’n v. Superior Court* (2011) 198 Cal.App.4th 986; *San Diego Employees Retirement Ass’n v. Superior Court* (2011) 196 Cal.App.4th 1228.)

A harder question is whether non-sworn-employee disciplinary records and/or misconduct investigation records must be disclosed. Generally speaking, these are public records that must be disclosed if they either (1) reflect allegations of a “substantial nature” and are “well-founded;” or (2) involve “high profile” public employees or officials. (See, e.g., *Bakersfield City School Dist. v. Superior Court* (2004) 118 Cal.App.4th 1041 [ordering disclosure of records of “sexual type conduct, threats of violence and violence” by school district employee]; *BRV, Inc. v. Superior Court* (2006) 143 Cal.App.4th 742 [alleged misconduct by school superintendent]; *Marken v. Santa Monica-Malibu Unified School Dist.* (2012) 202 Cal.App.4th 1250 [reverse PRA action as to finding that school teacher violated district’s sexual harassment policy].)

In *Bakersfield City School Dist.*, for example, a newspaper sought the disciplinary records of a school district employee. The appellate court weighed an individual's privacy rights against the public's right to know of an alleged wrongdoing under Government Code section 6254 (c's personnel records exemption). The Court of Appeal held that disclosure of the requested records was warranted, explaining "disclosure of a complaint against a public employee is justified if the complaint is of a substantial nature and there is reasonable cause to believe the complaint or charge of misconduct is well-founded." (118 Cal.App.4th at p. 1044.) The court further held "neither the imposition of discipline nor a finding that the charge is true is a prerequisite to disclosure." (*Ibid.*) Although there is "a strong policy for disclosure of true charges," a court must also order disclosure of records relevant to charges of misconduct that have not been found true by the public agency if the documents "reveal sufficient indicia of reliability to support a reasonable conclusion that the complaint was well founded." (*Id.* at 1046-1047.)

In *BRV, Inc. v. Superior Court, supra*, 143 Cal.App.4th 742, a school district entered into a severance agreement with its superintendent after an investigation of allegations of verbal abuse of students and sexual harassment of female students. The investigator found that the allegations were not sufficiently reliable. As part of the agreement, the district agreed to seal the investigation report and related documents. A newspaper made a CPRA request for the report. The court considered the public concern that the district and the superintendent had entered into a "sweetheart deal," and concluded that the public's interest in judging how the elected board had acted "far outweighed" any privacy interest: "Because of [the superintendent's] position of authority as a public official and the public nature of the allegations, the public's interest in disclosure outweighed [his] interest in preventing disclosure of the [investigation] report." (*Id.* at p. 759.) In addition, the court noted that even though the allegations were deemed not sufficiently reliable, a lesser standard of reliability applied than would otherwise apply for disclosure of personnel records of a nonpublic official. The public had a right to know why the superintendent was exonerated and how the district dealt with the charges against him. (*Ibid.*)

In *Marken, supra*, 202 Cal.App.4th 1250, a parent of a high school student made a CPRA request for records concerning the District's investigation of a teacher and its findings that the teacher had violated the District's sexual harassment policy. The court determined that a high school teacher occupies a position of trust and responsibility, and therefore the public has a

legitimate interest in knowing whether and how a school district enforces its sexual harassment policy against him. In light of the investigator’s findings that a number of the alleged acts had “more likely than not” occurred, and the District’s conclusion that the teacher violated its sexual harassment policy, the court held that the public’s right to know outweighed the teacher’s privacy interest. (*Id.* at 1273-1276.)

VII. Conclusion

It is unclear whether the trend towards more transparency with respect to peace officer personnel records will continue, but the legislative changes made thus far have increased demand for these records and that is likely to continue. Public agencies would be well-served to update their retention policies and assure that the policies, procedures, staffing and necessary tools (e.g., document management platforms with redaction capabilities) are in place to assure timely compliance with these new breeds of CPRA requests.

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Staffing a Public Meeting: From War Stories to Your Story

Thursday, May 5, 2022

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INTRODUCTION

One of the most challenging and exciting tasks to be undertaken by an attorney who is new to municipal law or to an advisory role is that of advising city councils, commissions, and boards during a public meeting.

Through a series of vignettes and the panel discussions that follow, the Attorney Development and Succession Committee seeks to highlight essential skills for a municipal attorney staffing a public meeting. The program will do so through the stories told by each vignette and shared by the panelists from their own experiences. Viewing meetings through the lens of three of the roles that a municipal attorney can inhabit, the program is organized into three parts featuring an archetypal city attorney: 1) City Attorney as “student”; 2) City Attorney as “counselor”; and 3) City Attorney as “referee.”

City Attorney as “student”

Preparation for meetings often involves more than simply knowing what is on the agenda, although that will of course inform the preparatory work the attorney may feel is needed prior to the meeting. Communication with key staff may reveal new background information or new circumstances germane to upcoming agenda items. As an example, staff may be aware of community or applicant concerns that have arisen with respect to a proposed housing project that could have implications on findings that could be necessary should the client wish to proceed in one direction or another. Staff may also be able to help identify potential conflict of interest issues that may affect which members can participate in a matter.

City Attorney as “counselor”

During a public meeting, members of the deliberative body may ask questions that would optimally be discussed in either a closed session or a one-on-one conversation rather than in a public setting. Being responsive in a non-confidential setting can be a challenge, and the panel will discuss how an attorney might respond during what can be a rather unsettling experience when an attorney’s advisory role, duty of confidentiality and need to avoid prejudicing the city client can seem to conflict.

City Attorney as “referee”

The attorney’s role in managing the public meeting process is also important. During the meeting the attorney may need to address procedural and parliamentary issues. Issues that implicate public hearing or due process requirements may also arise, requiring the attorney to weigh in and navigate during the meeting to help the client lawfully accomplish its objectives.

Through the vignettes, we follow a new City Attorney through what ultimately transpires to be a harrowing day. After each vignette, the panelists will discuss how they prepare for meetings, procedural issues that they have encountered during public meetings, and how they respond to conflict and other issues that may arise during the meeting. While acknowledging that it is impossible to be fully prepared for *all* eventualities that may arise during a public meeting, the panelists will discuss general approaches that apply to a variety of circumstances, ways to navigate through common issues, and how to learn from one's experience.

There are also treatises, guides, and informational materials that the Committee's attorneys have found useful and informative during the course of staffing public meetings. These have been described or linked in these materials, and we hope that these resources will be supplemented in the future as our community of attorneys identifies additional resources that will assist other members of the Department. An index for a suggested "Essential Skills Binder" is also provided, containing key resources an attorney may want to take to public meetings.

Attorney Development and Succession Committee
City Attorneys Department
League of California Cities

SETTING THE STAGE: HOW TO STAFF A PUBLIC MEETING

By sharing their experiences and approaches, a panel of city attorneys guided by a moderator will identify and discuss challenges and best practices for advising city councils and other municipal bodies in public meetings. Following a recorded skit that will preface each segment, the discussions will address the essential skills implicated in three different roles played by the City Attorney with respect to public meetings:

- City Attorney as “student”

An introductory vignette introduces us to an attorney the morning of their first council meeting, and some of the steps taken and basic resources they relied upon to prepare for that meeting. The discussion will address how to effectively prepare for meetings, including what resources to review and assemble, how to coordinate with key staff in advance, and how to anticipate potential issues that may arise.

- City Attorney as “counselor”

This vignette takes us to the meeting itself, where the hapless attorney is bombarded with questions about the defensibility of certain actions, liability that may arise from the same, as well as a potential conflict of interest issue. The panel discussion and stories will address how to give legal advice to the city client in a public setting, including when to speak up during meetings, how to give advice in a non-confidential setting, and how to deal with specific requests received from the dais. Potential strategies to be discussed include giving advice before the meeting, such as with a confidential memorandum, rather than during the meeting itself, and what to do when legal advice is requested during the meeting.

- City Attorney as “referee”

The final scenario finds our beleaguered attorney attempting to explain what happened procedurally during a heated discussion in the prior scene. The stories to be discussed by the panel will explore how to oversee the meeting process, including the different types of matters considered in meetings (e.g., public hearings, workshops, etc.) and how to handle parliamentary procedure, continuances, and other procedural matters that may arise during the course of a public meeting.

Through the discussion, those new to the public meeting context will be provided with suggestions and means by which city attorneys have acquired and applied the knowledge to adapt to issues that may arise, which can in turn be adapted and modified for their own use as suits their personality and style.

Resources - City Attorney as “Student” - Preparing for a Meeting¹

Brown Act:

Familiarity with the Ralph M. Brown Act (Govt. Code §54950, et seq.), commonly referenced as “the Brown Act,” is a fundamental requirement for those staffing public meetings or advising staff in preparation for them. Chapter 2 of *The California Municipal Law Handbook*, a League of California Cities resource published by CEB and updated by members of the City Attorneys Department (Department), is an absorbing read for attorneys, whether before or after review of the statute itself. It also includes substantive practice tips, citations, and other references that can be key for effective implementation. *The Municipal Law Handbook* is updated annually by Members of the Department. <https://store.ceb.com/the-california-municipal-law-handbook>

Many city attorneys take digital or hard copies of various provisions of the Brown Act with them to meetings. These may include, for example, Govt. Code section 54954.2, subdivision (b) of which delineates the findings that a legislative body must make to take action on items of business not appearing on the posted agenda, to add items to an agenda at the time of the meeting and Govt. Code section 54957.1, which contains the requirements for reporting out of closed session.

Cal Cities’ *Open & Public V: A Guide to the Ralph M. Brown Act (2016)*, developed by the Department, contains a summary of the Brown Act, its requirements, and remedies. https://www.calcities.org/docs/default-source/city-attorneys/open-public-v-revised-2016.pdf?sfvrsn=995414c9_3. The California Attorney General’s Office also has a guide, “The Brown Act: Open Meetings for Local Legislative Bodies (2003), <https://oag.ca.gov/system/files/media/the-brown-act.pdf>. Additionally, see this Institute of Local Government (ILG) resource: https://www.ca-ilg.org/sites/main/files/file-attachments/resources_25908.preparing_for_public_hearings.pdf?1436996368

Given recent changes in teleconferencing regulations and earlier changes to agenda provisions for closed sessions, if utilizing any resource other than the statute, particularly older resources such as the Attorney General’s resource noted above, care should be taken to refer back to applicable statutory provisions to ensure your knowledge and citations are up to date.

¹ The placement of resources within the vignette headings is unabashedly arbitrary for purposes of this paper. All listed resources can be relevant, and are often critical, to matters that are addressed and/or discussed in further detail in another vignette. For example, the Municipal Law Handbook contains information relating to most, if not all, of the issues raised by this presentation, but is only cited in the first section. Accordingly, please do not respect these boundaries when preparing for your own meetings!

Municipal Code and, if applicable, City Charter:

Local regulations such as zoning codes can govern appeals and can contain other requirements that are germane to the conduct of public meetings and public hearings, and may differ from city to city. Attorneys should be familiar with provisions that may pertain to the items that appear on upcoming agendas.

For attorneys of charter cities, applicable charter provisions should be reviewed prior to public meetings. Charters will vary significantly in length and scope of content and regulatory effect. Additionally, it should be noted that certain charter provisions may be superseded or preempted by state law, which over time has eroded charter city authority. For example, pursuant to SB 1333 (Wieckowski, 2018), certain charter provisions relating to general plan adoption and housing elements may be superseded.

Finally, some cities have adopted formal procedural rules governing how their public meetings are to be conducted, and some cities with formal meeting rules have also established other legislative bodies subject to the Brown Act and have adopted or permitted the other bodies to adopt their own, separate meeting rules. Attorneys covering public meetings of legislative bodies subject to the Brown Act will need to be familiar with any local meeting rules that apply to the meetings in addition to applicable provisions of the Brown Act.

Resources – City Attorney as “Counselor” – Giving Advice on Meeting Items

Conduct of Public Meetings and, if applicable, City Code of Conduct

“Counsel and Council: A Guide for Building a Productive Employment Relationship,” is a very helpful and informative League of California Cities resource. Its initial discussion of the “Nature of the Relationship” contained in pages 5 – 14, describes some of the fundamental duties, professional obligations, and constraints inherent in the city attorney position and the relationship with the client. Chapter II.C (the second C, beginning on page 21) contains a good discussion of navigating the procedural rules and the Brown Act. Chapter III.B, beginning on page 30, describes dilemmas that may occur with respect to communication and the provision of legal advice, whether in a public meeting or otherwise. As a soup-to-nuts primer, this resource can be useful throughout one’s tenure as a city attorney.

The Department’s *“Counsel and Council”* publication was recently updated, and is available on the CaCities website. https://www.calcities.org/docs/default-source/city-attorneys/cc-counsel-council-2022-ver4.pdf?sfvrsn=ffd5aa65_1

The ad hoc committee responsible for the update will be discussing the new edition at this conference.

Even those who have not yet staffed a meeting know that interesting issues can arise during the course of a public meeting discussion. The Institute for Local Government (“ILG”) has a resource entitled “Tips for Promoting Civility in Public Meetings” (2011), which provides strategies for dealing with different points of view and the disagreements that can arise as a result. The brief guide also includes a number of helpful references and resources for the quest for civil discourse. https://www.ca-ilg.org/sites/main/files/file-attachments/tips_for_promoting_civility_in_public_meetings_3.pdf?1395441954

Another resource for general information on open meetings is “the ABCs of Open Government Laws,” an ILG resource. <https://www.ca-ilg.org/sites/main/files/file-attachments/abcs.pdf?1485796214>.

Civil discourse and non-personalized dialogue are also encouraged in the ILG resource entitled “Attributes of Exceptional Councils:” https://www.ca-ilg.org/sites/main/files/file-attachments/exceptional_councils_6.21.pdf?1497853394, and additional strategies are included in “Dealing with Deeply Held Concerns and Other Challenges to Public Engagement Processes,” https://www.ca-ilg.org/sites/main/files/file-attachments/deeply_held_concerns.pdf?1497552740

With respect to issues relating to voting requirements for various types of actions including absences, vacancies, abstentions and disqualifications, and the Rule of Necessity, a 2006 paper for the Department’s Spring Conference provides a good grounding of statutory requirements applicable to various situations. https://www.ca-ilg.org/sites/main/files/file-attachments/resources_LEAGUE_OF_CA_CITIES_VOTING_REQUIREMENTS_ABSENCES_VACANCIES_ABSTENTIONS_AND_DISQUALIFICATIONS-1.pdf?1395441985

With respect to meeting logistics, the 2011 ILG Resource “Understanding the Role of Chair” and the Strategies for Success set forth therein can be very helpful: https://www.ca-ilg.org/sites/main/files/file-attachments/understanding_the_role_of_chair_nov_2012_3.pdf?1396626970

Some attorneys keep a copy of Govt. Code §54957.9 available in the event of potential meeting disturbance. Only applicable in event of an actual disruption of the meeting, it provides the basis for legislative bodies to clear a meeting and the constraints on the exercise of that ability.

Resources – City Attorney as “Referee”- Procedure & Ethics

Parliamentary Procedure

Municipalities generally reference the procedural regulatory framework to be used in their Municipal Codes or in a meeting policy (Govt. Code §36813). Historically, many jurisdictions have utilized *Robert’s Rules of Order*, now in its 12th edition, the *In Brief* edition of which is in its 3rd edition. <https://robertsrules.com/>.

The application of Robert’s Rules can be complicated. A 2007 paper, “Unraveling some common Procedural Tangles” may help with various motions and Govt. Code and due process requirements.

<https://www.cacities.org/UploadedFiles/LeagueInternet/f6/f69097b8-e3c5-47ff-afd5-3c6799600759.pdf>

Rosenberg’s Rules of Order were developed by Judge Dave Rosenberg, a parliamentarian and former member of the Yolo County Board of Supervisors as well as a former Davis City Council Member and Mayor. Judge Rosenberg’s work has been hailed as a commonsense simplification of parliamentary procedure and adaptation of meeting rules in a manner suitable for use by smaller governing bodies. *Rosenberg’s Rules of Order* are used by a growing number of jurisdictions.

https://www.calcities.org/docs/default-source/get-involved/rosenberg's-rules-of-order-simple-parliamentary-procedures-for-the-21st-century.pdf?sfvrsn=d3f73e91_3

There are also additional resources relating to *Rosenberg’s Rules of Order*, which can be located at: https://www.ca-ilg.org/sites/main/files/file-attachments/resources_A_Note_on_Votes.pdf?1395441985, as well as a handy shortened description of *Rosenberg’s Rules* and operative guidance available here: <https://www.el-cerrito.org/DocumentCenter/View/3382/Parliamentary-Procedures-Cheat-Sheet>

Voting and Ethics

With respect to the Rule of Necessity and its application to resolve issues relating to a maintenance of a quorum for voting purposes, the previously referenced 2006 paper for the Department’s Spring Conference provides background on the Rule and its application. https://www.ca-ilg.org/sites/main/files/file-attachments/resources_LEAGUE_OF_CA_CITIES_VOTING_REQUIREMENTS_ABSENCES_VACANCIES_ABSTENTIONS_AND_DISQUALIFICATIONS-1.pdf?1395441985

In addition to promulgating regulations relating to conflict of interest and disqualification, which are available on its website, the FPPC has guidance for public

officials on disqualifying conflicts of interest. The following page contains basic parameters for disqualifying financial interests, impacts, or effects, as well as a link to the page which explains how public officials can obtain advice from the FPPC. <https://www.fppc.ca.gov/learn/conflicts-of-interest-rules.html>

The League of California Cities guide to “*Providing Conflict of Interest Advice*” remains the gold standard for city attorneys evaluating potential conflicts of interest. The 2016 version has been updated, and the 2022 version is now available on the Department’s webpage. https://www.calcities.org/docs/default-source/city-attorneys/conflict-of-interest-guide1240b84a-e02b-4ba3-9b4b-909ae4713742.pdf?sfvrsn=bb62333c_8. The FPPC committee will be discussing the new edition at this conference.

Also informative is a 2016 ILG publication, “*Public Service Ethics Laws*,” 2016, https://www.counties.org/sites/main/files/file-attachments/csac_ethics_booklet.pdf.

Having 500’ and 1,00’ radius maps relating to property owned by each member of the body can be helpful, both before and during meetings.

ESSENTIAL SKILLS: STAFFING A PUBLIC MEETING RESOURCES INDEX

TAB	SOURCE	TITLE
1.	GIS	500' and 1,000' radius maps for legislative body
2.	GC § 54950, et seq.	Ralph M. Brown Act
3.	GC § 54954.2	Urgency Items not on the Agenda
4.	GC § 54957.1	Reporting Out of Closed Session
5.	GC § 54957.9	Willful Interruptions that Disrupt Meetings
6.	Fair Political Practices Commission	Conflict of Interest Rules, Disqualifications
7.	California Attorney General	The Brown Act: Open Meetings for Local Legislative Bodies (2003)
8.	Institute for Local Government	The ABCs of Open Government Laws (2015)
9.	Institute for Local Government	Attributes of Exceptional Councils
10.	Institute for Local Government	Dealing with Deeply Held Concerns and other Challenges to Public Engagement Processes (Oct. 2012)
11.	Institute for Local Government	A Note on Votes Required for Action as Referenced in Judge Rosenberg's Video
12.	Institute for Local Government	Preparing for Public Hearings (2009)
13.	Institute for Local Government	Public Service Ethics Laws (2016)
14.	Institute for Local Government	Tips for Promoting Civility in Public Meetings (Dec. 2011)
15.	Institute for Local Government	Understanding the Role of Chair (2011)
16.	League of California Cities	Counsel and Council: A Guide for Building a Productive Employment Relationship (2022)
17.	League of California Cities	Open & Public V, a Guide to the Ralph M. Brown Act (2016)
18.	League of California Cities	Providing Conflict of Interest Advice (2022)
19.	League of California Cities	Simple Parliamentary Procedures Cheat Sheet, Adapted from Rosenberg's Rules (2011)
20.	League of California Cities	Unraveling Some Common Procedural Tangles (2007)
21.	League of California Cities	Voting Requirements: Absences, Vacancies, Abstentions and Disqualifications (May 2006)
22.	Rosenberg's Rules of Order	Simple Rules of Parliamentary Procedure for the 21st Century, Revised 2011



Practical Tips When Partnering with Outside Investigators

Thursday, May 5, 2022

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Practical Tips When Partnering with Outside Investigators

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April 2022

Introduction

Responding to employee complaints is a necessary part of every municipality's human resources function. Such complaints may involve everything from EEO policy violations, such as harassment, discrimination or retaliation, to other violations, such as fraud and misuse of City resources. In California, employers have several obligations that govern how they respond to such complaints. First among those is the obligation to conduct a prompt, thorough, and impartial investigation of the complaint. Once the facts are known, employers can take appropriate action to resolve the dispute or concerns that led to the complaint.

While most complaints can be properly investigated internally by trained human resources professionals, some complaints require services of an external attorney investigator or licensed private investigator. For example, an employer may not have the capacity to conduct the investigation if the allegations involve multiple complaints or parties. An employer may also require an investigator with specialized training, like that for trauma informed interviewing.¹ Finally, employers often hire external investigators when the complaint involves a high-ranking employee, like a department head or agency executive.

This article discusses how to engage an external attorney investigator and what considerations should be addressed at the outset and during the investigation process to ensure a prompt, thorough, and impartial investigation that is completed in good faith and that will fulfill the employer's investigatory obligations as well as accomplish the employer's objectives in launching the investigation. Employers must consider, for example, how to engage with an external investigator to preserve the attorney-client relationship, the integrity of the investigation, and the neutrality of the investigator. Many of the principles discussed here apply to private investigators as well as attorney investigators. However, given the complexity that the attorney-client privilege and the work product doctrine introduce to an investigation, the focus is on working with attorney investigators.

Purpose of the Investigation

All investigations have at least one purpose in common: to provide decision-makers with the necessary information to appropriately respond to a workplace conflict. Beyond this foundational purpose, investigations may achieve several other purposes, too.

First, conducting effective investigations can promote a positive and healthy work environment by showing employees that the employer takes complaints seriously and will take appropriate action if necessary. The benefits of a positive and healthy work environment are apparent: lower employee turnover, higher morale, increased productivity, and the list goes on.

Second, the purpose of an investigation may be to fulfill the employer's legal obligations under certain statutes, regulations, and case law. For example, in California, the Fair Employment and Housing Act (FEHA) imposes an affirmative obligation on employers to take all reasonable steps to prevent

¹ Trauma informed interviewing is an approach to interviewing witnesses that accounts for the impact past trauma can have on a witness. The stress of trauma can affect brain function and, therefore, memory. An investigator trained in this area will 1) seek to not retraumatize the witness through their questions and 2) account for the impacts of trauma when evaluating the credibility of the witness.

discrimination in the workplace.² Also, under federal law, Title VII imposes a similar duty on the employer to take all reasonable steps necessary to prevent and correct harassment, discrimination, and retaliation. Conducting a prompt, thorough, and fair investigation is essential to fulfilling this duty.³ Numerous other legal obligations not addressed in this article may necessitate a workplace investigation as well, such as more specialized allegations of fraud, SEC violations or whistleblower retaliation.

Third, an investigation may help an employer in planning for litigation. An investigation may resolve a complaint more quickly and avoid civil litigation all together. If the investigation does not resolve the complaint, then the investigation can preserve important evidence for use during litigation. Additionally, the employer may be able to use the investigation in their defense. Under both California and federal law, an investigation could be used as an affirmative defense by the employer in certain circumstances.⁴

The Engagement Agreement

As with any agreement to provide professional services, the employer should enter into an engagement agreement with attorney investigators that documents the nature of the relationship and the scope of services to be performed.

California law defines who an employer can properly retain to conduct a workplace investigation. Specifically, the Private Investigator's Act (PIA) establishes that only a licensed private investigator or an "an attorney at law ... performing the attorney's duties as an attorney at law" may conduct an investigation as an external consultant.⁵ In other words, an external human resources consultant who is not a licensed private investigator may not conduct a workplace investigation for a client.

When retaining an external attorney investigator, the employer should consider how to properly document and establish the attorney-client relationship. As the PIA notes, the attorney must be performing duties as an attorney at law. Therefore, the engagement agreement should clearly state that the employer retained the investigator to conduct a workplace investigation as an attorney providing legal services. Importantly, it is not necessary for an employer's regular employment counsel to retain the attorney investigator on behalf of the employer to preserve the attorney-client privilege. Because the attorney investigator must be retained as an attorney providing legal services, the engagement creates an attorney-client relationship to which the attorney-client privilege necessarily applies.

The engagement agreement should also document the scope of representation. The role of an attorney investigator is narrow in scope. Typically, an attorney investigator is retained only to provide neutral investigation services, not to provide legal advice or recommendations about the employment dispute.

² Cal. Govt. Code § 12940(k). The DFEH explains that a prompt, thorough, and fair investigation is an important part of this duty. See CALIFORNIA DEPARTMENT OF FAIR EMPLOYMENT AND HOUSING WORKPLACE HARASSMENT PREVENTION GUIDE FOR CALIFORNIA EMPLOYERS, <https://www.dfeh.ca.gov/wp-content/uploads/sites/32/2017/06/DFEH-Workplace-Harassment-Guide.pdf>.

³ *Hardage v. CBS Broadcasting, Inc.*, 427 F. 3d 1177 (9th Cir. 2005).

⁴ Under federal law, two United States Supreme Court cases established this affirmative defense for employers in sexual harassment claims: *Faragher v. City of Boca Raton* (1998) 524 U.S. 775 and *Burlington Industries, Inc. v. Ellerth* (1998) 524 U.S. 742. In California, in *Department of Health Services v. Superior Court of Sacramento County (McGinnis)* (2003) 31 Cal.4th 1026, the California Supreme Court held that the "avoidable consequences" mitigation doctrine may be applied to harassment claims by a supervisor under the FEHA.

⁵ Cal. Bus. & Prof. Code § 7522(e). The PIA also provides an exception for individuals employed by the employer, under which, for example, a human resources employee can conduct an investigation for their employer.

The employer retains separate counsel, or relies on the City Attorney's office, to provide advice and recommendations about what to do in response to the findings of the investigation or other legal issues that may arise along the way. California's Rules of Professional Conduct, which govern attorneys, permit an attorney and client to enter into a limited scope engagement.⁶

California courts have upheld application of the attorney-client privilege and the work-product doctrine where the employer retained an attorney to conduct a workplace investigation as a provider of legal services under a limited scope engagement. In *City of Petaluma v. Superior Court*,⁷ the court held that an investigative report was protected by the attorney-client privilege and work-product doctrine because the external attorney investigator, Amy Oppenheimer, provided a "legal service" by conducting a fact-finding investigation. The court's ruling allowed the City Attorney and outside legal counsel retained to represent the city in litigation to render legal advice to the city decisionmakers based on the results of the investigation and to preserve the confidentiality of the investigation report.

The *Petaluma* case is critical for clients seeking to retain an attorney investigator. The court noted several important elements that should be a part of engagement agreements to establish and preserve an attorney-client relationship with the outside attorney investigator. Such agreements should expressly provide that:

- The parties are creating an attorney-client relationship and that the report will be subject to the attorney-client privilege
- The city is retaining the investigator to conduct a fact-finding investigation
- The agreement requires the investigator to use her employment law and investigation expertise to perform the services for which she is being retained
- The investigator will not provide legal advice or recommendations about what action the city should take as a result of the investigation's factual findings

The court ultimately focused on the nature of the relationship between the investigator and the City. The court concluded an attorney-client relationship existed and the report at issue was protected by the attorney-client privilege and the attorney work-product doctrine. *Petaluma* provides a helpful roadmap for the engagement agreement between employer and attorney investigator.

Starting Out: Initial Logistical Considerations

There are several logistical considerations that arise at the beginning of the investigative process. The considerations discussed in this section apply to most investigations, but are not exhaustive. First, the client should select a client contact for the investigator. An external investigator will rely on the client contact to set the scope of the investigation, provide witness introductions, and determine certain investigative procedures (discussed below). The client contact should be an individual within the organization who will not be a part of the investigation, even as a witness. For very small organizations, this may not be feasible. In these cases, the client contact should be an employee with the least involvement in the allegations who may be trusted to maintain the confidentiality of the investigation. The investigator can then take steps to remain neutral and impartial, such as by interviewing the client contact first.

⁶ Cal. Rule of Professional Conduct 1.2, Scope of Representation and Allocation of Authority.

⁷ *City of Petaluma v. Superior Court* (2016) 248 Cal.App.4th 1023.

Second, during the COVID-19 pandemic, investigators had to quickly adjust interviews from in-person to virtual. Prior to March 2020, investigators had a strong preference for in-person interviews; however, now it is much more commonplace to conduct interviews via videoconference. As our world continues to change, interview location should be discussed by the client and investigator prior to the start of the investigation to fit the unique needs of each matter.

Next, the client and investigator should discuss how the interviews will be memorialized. Many investigators have a practice to audio or video record interviews, while other investigators prefer to take typewritten notes. Recording interviews is more common in the public sector, particularly in fire and public safety investigations where employee rights allow the subject of the investigation to record the interview.⁸ Additionally, the client may have a written policy dictating how an investigator must memorialize investigative interviews. Whatever the investigator and client agree upon, this method should remain consistent throughout the investigation.

The client and investigator also need to consider whether the investigator will give confidentiality admonitions. With this admonition, an investigator generally asks witnesses and the parties to keep issues raised in an on-going investigation confidential, which includes not sharing with anyone the information given or learned throughout the process. Over the past few years, investigators have seen changes in the law regarding confidentiality admonitions. The permissible scope of confidentiality admonitions now depends in part on whether the employer is a public or private entity. In California, public employers may not impose blanket confidentiality admonitions under a 2014 California Public Employee Relations Board decision, except in discrete circumstances.⁹

In *LA Cmty. College*, PERB acknowledged that in certain situations, the employer may demand confidentiality, but the employer holds the burden of establishing a legitimate justification for such a demand. Some possible justifications could include the need to, protect witnesses, avoid destruction of evidence, prevent a cover up, or prevent fabrication of testimony. However, PERB was clear that the employer faces a high bar to impose a confidentiality admonition.

Scope: What Will Be Investigated?

Scope, put simply, is what issues the investigator will be investigating. Most often, scope includes all the allegations contained in an employee's complaint. Scope also includes the type of findings the investigator will make: factual findings only or factual *and* policy findings (as opposed to legal findings, which are not an appropriate role for outside attorney investigators). The employer determines the scope of the investigation and should discuss this with the investigator at the beginning of the investigative process. Together, the employer and the investigator should come to a mutual understanding about the issues to be investigated.

In some investigations, the investigation proceeds in accordance with the scope initially agreed upon. However, it is common for new issues to arise during the investigation. An investigation into one employee's complaint may uncover additional complaints from that same employee or other employees. It is the investigator's responsibility to highlight and identify these issues for the employer so the employer can determine whether these new issues should be incorporated into the scope of the

⁸ Cal Gov. Code §§ 3300-3311 and Cal. Gov. Code §§ 3250-3262

⁹ *Los Angeles Community College District* (2014) PERB Decision No. 2404 (*LA Cmty. College*)

investigation, or not. The investigator should not decide on their own to expand the scope of the investigation. In some cases, the employer should incorporate the new issues into the scope of the original investigation. In other cases, it may be appropriate to address the issues in a separate investigation.

The employer and investigator should establish from the beginning the standard under which the investigator will make findings. In every case, an investigator is tasked with making factual determinations or factual findings. An investigator is answering the “who, what, where, when, and why” questions brought forth by an employee’s complaint. In nearly all investigations, an investigator looks at the evidence under a “preponderance of the evidence” standard to determine whether or not the alleged conduct occurred. In rare circumstances, such as under a whistleblower policy or statute, the investigator may make findings under a “clear and convincing” standard. Workplace investigators never use the criminal law standard of “beyond a reasonable doubt.”

In addition to factual findings, an investigator may in some cases make policy findings, depending on the scope set by the client. An external investigator must have a clear understanding of the policies in question, such that they can engage in a thoughtful application of the policies to the facts. Unlike in-house investigators or Human Resources professionals, an external investigator may not be intimately familiar with the employer’s specific policies or past practices. Therefore, if the employer requests policy findings, the employer should provide any relevant policies to the investigator, and the investigator should take steps to fully understand the relevant policies and how they have been interpreted and applied in the past.

It is *not* appropriate for the investigator to make legal findings or determinations. An investigator’s finding that certain conduct violated the law could be held against an employer as a party admission in court during future litigation. Legal conclusions in an investigator’s report may also undermine the objective nature of the investigation and the report by implying that the investigator is also playing an advocacy role by advising about whether conduct violated the law or not. Any implication that the investigation report is not completely objective may impair its effectiveness for the employer in fulfilling its investigatory duties and as a sound basis for any employment action based on the investigation results. External investigators should make clear in their reports that they do not reach findings of law, but only make policy compliance findings, if applicable.

Investigator Independence

While the employer sets the scope of the investigation, the investigator is responsible for determining how to conduct the investigation. Impartiality is one of the main tenants of a good faith investigation. During the course of the investigation, the client contact should be mindful not to engage in any conduct that could impact the investigator’s independence, or have the appearance of doing so.

The investigator must also take steps to ensure they maintain their independence and avoid any undue influence over the investigation. Therefore, the investigator is responsible for the methodology of the investigation: who and when to interview, what interview questions to ask, what documents to request, how to analyze the evidence, and what findings to reach. An investigator must also be aware of their own biases and take appropriate steps to mitigate the impact of bias on their ultimate factual findings.

However, this does not mean that the employer hires the external investigator and then does not speak to the investigator until they reach their findings. An investigator can and should check in with the client contact periodically to provide updates on the investigation. These updates may include:

- Addressing scope questions
- Scheduling additional witnesses
- Requesting documents or other physical evidence
- Informing the client that the evidence gathering stage is complete
- Discussing the type of report desired
- Providing updates on the status of the interviews, the investigation, and when the investigation report is expected to be complete.

Interviews & Serving Notices

After the initial logistics have been discussed and the investigator is ready to begin interviews, the client contact can begin issuing introductions or notices to the complainant and witnesses. It is often most effective for the client contact to introduce the investigator to witnesses, as cold calls by investigators often go unanswered and may be viewed as intimidating.

Generally, the level of detail in the notice depends on the practices of the employer and on whether any statute or agreement governs the information to be included. For example, under the Public Safety Officer Bill of Rights or the Firefighters Bill of Rights, the notice provided to the subject of the investigation must include information specified in the statute. Similarly, some union contracts or memorandums of understanding require the employer to provide individuals involved in an investigation specific information in a written notice. The approach to providing notice to parties and witnesses should be consistent throughout the investigation process.

The sequence of witnesses will depend on the specific facts and circumstances of the situation and the investigator should retain the discretion to determine the order. However, it is most common to interview the complainant first. The complainant has the best knowledge of their allegations and can provide additional detail needed for future witness interviews. As the investigator completes interviews, they will evaluate their need to interview more people. This may result in a few “rounds” of notices for interviews. In some situations, the employer may have insight into the availability of a witness, or other issues that can impact the sequence of witness interviews. For example, if a witness is going on an extended leave, the employer should notify the investigator, who may choose to interview the witness sooner than originally planned.

As for the respondent, an investigator may choose to interview the respondent after the complainant or after completing all of the witness interviews. The investigator must give the respondent a full opportunity to respond to the allegations against them, so it often can be helpful to speak with a few relevant witnesses first. However, in some situations, interviewing the respondent immediately after the complainant can reduce the issues in dispute and limit the number of additional witnesses and evidence.

Reviewing and Providing Feedback on a Report

Typically, once the draft investigative report is completed, the investigator will transmit this draft report to the client contact for a technical review. It is important to understand the different roles of the investigator and the decision-maker at this stage. The investigator is the fact-finder and makes the

factual determinations. The decision-maker decides what action to take following the conclusion of the investigation. When it comes to the investigative report, it is not the decision-maker's role to make substantive changes to the investigative findings or suggest a different outcome. The client and/or decision-maker may request edits like corrections to job titles, names, or undisputed dates. The client can also ask the investigator for clarifications in the report, such as with respect to factual summaries so that they are clear and understandable. However, the factual findings themselves should not be changed as a result of these technical edits.

Ideally, the investigation report will be well-structured and organized and provide clear and unambiguous factual findings. Clients may need to request report revisions or even follow-up interviews if factual findings are unclear or equivocal, or if factual findings needed in response to the complainant's allegations or to determine compliance with relevant employer policies are missing from the report. Clear communications between the investigator and the client in the beginning of the retention, and throughout the investigation process, will avoid the need for these types of report revisions.

Conclusion

Managing the workplace investigation process requires forethought on the part of the investigator and the employer. Ultimately, the goal is to facilitate the investigator completing a prompt, thorough, impartial investigation in good faith.



Labor and Employment Litigation Update

Thursday, May 5, 2022

Geoffrey S. Sheldon, Partner, Liebert Cassidy Whitmore

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Labor and Employment Litigation Update

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Labor and Employment Litigation Update

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I. INTRODUCTION

In our view, the past year did not result in any landmark judicial decisions or legislative acts that fundamentally impact employment litigators. The most significant decision was a decision by the California Supreme Court which will make it much more difficult for employers to combat “whistleblower” retaliation claims brought under Labor Code section 1102.5. As whistleblower case filings have been on the rise over the past few years anyway, the State Supreme Court’s decision will undoubtedly impact the volume of these types of cases even more.

The following are a few bills and court decisions that we feel employment law practitioners, particularly those that represent cities, may want to be aware of.

II. LEGISLATION

SB 807 – Modifies DFEH’s Procedures for Enforcing Civil Rights Laws, Extends Employer Retention Requirement for Specified Employment Records.

Existing law, the California Fair Employment and Housing Act (FEHA), establishes the Department of Fair Employment and Housing (DFEH) to enforce civil rights laws with respect to housing and employment. The FEHA makes certain discriminatory employment and housing practices unlawful, and authorizes a claimant to file a verified complaint with DFEH. The FEHA requires DFEH to investigate administrative claims, and to attempt to resolve disputes through alternative dispute resolution (ADR). If ADR fails and DFEH finds the claim has merit, the FEHA authorizes the DFEH director to bring a civil action in the name of DFEH on behalf of the claimant within a specified amount of time.

SB 807 authorizes DFEH and a party under DFEH investigation to appeal adverse superior court decisions regarding the scope of DFEH’s power to compel cooperation in the investigation within 15 days after the adverse decision. SB 807 further directs courts to give precedence to the appeal and to make a determination on the appeal as soon as practicable after the notice of appeal is filed. SB 807 authorizes courts to award attorney’s fees and costs to the prevailing party in the action, except for a prevailing defendant, unless the court determines that DFEH’s petition was frivolous when filed or that DFEH continued to litigate the matter after it clearly became frivolous.

SB 807 also extends the employer record retention requirement from two to four years when a complaint has been filed, and eliminates exemptions for a certain state agency (the State Personnel Board).

For a complaint treated as a group or class complaint, as specified, SB 807 will require the DFEH to issue a right-to-sue notice upon completion of its investigation, and not later than 2 years after the filing of the complaint.

SB 807 changes the deadlines by which some complaints for violations of civil rights laws must be filed with DFEH. Under current law, the FEHA prohibits filing a complaint with the DFEH alleging certain civil rights violations one year after the unlawful practice occurred.

The FEHA prohibits filing a complaint alleging a sexual harassment claim that occurred as part of a professional relationship three years after the unlawful practice occurred. SB 807 subjects the filing of a complaint with the DFEH alleging sexual harassment that occurred as part of a professional relationship to the one-year limitation.

SB 807 also tolls the statute of limitations, including retroactively but without reviving lapsed claims, for filing a civil action based on specified civil rights complaints under investigation by DFEH until:

1. DFEH files a civil action for the alleged violation; or
2. One year after DFEH issues written notice to a complainant that it has closed its investigation without electing to file a civil action for the alleged violation.

SB 807 also authorizes DFEH or counsel for a complainant to serve a verified complaint on the entity alleged to have committed the civil rights violation by any manner specified in the Code of Civil Procedure.

Moreover, SB 807 enables DFEH to bring an action to compel cooperation with its discovery demands in any county in which DFEH's investigation takes place, or in the county of the respondent's residence or principal office.

Further, SB 807 authorizes DFEH to bring a civil action to enforce the FEHA in any county where:

1. The unlawful practices are alleged to have been committed;
2. Records relevant to the alleged unlawful practices are maintained and administered;
3. The complainant would have worked or had access to public accommodation but for the alleged unlawful practice;
4. The defendant's residence or principal office is located; or
5. If the civil action includes class or group allegations on behalf of DFEH, in any county in the state.

SB 807 tolls the deadline for DFEH to file a civil action while a mandatory or voluntary dispute resolution is pending.

SB 807 clarifies that, for any employment discrimination complaint treated by DFEH as a class or group complaint, DFEH must issue a right-to-sue notice upon completion of its investigation, and not later than two years after the filing of the complaint.

(NOTES: SB 807 amends Sections 12930, 12946, 12960, 12961, 12962, 12963.5, 12965, 12981, and 12989.1 of the Government Code. Generally speaking, SB 807 gives the DFEH more power and flexibility in bringing enforcement actions.)

SB 331 – Expands Existing Restrictions Against Employment-Related Non-Disparagement Agreements, Non-Disclosure Clauses In Settlement Agreements.

In 2019, the Legislature adopted several laws that restricted the use of “non-disclosure” provisions in employment related agreements. Those existing restrictions prohibit any provision in a settlement agreement that prevent the disclosure of information related to claims regarding certain forms of sexual assault, sexual harassment, workplace harassment or discrimination based on sex, failure to prevent workplace harassment or discrimination based on sex, or retaliation for reporting workplace harassment or discrimination based on sex. Existing law also makes it unlawful for an employer, as a condition of continued or future employment, or in exchange for a raise or bonus, to sign a non-disparagement agreement or other document that purports to restrict the employee’s right to disclose such information. SB 331 expands these provisions.

For settlement and severance agreements entered into on or after January 1, 2022, SB 331 expands the prohibition against non-disclosure and non-disparagement provisions to include acts of workplace harassment or discrimination not based on sex and acts of harassment or discrimination not based on sex by the owner of a housing accommodation. That is, the prohibition has been extended to harassment and discrimination based on other FEHA protected classes.

Under SB 331, a settlement agreement may not contain a provision that prevents or restricts disclosure of factual information related to a claim filed in a civil or administrative action regarding any form of discrimination based on protected classifications.

SB 331 also expands the restrictions on employment-related non-disparagement or non-disclosure agreements in several ways:

1. Such agreements are now unlawful to the extent it has the purpose or effect of denying an employee's right to disclose information about unlawful acts in the workplace, not only if the agreement actually purports to deny such rights.
2. Any contractual provision that restricts an employee's ability to disclose information related to conditions in the workplace must include the following statement, or substantially similar language: "Nothing in this agreement prevents you from discussing or disclosing information about unlawful acts in the workplace, such as harassment or discrimination or any other conduct that you have reason to believe is unlawful."

In addition, SB 331 prohibits an employer from including any provision that prohibits the disclosure of information about unlawful acts in the workplace in an agreement related to an employee's separation from employment, except in a negotiated settlement agreement to resolve an underlying claim filed by an employee in court, before an administrative agency, in an alternative dispute resolution forum, or through an employer's internal complaint process. For this exception to apply, the agreement must be voluntary, deliberate, and informed, the agreement must provide consideration of value to the employee, and the employee must be given notice and an opportunity to retain an attorney or be represented by an attorney.

(NOTE: SB 331 amends Section 1001 of the Code of Civil Procedure, and Section 12964.5 of the Government Code. SB 331's most significant provision, in our view, is the expansion of the State's prohibition of non-disparagement provisions in severance or settlement agreements beyond sexual harassment or discrimination based on sex/gender, i.e., the prohibition now extends to, harassment or discrimination based on FEHA's other protected classes.)

III. CASES

California Supreme Court Confirms Employee-Friendly Test For Evaluating Whistleblower Retaliation Claims.

Lawson v. PPG Architectural Finishes, Inc., (2022) 12 Cal.5th 703

Wallen Lawson worked as a territory manager for PPG Architectural Finishes, Inc. (PPG) -- a paint and coatings manufacturer -- from 2015 until he was fired in 2017. PPG used two metrics to evaluate Lawson's work performance: 1) his ability to meet sales goals; and 2) his scores on "market walks," which were sales calls during which PPG managers shadowed Lawson as he did his work. While Lawson received the highest possible score on his first market walk, his scores thereafter took a nosedive. He also frequently missed his monthly sales targets. In spring 2017, PPG placed Lawson on a performance improvement plan.

During this same time, Lawson alleged his direct supervisor began ordering him to intentionally mistint slow-selling PPG paint products, i.e., to tint the paint to a shade the customer had not ordered so PPG's retail customer would then be forced to sell the paint at a deep discount, enabling PPG to avoid buying back what would otherwise be excess unsold product. Lawson did not agree with his supervisor's mistinting plan, and therefore he filed two anonymous complaints with PPG's central ethics hotline. He also told his supervisor he refused to participate in mistinting. PPG investigated the issue and told the supervisor to discontinue the order. Yet, the supervisor continued to directly supervise Lawson and oversee his market walk evaluations. After Lawson failed to improve as outlined in his performance improvement plan, his supervisor recommended that he be fired. PPG then terminated Lawson's employment.

Lawson sued PPG. He alleged that PPG had fired him because he "blew the whistle" on his supervisor's mistinting order, in violation of Labor Code Section 1102.5. Section 1102.5 prohibits an employer from retaliating against an employee for disclosing information to a government agency or person with authority to investigate if the employee "has reasonable cause to believe" the information discloses a violation of a state or federal statute, rule, or regulation.

In considering PPG's motion for summary judgment, the district court applied the three-part burden-shifting framework the U.S. Supreme Court laid out in *McDonnell Douglas Corp. v. Green*. Under this framework, the employee must first establish a prima facie case of unlawful retaliation. Next, the employer must state a legitimate reason for taking the challenged adverse employment action. Finally, the burden shifts back to the employee to demonstrate that the employer's stated reason is actually a pretext for retaliation. The district court determined that Lawson could not satisfy the third step of this *McDonnell Douglas* test, and it entered judgment in favor of PPG on Lawson's whistleblower retaliation claim.

On appeal, Lawson argued that the district court was wrong to use the *McDonnell Douglas* framework. Instead, he contended that the court should have followed Labor Code Section 1102.6. Under Section 1102.6, Lawson only needed to show that his whistleblowing was a “contributing factor” in his dismissal. Section 1102.6 did not require Lawson to show that PPG’s stated reason was pretextual. The Ninth Circuit asked the California Supreme Court to decide the issue.

The California Supreme Court clarified that Labor Code Section 1102.6, and not *McDonnell Douglas*, is the framework for litigating whistleblower claims under Labor Code Section 1102.5. After all, Labor Code Section 1102.6 describes the standards and burdens of proof for both parties in a Labor Code Section 1102.5 retaliation case. First, the employee must demonstrate “by a preponderance of the evidence” that the employee’s protected whistleblowing was a “contributing factor” to an adverse employment action. Second, once the employee has made that showing, the employer has to prove by “clear and convincing evidence” that the alleged adverse employment action would have occurred for legitimate, independent reasons, even if the employee was not involved in protected whistleblowing activities.

The Court noted that other courts addressing burden-shifting frameworks similar to Section 1102.6 have found the *McDonnell Douglas* framework to be inapplicable. For instance, nearly all courts to address the issue have concluded that *McDonnell Douglas* does not apply to First Amendment retaliation claims, or to federal statutes that are similar to Labor Code Section 1102.6.

Finally, the Court found that there was no reason why Labor Code Section 1102.5 would require employees to prove that any of the employer’s proffered legitimate reasons were pretextual. This is because Section 1102.5 prohibits employers from considering the employee’s protected whistleblowing as any “contributing factor” to an adverse employment action. Requiring an employee to also prove the falsity of any potentially legitimate reasons the employer may have had for an adverse employment action would be inconsistent with the Legislature’s intent to encourage reporting of wrongdoing.

(NOTE: The California Supreme Court’s decision will make it easier for plaintiffs to avoid summary judgement and pursue Labor Code section 1102.5 “whistleblower retaliation” claims. In our practice, we have seen an uptick in whistleblower claims and in light of this decision California employers will likely see more of these claims.)

The Time To File A Failure-To-Promote Claim Begins When The Employee Knows Or Should Know Of The Decision To Promote Another.

Pollock v. Tri-Modal Distribution Servs., Inc., (2021) 11 Cal.5th 918

Pamela Pollock is a customer service representative at Tri-Modal Distribution Services, Inc. (Tri-Modal), a freight shipping company. In 2014, Tri-Modal’s executive vice-president, Michael Kelso, initiated a dating relationship with Pollock. While Kelso wanted the relationship to become sexual, Pollock did not, so she ended the relationship in 2016. Subsequently, Pollock alleged that Tri-Modal and Kelso denied her a series of promotions, even though she was the most qualified candidate, and that her refusal to have sex with Kelso was the reason.

On April 18, 2018, Pollock filed an administrative complaint with California’s Department of Fair Employment and Housing (DFEH) alleging quid pro quo sexual harassment in violation of the Fair Employment and Housing Act (FEHA). In her DFEH complaint, Pollock challenged the promotion of Leticia Gonzalez, among others. As relevant to this appeal, Tri-Modal offered, and Gonzalez accepted, a promotion in March 2017 and the promotion took effect on May 1, 2017. There was no evidence as to whether or when Tri-Modal notified Pollock that she did not receive the promotion. There was also no evidence that Pollock knew or had reason to know that Gonzalez was offered the promotion and accepted it in March 2017.

At the time, Pollock filed her DFEH complaint, the FEHA required employees seeking relief to file an administrative complaint with the DFEH within one year “from the date upon which the alleged unlawful practice . . . occurred.” Pollock argued her failure to be promoted occurred on the May 1, 2017 date that Gonzalez began her promotion, so her April 2018 administrative complaint was timely. Tri-Modal and Kelso argued, however, that its failure to promote Pollock “occurred” in March 2017 when Gonzalez accepted promotion, so Pollock filed her complaint too late.

The trial court concluded that the failure to promote occurred in March 2017 when Gonzalez was offered and accepted the promotion. Thus, the trial court found that Pollock’s claim was time-barred, and the Court of Appeal agreed. The Court of Appeal then awarded costs on appeal to all of the defendants. However, the court did not address whether Pollock’s underlying claim was “frivolous, unreasonable, or groundless when brought” or that she “continued to litigate after it clearly became so.” After Pollock petitioned for a rehearing on the award of costs and the Court of Appeal denied her petition, the California Supreme Court granted review.

The California Supreme Court held that for a FEHA failure to promote claim, the statute of limitations to file a DFEH complaint begins to run when an employee knows or reasonably

should know of the employer's refusal to promote the employee. Although there was no evidence in this case when Pollack knew of Gonzalez' promotion, Pollack's legal papers in opposition to Kelso's motion for summary judgment did not dispute that Gonzalez was offered and accepted the promotion in March 2017.

In addition, the Court held that the FEHA's directive that a prevailing FEHA defendant "shall not be awarded fees and costs unless the court finds the action was frivolous, unreasonable, or groundless when brought, or the plaintiff continued to litigation after it clearly became so" also applies to an award of costs on appeal. The Court concluded the Court of Appeal erred in awarding costs on appeal to Tri-Modal and Kelso without first finding whether Pollock's underlying claim was objectively groundless.

(NOTE: This decision brings some needed clarity to when an employee's failure to promote claim begins running for the purpose of a failure to promote claim under the FEHA. Employers should be counseled to provide some type of notice to non-selected candidates to establish proof that the employee knew or should have known that another candidate received the promotion in question.)

Ninth Circuit Addresses How First Amendment Rights Impact an Agency's Ability To Discipline A Law Enforcement Officer For A Social Media Post
Moser v. Las Vegas Metropolitan Police Department (9th Cir. 2021) 984 F.3d 900

In 2015, an individual shot a police officer with the Las Vegas Metropolitan Police Department (Department). Department officers later found and arrested that suspect. Upon seeing news of the suspect's capture, Charles Moser, a SWAT sniper with the Department, commented the following on a friend's Facebook post about the shooting: "It's a shame he [the suspect] didn't have a few holes in him[.]" Moser made the comment through his personal Facebook profile while off-duty at home.

An anonymous tip notified the Department of Moser's comment, prompting an internal investigation wherein Moser admitted his comment was inappropriate, but explained that he was expressing frustration that the suspect ambushed and shot one of the Department's officers. Moser also removed the comment from social media approximately three months after posting it. Based on the investigation's findings, Moser was transferred out of SWAT and placed back on patrol out of concern that his comment indicated he had become "a little callous to killing." Upon his dismissal from the SWAT team, Moser sued the Department, alleging violation of his free speech right under the First Amendment.

The district court granted summary judgment for the Department, holding that the government's interest in employee discipline outweighed Moser's First Amendment right under the applicable balancing test for speech by government employees. Moser appealed, and the Ninth Circuit reversed the district court's grant of summary judgment.

The Ninth Circuit first identified the framework for considering the First Amendment rights of government employees. An employee must first establish: (i) he spoke on a matter of public concern; (ii) he spoke as a private citizen rather than a public employee; and (iii) the relevant speech was a substantial or motivating factor in the adverse employment action. Once this is established, the burden then shifts to the government to show that it: (iv) had an adequate justification for treating the employee differently than other members of the general public; or (v) it would have taken the adverse employment action even absent the protected speech. If the employer cannot meet this burden, then the employee's speech is protected under the First Amendment.

On appeal, Moser and the Department only disputed the fourth factor of this test, which requires courts to balance the First Amendment rights of the employee against the government's administrative interest in avoiding disruption and maintaining workforce discipline. As part of this balancing test, the Ninth Circuit noted that courts may consider the content of a government employee's speech to determine how much weight to give the employee's free speech interests. However, the Ninth Circuit held that it could not balance Moser's First Amendment interests against the Department's administrative interests due to two factual disputes.

First, the Ninth Circuit held a factual dispute existed as to the meaning of Moser's Facebook comment. The Department alleged Moser's comment objectively advocated for unlawful violence by law enforcement, and therefore, is not at the core of First Amendment protection. In contrast, Moser contended that his comment merely expressed frustration at the dangers law enforcement officers face in the line of duty, which should receive higher First Amendment protection.

Second, the Ninth Circuit held another factual dispute existed regarding whether Moser's Facebook comment would cause disruption to the Department. The Ninth Circuit noted that the Department failed to provide enough evidence to support its prediction that the comment would cause disruption in the workplace because there was no evidence that anyone knew about the post other than the individual who anonymously notified the Department of the comment. The Court also noted that there was little chance the public would have seen the comment because Moser deleted it.

Based on these two factual disputes, the Ninth Circuit held that the district court erred in granting summary judgment to the Department and remanded the case to the district court.

(NOTE: Public employers have been forced to navigate difficult issues such as those addressed in Moser given the increased prevalence of employees on social media. The Ninth Circuit's decision provides guidance on the burden public employers will have to meet if they are inclined to take disciplinary action against a public employee's speech. Social media posts are often ambiguous and on controversial subjects, and therefore public employers should carefully evaluate these situations when they occur).

Allegedly Racist Comments made by an Outside Presenter at a Business meeting may be Actionable.

Smith v. BP Lubricants USA Inc., (2021) 64 Cal.App.5th 138 (2021).

An African American employee brought action against company and company representative alleging representative made several comments to the employee during presentation of company product that he considered racist and offensive in violation of the Fair Employment and Housing Act (FEHA) and the Unruh Act, and alleging a claim against representative for intentional infliction of emotional distress (IIED).

Smith, who is African American, worked for Jiffy Lube for almost two decades. Smith alleges Jiffy Lube harassed and discriminated against him because he is African-American. In September 2017, Jiffy Lube “held a company presentation to discuss and teach employees about a new product from Castrol.” Outside presenter (Pumarol- employed by BP) made comments like: “You sound like Barry White” and “I don't like taking my car to Jiffy Lube because I've had a bad experience with a mechanic putting his hands all over my car. How would you like Barry White over there with his big banana hands working on your car?”

The court rejected BP and Pumarol's argument that they cannot be liable under FEHA because they were never Smith's employer. FEHA prohibits “any person” from aiding or abetting workplace discrimination. For that reason, individuals and entities who are not the plaintiff's employer may be liable under FEHA for aiding and abetting the plaintiff employer's violation of FEHA. Thus, BP and Pumarol are liable under FEHA for aiding and abetting Jiffy Lube's alleged harassment and discrimination against Smith only if (1) Jiffy Lube subjected Smith to discrimination and harassment, (2) BP and Pumarol knew that Jiffy Lube's conduct violated FEHA, and (3) BP and Pumarol gave Jiffy Lube “substantial assistance or encouragement” to violate FEHA.

(NOTE: This case highlights the expansive reach of the FEHA. While aiding and abetting liability is an uncommon theory and more difficult to prove, public agencies should assure that their employees are trained that discriminatory and harassing conduct perpetrated against even third parties is prohibited while acting on behalf of the employer.)

Stray Remark That Assistant Dean “Wanted Someone Younger” Tanks Employer’s Motion. Jorgensen v. Loyola Marymount Univ. (2021) 68 Cal.App.5th 882

Linda Jorgensen started working at Loyola Marymount University (University) in 1994. In July 2010, the University appointed Stephen Ujlaki to be the Dean of its School of Film and Television (School). At the time, Jorgensen was over 40 years old.

In 2014, Ujlaki promoted Johana Hernandez to be an Assistant Dean. Hernandez was 30 years old, and she had begun work at the School four years earlier as an administrative assistant. Jorgensen helped train Hernandez, and claimed that Ujlaki “made Hernandez his favorite.” Jorgensen alleged she was far more qualified and experienced for the Assistant Dean position than Hernandez. In a particularly insensitive decision, Ujlaki ordered Jorgensen to report to Hernandez.

Jorgensen further claimed that after Hernandez was promoted, Ujlaki and Hernandez sidelined her and left her with few duties. Jorgensen attributed her lost promotion and marginalization to age and gender discrimination. Jorgensen complained to the University, but it rejected her claims. Jorgensen then alleged she was punished for her complaint. Jorgensen sued the University in 2018 and resigned in 2019.

In the trial court, the University contended that Jorgensen was a problem employee who became insubordinate when Ujlaki and his team tried to improve the way the School operated. One Associate Dean – a woman older than Jorgensen – described Jorgensen as the “the most difficult employee I have ever had to manage by orders of magnitude.” The University also presented facts that Hernandez’s promotion was due to her competence, not age discrimination.

The University moved for summary judgment, arguing that the lawsuit had no merit. The trial court excluded from evidence a sworn statement from Carolyn Bauer, a former School employee. Bauer declared that while she was working at the School, a person expressed interest in another position that was unrelated to the Assistant Dean position Jorgensen sought. According to Bauer’s statement, when Bauer told Hernandez about the person’s interest in the other position, Hernandez responded she “wanted someone younger”. Without this evidence, the trial court found for the University. Jorgensen appealed.

The Court of Appeal concluded that the trial court was wrong to excluded Bauer’s sworn statement. Under California precedent, even a non-decision maker’s age-based remark “may be relevant, circumstantial evidence of discrimination.” Thus, even though Hernandez and not Ujlaki made this age-related remark about another position, the remark was relevant because it showed Hernandez could influence Ujlaki, the School’s top decision maker, on all issues

including hiring and promotion. The court noted that Ujlaki invited Hernandez to participate in the interviews for Assistant Dean positions and that they discussed hiring decisions. In addition, Ujlaki gave Hernandez a series of special assignments that flouted formal organization lines. Thus, a jury could reasonably conclude Hernandez could influence Ujlaki's decisions. The trial court erred in excluding Bauer's statement because Bauer quoted Hernandez word-for-word and Hernandez's remark explicitly described her state of mind.

The Court of Appeal next considered whether Hernandez's remark would have changed the trial court's analysis. In a discrimination case, the employee must first establish a prima facie case, in order to raise a presumption of discrimination. Second, the employer may rebut that presumption by showing it acted for legitimate and nondiscriminatory reasons. Finally, the employee may attack the employer's legitimate reasons as pretextual or offer other evidence of improper motives.

Here, the Court of Appeal concluded Hernandez's remark would have changed the trial court's analysis. Hernandez's remark she wanted someone younger was unambiguous. Also, there was evidence that: Ujlaki created a pay differential between male and female Associate Deans hired concurrently; and Hernandez was an influential advisor to Ujlaki. People other than Jorgensen were also critical of Ujlaki's leadership. An outside consultant also evaluated Ujlaki's deanship and concluded the faculty consensus was the situation was "too dysfunctional to be allowed to continue." Taking all this evidence into account, the appellate court held that the trial court improperly decided in the University's favor. The court remanded the case for further proceedings.

(NOTE: This case demonstrates how difficult it is to prevail on a motion for summary judgement in a FEHA discrimination (or retaliation) lawsuit. Because there is rarely direct evidence of discriminatory (or retaliatory) motive, courts are willing to accept indirect or circumstantial evidence of discriminatory motive, even in circumstances where the trier-of-fact needs to "connect the dots" to establish causation. Here, a non-decisionmaker's arguably stray comments created a dispute of fact as to whether the decisionmaker's decisions were tainted by the non-decisionmaker's discriminatory animus because the plaintiff was able to establish that the non-decisionmaker had significant influence in the decision-making process at issue).

Agency Unlawfully Terminated Peace Officer After He Returned From Leave.

Vincent v. Department of the California Highway Patrol, 2021 WL 3878390 (Cal. Ct. App. Aug. 31, 2021), unpublished.

In 2006, the Department of the California Highway Patrol (CHP) hired Stanley Vincent as a peace officer. Vincent, a native of Haiti, stood in loco parentis to his sister, who had paranoid schizophrenia. Vincent regularly traveled to Haiti to help with her care. In 2007 and 2010, Vincent took emergency leave from his CHP duties to care for his sister. On those occasions, CHP did not require him to fill out any forms prior to traveling for these emergencies, nor did it require him to provide any medical certifications.

On November 9, 2014, Haitian law enforcement informed Vincent that his sister had left the family home and was wandering the streets of Port-au-Prince. Vincent informed CHP Sergeant Eric Martinez that he might need to take an emergency leave of absence. The next day, Vincent told Sergeant Brian DeMattia that his sister was missing in Haiti, and requested a two-week leave of absence. Sergeant DeMattia notified Captain Mark D'Arelli that Vincent needed to leave the country to attend to family matters.

On November 11, 2014, Vincent left for Haiti. Over the next three days, two sergeants attempted to contact Vincent about his absence. One of the sergeants requested that Vincent come into the office to determine whether his request met CHP's family leave criteria. Vincent did not respond to these messages.

On November 14, 2014, CHP labelled Vincent absent without leave (AWOL) when he failed to show for work. Six days later, Captain D'Arelli directed CHP to initiate an investigation into Vincent's AWOL status. On November 25, 2014, Vincent contacted Lieutenant Mike Bueno from Haiti and requested an additional eight days of emergency leave. Lieutenant Bueno ordered Vincent to return to work immediately.

On December 4, 2014, Vincent returned to work and submitted documentation about his leave, including medical and financial documents that showed his support for his sister. CHP refused to accept or evaluate the documents, and opened an investigation into "possible adverse action issues" for being AWOL. CHP later expanded the scope of the investigation to include charges of dishonesty and mishandling of evidence based on misdated booking forms. CHP's investigation substantiated all charges against Vincent, but failed to mention that Vincent had requested family care leave before departing for Haiti. Based on the investigation's findings, Commissioner Joseph Farrow terminated Vincent.

Vincent sued CHP for wrongful termination, and violations of the California Family Rights Act (CFRA) and Fair Employment and Housing Act (FEHA). After Vincent prevailed at trial, CHP filed motions for judgment notwithstanding the verdict and a new trial. The trial court denied these motions, and CHP appealed. On appeal, CHP alleged that Vincent was ineligible for CFRA leave because he did not stand in loco parentis to his sister. The Court of Appeal disagreed, finding that the evidence showed that Vincent provided for his sister, including financially, on a day-to-day basis for nearly two decades.

CHP further alleged that Vincent failed to notify CHP of his in loco parentis claim. The Court of Appeal disagreed, citing to Vincent's notice to Sergeant DeMattia about his family situation before he left for Haiti. Sergeant DeMattia, in turn, informed Captain D'Arelli of Vincent's family's situation. The Court of Appeal also found that any lack of notice to CHP was the result of CHP's failures to follow CFRA regulations and ask Vincent for more information about his parental relationship to his sister. CHP also alleged that Vincent failed to provide CHP with the requisite medical certification for his CFRA leave. Again, the Court of Appeal disagreed, citing to medical documentation that Vincent provided upon his return from Haiti that CHP refused to accept or evaluate.

Lastly, CHP alleged that Vincent's FEHA claim failed because he did not provide sufficient evidence that CHP intentionally retaliated against him for taking protected leave. The Court of Appeal disagreed. The jury had seen that the CHP's investigation omitted the fact that Vincent requested emergency leave before leaving for Haiti. The Court found that this deliberate concealment supported the jury's determination that CHP possessed retaliatory intent when it fired Vincent.

The Court of Appeal found that substantial evidence supported the jury's determination that Vincent proved his CFRA and FEHA claims.

(NOTE: Although unpublished, this case demonstrates the danger of taking disciplinary or other punitive action against an employee in circumstances where the employee's performance deficiencies are directly or indirectly tied to a leave of absence (e.g., absenteeism). California law recognizes a number of different "protected leaves," from CFRA leave to domestic violence victim leave to jury leave, etc., and employer's failure to recognize that it must excuse performance issues tied to those leaves can lead to liability like the jury found here.)

Terminated RN Could Not Show Hospital's Reasons for Her Discharge Were Pretextual.
Wilkin v. Cmty. Hosp. of the Monterey Peninsula (2021) 71 Cal.App.5th 806

Kimberly Wilkin began working at the Community Hospital of the Monterey Peninsula (Hospital) as a registered nurse in 2005.

In November 2016, Wilkin received a written disciplinary notice for poor attendance after receiving three courtesy warnings that she could be disciplined if her attendance did not improve. Over the next 14 months, Wilkin's attendance continued to be poor. While Wilkin requested and received intermittent family leave under the Family and Medical Leave Act ("FMLA") and other medical leave during this time, her absences exceeded the frequency of FMLA-protected intermittent leave that her healthcare provider had estimated. Wilkin was repeatedly counseled that her attendance issues could result in her termination.

In November 2017, a director was asked to investigate whether a patient received medication without supporting documentation, in violation of Hospital policy. The director found that Wilkin had failed to properly document her handling and administration of Narcan to the patient. During her investigation, the director found numerous incidents when Wilkin signed off on the administration of medication, including controlled substances, but failed to properly document each administration. For example, Wilkin used a system override function to pull syringes of morphine, some without a written physician's order, and failed to document how much, if any, was either given to the patient or discarded.

The director subsequently terminated Wilkin's employment in late December for failure to accurately document her handling and administration of controlled substances and ongoing attendance issues. However, after Wilkin requested a reasonable accommodation in the form of a medical leave of absence, the Hospital determined that Wilkin would not be immediately discharged. After further investigation, on January 16, 2018, Wilkin received written notice she was being terminated. That day, the Hospital also filed a complaint with the Board of Registered Nursing regarding Wilkin's handling and administration of controlled substances.

Wilkins then sued the Hospital, alleging her discharge constituted disability discrimination, retaliation, and otherwise violated the Fair Employment and Housing Act (FEHA); resulted in the unlawful denial of medical leave and violation of the California Family Rights Act (CFRA) and the FMLA; and was a wrongful termination in violation of public policy. The trial court granted the Hospital's motion for summary judgment, principally on the grounds that Wilkin did not produce any evidence showing the Hospital fabricated its reasons for her termination.

Wilkin appealed, and the California Court of Appeal affirmed the trial court. California courts use a three-stage burden-shifting test to analyze FEHA discrimination and retaliation claims. Under this test, the employee must first establish the essential elements of the claims. If the employee can do so, the burden shifts back to the employer to show that the allegedly discriminatory or retaliatory action was taken for a legitimate, non-discriminatory and non-retaliatory reason. If the employer meets this burden, the presumption of discrimination or retaliation disappears and the employee then has the opportunity to attack the employer's legitimate reason as pretextual.

The court found that the Hospital produced evidence that it terminated Wilkin's employment because she: 1) repeatedly failed to properly document the administration of patient medication and the discarding of unused medication; and 2) was chronically absent over the prior 14 months.

At Wilkin's deposition, for example, she admitted that she had failed to comply with the Hospital's drug handling policy and she acknowledged she had administered a drug to a patient for nearly an hour before she retrieved the drug from the medication dispensing machine. In addition, the Hospital produced evidence of Wilkin's long history of attendance problems including disciplinary notices issued in November 2016, December 2016, February 2017; meetings in September and November 2017 to discuss the ongoing concerns; and many warnings to improve her attendance. Thus, the court found the Hospital met its burden of presenting non-discriminatory and non-retaliatory reasons for Wilkin's termination.

Further, the court concluded that Wilkin failed to present any evidence that the Hospital's stated reasons for terminating her employment were either false or pretextual as required under the burden-shifting framework. It was undisputed Wilkin had attendance issues unrelated to any disability or health condition, and that she violated the Hospital's policy regarding the documentation and handling of patient medication. The court rejected each of Wilkin's arguments to the contrary. The Hospital never denied Wilkin's FMLA leave; it corrected any mistakes it discovered in Wilkin's timekeeping records; and the director met with Wilkin to discuss the documentation issues before terminating her employment. For these reasons, the court concluded that the trial court properly granted summary judgment to the Hospital on Wilkin's discrimination and retaliation claims.

The Court also affirmed the trial court's ruling with respect to Wilkin's other claims. Specifically, it found she could not maintain claims for failure to accommodate or failure to engage in the interactive process because requesting that she be placed on a medical leave of absence instead of being discharged for violation of the Hospital's policies does not qualify as a reasonable accommodation under California law. Further, because the court found in the

Hospital's favor regarding her discrimination and retaliation claims, Wilkin could not establish a "failure to prevent" cause of action. This was because under existing case law an employer cannot be liable for failure to prevent discrimination or harassment if the plaintiff cannot prove he or she was discriminated or harassed in the first place.

Finally, the court held that Wilkin failed to offer sufficient evidence to establish that the Hospital's decision to discipline her and terminate her employment was because of her CFRA and/or FMLA leave.

(NOTE: While motions for summary judgment in FEHA cases are difficult to employer's to win, employers can prevail if they have strong evidence to support the legitimacy of the business reasons for the disputed adverse employment action. Here, the Hospital was able to prevail because the nurse's performance deficiencies were objectively below the standard of care. The serious consequences caused by the performance deficiencies also likely make it more likely that that courts accepted the legitimacy of the Hospital's proffered reasons for the termination of the plaintiff's employment.)

MOU Provision Authorized Charter County To Recover Overpayments From Employees. Association for Los Angeles Deputy Sheriffs v. County of Los Angeles (2021) 60 Cal.App.5th 327

The Association for Los Angeles Deputy Sheriffs (ALADS) is the union representing sworn non-management peace officers employed by the Los Angeles County (County) Sheriff's Department (Department). The memorandum of understanding (MOU) between ALADS and the County includes provisions that address "Paycheck Errors," including overpayments and underpayments.

The MOU provision on overpayments states that "employees will be notified prior to the recovery of overpayments." Further, "recovery of more than 15% of net pay will be subject to a repayment schedule established by the appointing authority under guidelines issued by the Auditor-Controller. Such recovery shall not exceed 15% per month of disposable earnings (as defined by State law), except, however, that a mutually agreed-upon acceleration provision may permit faster recovery."

In April 2012, during a conversion to a new payroll system, the County failed to apply an agreed-upon cap to certain bonus payments. The error resulted in salary overpayments to 107 deputies.

In May 2017, the County sent letters to these deputies, informing them of the overpayment, and giving them two repayment options: remit the payment in full, or repay the amount through payroll deductions at a specified rate. In April 2018, the County sent the deputies letters stating it would deduct the overpayments as described in the prior letters.

In May 2018, the County began the paycheck deductions. Thereafter, ALADS filed grievances on behalf of the affected employees, challenging the deductions from their paychecks to recover the overpayment amounts.

While the parties addressed the grievances through the County's administrative procedures, ALADS also went to court. ALADS sought a writ of mandate and declaration that an overpayment provision of the MOU between ALADS and the County was unenforceable because it violated wage garnishment law and the Labor Code. Specifically, ALADS alleged the deductions violated Labor Code Section 221, which makes it unlawful "for any employer to collect or receive from an employee any part of wages" paid to the employee. ALADS alleged that the wage garnishment law provided the exclusive procedure for withholding an employee's earnings.

The County demurred to the writ of mandate on multiple grounds, including that ALADS failed to exhaust administrative remedies, and that neither Labor Code Section 221 nor wage garnishment law applied to the County. The trial court granted the demurrer solely on the ground that ALADS failed to exhaust administrative remedies. ALADS appealed, and the Court of Appeal affirmed the trial court's ruling, but on the grounds that Labor Code Section 221 and the wage garnishment laws do not prevent a charter county from agreeing to MOU provisions regarding the recovery of overpayments.

The union argued it was not required to exhaust administrative remedies because the available administrative remedy would be futile since it would require all 107 deputies to bring individual grievances addressing the same issue: namely, the County's ability to recover overpayments under the MOU. The Court of Appeal agreed, holding that the administrative remedy was inadequate because it would not provide "classwide" relief for the 107 deputies.

However, the County argued that ALADS could not state a valid claim because of the home rule doctrine, which gives charter counties like the County the exclusive right to regulate matters relating to its employees' compensation. The Court of Appeal agreed and held the recovery of overpayments pursuant to a MOU was within the authority of a charter county as part of its exclusive right to regulate compensation. For similar reasons, the Court of Appeal noted that wage garnishment law did not prohibit the County from recouping overpayments.

(NOTE: Whether or not a city is a general law or charter city is an important factor that is sometimes overlooked by practitioners defending public agencies in litigation. With respect to wage and hour matters in particular, practitioners should evaluate whether or not the defendant city is a charter or general law city).

Retirees Had No Vested Right To Health Insurance Benefits Under County Retirement Plan. Harris v. Cty. of Orange (9th Cir. 2021) 17 F.4th 849

In January 1993, the County of Orange and the Orange County Employee Retirement System (OCERS) entered into a memorandum of understanding (MOU). That MOU allowed the County to access surplus investment earnings controlled by OCERS and to deposit a portion of the surplus into an Additional Retirement Benefit Account (ARBA) to pay for health insurance of present and future County employees. In April 1993, the County adopted the Retiree Medical Plan, funded by investment earnings from the ARBA account and mandatory employee deductions. The Retiree Medical Plan explicitly stated that the plan did not create any vested rights to benefits. The County’s intent was to induce employees to retire early.

Labor unions then entered into MOUs with the County providing that the County would administer a Retiree Medical Insurance Plan and retirees would receive a Retiree Medical Insurance Grant. As a result, County employees received a monthly grant to defray the cost of health care premiums from 1993 through 2007. However, beginning in 2004, the County negotiated with its labor unions to restructure the retiree medical program, which was underfunded. The County ultimately approved an agreement with the unions that reduced benefits for retirees.

A group of County retirees then filed a class action complaint alleging, among other claims, that the County intended in the 1993 MOU to create an implied vested right to the monthly grant, and then breached that MOU by reducing the benefit in 2004. The district court granted judgment in the County’s favor, and retirees appealed. The case made its way to the Ninth Circuit.

First, the Ninth Circuit held that the April 1993 Retiree Medical Plan did not create any vested right to the monthly grant benefits. Under California precedent, a person bears a “heavy burden” to overcome the presumption that the legislature did not intend to create vested rights. The evidence of a vested implied right in an ordinance or resolution must be “unmistakable.” Since the April 1993 Retiree Medical Plan explicitly said that the plan did not create any vested right to the benefit, the retirees’ claim to an implied vested right was foreclosed.

Next, the Ninth Circuit rejected the retirees' argument that the MOUs contained a contradictory implied term. The court held that at the summary judgment stage, the County provided evidence that the Retiree Medical Plan was adopted by resolution and therefore became governing law with respect to the monthly grant benefits. As existing County law, the Retiree Medical Plan became part of the MOUs, which were of limited duration and expired on their own terms by a specific date. Absent express language that the monthly grant benefits vested, the right to the benefits expired when the MOUs expired.

Moreover, the Ninth Circuit disagreed with retirees' argument that the plan was void because the County drafted and imposed the anti-vesting provisions in the Retiree Medical Plan without collective bargaining. As a preliminary matter, the court held that any claim the Retiree Medical Plan was void based on a failure to bargain was barred under the three-year statute of limitations in effect at that time for unfair practice charges. In any event, the Ninth Circuit further held that the Retiree Medical Plan was not unilaterally imposed on the unions and their employees without collective bargaining because the unions had the option to reject the plan or to negotiate different terms. Instead, the unions signed the MOUs that adopted the Retiree Medical Plan. Thus, the process was consistent with the Meyers-Milias Brown Act.

Finally, the Ninth Circuit concluded that the monthly grant benefits were not deferred compensation, which would vest upon retirement like pension benefits. The court reasoned that the Retiree Medical Plan did not provide insurance benefits, but rather it provided the opportunity for employees to purchase health insurance at a reduced cost. Unlike deferred compensation, which is earned by merely accepting employment, access to the health benefit required the employee to choose to pay his portion of the health insurance premium.

For these reasons, the Ninth Circuit affirmed the district court's decision in favor of the County.

(NOTE: This case reaffirms the principle that rights provided to employees and/or retirees through collective bargaining will not be deemed to be "vested," i.e., irrevocable, unless there is a clear and "unmistakable" intent to bind the city that way. Those who assist their city with collective bargaining must take care to ensure that benefits negotiated into an MOU will not inadvertently be deemed to be "vested" upon a court challenge.)

Retiree Forfeited Part of Pension Because Of Criminal Conduct

Wilmot v. Contra Costa County Employees' Retirement Association (2021) 60 Cal.App.5th 631

In December 2012, Jon Wilmot, an employee with the Contra Costa County Fire Protection District, submitted his application for retirement to the County's retirement authority, the Contra Costa County Employees' Retirement Association (CCERA), established in accordance with the County Employees Retirement Law of 1937 (CERL). On January 1, 2013, the California Public Employees' Pension Reform Act of 2013 (PEPRA) took effect, which included a provision mandating the forfeiture of pension benefits/payments if a public employee is convicted of "any felony under state or federal law for conduct arising out of or in the performance of his or her official duties."

In February 2013, Wilmot was indicted for stealing County property. In April 2013, CCERA approved Wilmot's retirement application, fixing his actual retirement on the day he submitted his application in December 2012. Also in April 2013, Wilmot began receiving monthly pension checks. In December 2015, Wilmot pled guilty to embezzling County property over a 13-year period ending in December 2012. Thereafter, the CCERA reduced Wilmot's monthly check in accordance with PEPRA's forfeiture provision.

Wilmot petitioned for a writ of traditional mandate and declaratory relief. He argued that the CCERA's application of the PEPRA's felony forfeiture provision was improper because the statute does not apply retroactively to persons who retired prior to PEPRA's effective date. The trial court disagreed, holding that the CCERA properly applied the forfeiture provision to Wilmot's pension.

Wilmot appealed, and the Court of Appeal affirmed the trial court's decision. On appeal, Wilmot argued when PEPRA took effect in January 2013, he was no longer a "public employee" because he worked his final day and submitted his retirement paperwork in December 2012. The Court of Appeal disagreed, stating that an employee's retirement application is pending until approved by a retirement board under the CERL. When PEPRA took effect, Wilmot's application was submitted, but CCERA did not approve his application until April 2013. Thus, he was subject to PEPRA's forfeiture provision.

Wilmot also argued he was improperly being "divested" of his vested pension benefits. Again, the Court of Appeal disagreed. Relying on the Court of Appeal's previous decision in *Marin Association of Public Employees v. Marin County Employees' Retirement Association*, the Court of Appeal confirmed that anticipated pension benefits are subject to reasonable

modifications and changes before the pension becomes payable and that an employee does not have a right to any fixed or definite benefits until that time.

Next, Wilmot argued that application of the forfeiture provision “impaired the obligation” of his employment contract with the Contra Costa County. The Court of Appeal rejected that argument because his supposed employment contract was prohibited by the California Constitution’s contract clause. The Court of Appeal acknowledged that to be constitutional under the contract clause, modification of public pension plans must relate to the operation of the plan and intend to improve its function or adjust to changing conditions. Relying on the Supreme Court’s decision in *Alameda County Deputy Sheriff’s Association v. Alameda County Employees’ Retirement Association* and the Court of Appeal’s decision in *Hipsher v. Los Angeles County Employees Retirement Association*, the Court of Appeal noted that one of the primary objectives in providing pensions to public employees is to induce competent persons to remain in public employment and render faithful service. Therefore, withholding that inducement if an employee’s performance is not faithful (such as with Wilmot - who pled guilty to embezzling County property for 13 years) is a logical and proper response to improve the function of a public pension plan.

Finally, Wilmot argued applying the PEPRAs forfeiture provision was an unconstitutional *ex post facto* law -- meaning a law that only makes an act illegal or that increases the penalties for an infraction after the act has been committed. The Court of Appeal disagreed, holding the forfeiture provision is a civil remedial measure, not a criminal penalty, and does not improperly increase the penalty for Wilmot’s misconduct. Rather, the forfeiture provision merely takes back from Wilmot what he never rightfully earned in the first place due to his failure to faithfully perform in public service.

For all these reasons, the Court of Appeal determined that the CCERA properly applied the PEPRAs forfeiture provision to Wilmot because of his admitted criminal conduct during his employment.

(NOTE: This case demonstrates that challenges to PEPRAs forfeiture provisions will be difficult for a public employee to make. As long as the employee’s retirement application was granted before the effective date of PEPRAs, a forfeiture should withstand a judicial challenge.)



Frequent FLSA Liability Risks in Public Agencies

Thursday, May 5, 2022

Brian Walter, Partner, Liebert Cassidy Whitmore

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FREQUENT FLSA LIABILITY RISKS IN PUBLIC AGENCIES

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GENERAL INFORMATION ABOUT THE FAIR LABOR STANDARDS ACT CAN BE FOUND IN THE MUNICIPAL LAW HANDBOOK, CHAPTER 4, "PERSONNEL," SECTION III, "WAGE AND HOUR LAWS."

[HTTP://ONLAW.CEB.COM/ONLAW/GATEWAY.DLL?F=TEMPLATES&FN=DEFAULT.HTM&VID=ONLAW:CEB](http://onlaw.ceb.com/onlaw/gateway.dll?f=templates&fn=default.htm&vid=onlaw:ceb)

BACKGROUND OF FLSA LITIGATION AGAINST PUBLIC ENTITIES

Congress enacted the FLSA in 1937 to protect workers from substandard wages and oppressive working hours and conditions that were detrimental to the "health, efficiency, and general well being of workers."¹ The FLSA was "designed to give specific minimum protection to individual workers and to ensure that each employee covered by the Act would receive [a] fair day's pay for a fair day's work and would be protected from the evil of 'overwork' as well as 'underpay.'"² The Act was primarily aimed at protecting vulnerable workers - children and underpaid sweatshop employees. The Act did not apply to public agencies and the FLSA regulations initially issued by the United States Department of Labor ("DOL") did not contemplate the Act applying to public agencies.

The FLSA was originally drafted to apply to manufacturing and retail industries. The text of the statute itself, and many of the regulations, interpretations and opinion letters issued by the U.S. Department of Labor, are not easily applied to the diverse and unique types of services provided by municipalities.

Nonetheless, a few decades later Congress began attempting to apply the FLSA to public employers.³ The FLSA became fully applicable to public agencies after a Supreme Court decision in 1985 (*Garcia v. San Antonio Metropolitan Transit Authority*).⁴ Many public agencies were ill-prepared for the transition to an FLSA environment that the Court suddenly thrust upon them. But employees were prepared to sue their employers for violating the FLSA. The *Garcia* decision triggered a flood of FLSA litigation against public agencies that has continued through the present day.

In California, municipalities are generally not subject to California wage and hour laws⁵. However, the ubiquitous nature of wage and hour litigation in the private sector for missed meal breaks and non-compliant pay stubs under state wage law has resulted in many multi-million dollar settlements and verdicts. As a result of the awareness of the potential recovery in wage and hour cases, FLSA litigation continues to expand and evolve against municipalities. Additionally, liquidated (double) damages are mandatory in FLSA cases unless an employer can prove it acted in good faith, which is far more difficult to prove under Ninth Circuit precedent than one might expect.⁶ A further incentive for FLSA litigation is that a plaintiffs will recover attorney's fees and costs if an FLSA violation is proved.

OVERVIEW OF THE FLSA

Although the DOL has issued hundreds of pages of regulations and interpretations regarding the FLSA, the issues that most commonly present liability issues for municipal employers involve employees who are eligible to receive overtime under the FLSA, commonly referred to as “non-exempt” employees.

The FLSA issues that present a greater risk of liability to municipalities are those claims that can be brought as collective actions that include significant numbers of employees. Under the FLSA, an employee can ask the court to certify a collective action and send a notice out to all similarly situated employees to solicit them to join the lawsuit.⁷ The standard required for preliminary certification to send out a notice of collective action is a very low bar, and can result in large numbers of employees opting-in to the lawsuit. The most frequent FLSA liability issues for municipalities fall into the following categories:

1. Workweek and Work Period Designations
 - a. Designation of FLSA Workweeks for All Employees
 - b. Proper Designation of Public Safety Work Periods
 - i. Law Enforcement
 - ii. Fire Protection
 - c. Level Pay Plans for Firefighters
2. Regular Rate of Pay
 - a. Cash Back in Lieu of Health Insurance
 - b. Sick Leave Buy Backs
 - c. Holiday-in-Lieu Pay
3. Off the Clock Work
 - a. Remote Work Arrangements
4. Overtime Exemptions
 - a. Administrative Exemption
 - b. First Responders

EMPLOYERS MUST DESIGNATE FLSA WORKWEEKS FOR ALL EMPLOYEES

Employers are required to designate FLSA work periods for each of their non-exempt employees that states the time of day and day of week on which the employee’s FLSA work period begins and ends.⁸ The most common work period for most civilian employees is a 7 day work week for which a non-exempt employee is entitled to overtime after actually working 40 hours.⁹ FLSA overtime is owed based upon whether the employee works in excess of the FLSA limit for that work period. The FLSA work week, not the calendar week or the pay period, is what must be used to calculate FLSA overtime for non-exempt employees.¹⁰

Many municipalities have a 9/80 work schedule in which they work nine days instead of ten in a two week period, with eight nine hour days and one eight hour day. The FLSA work week must be carefully designated so that employees on a 9/80 schedule do not cause the employer to incur automatic FLSA overtime every other week. The FLSA does not permit employers to average

overtime over multiple FLSA work weeks or work periods.¹¹ Thus, an overpayment of 4 hours in one FLSA work week cannot be used to offset an underpayment of 4 hours in a subsequent work week.

If the employee on a 9/80 work schedule typically has every other Friday off, the work week must be designated to start and stop four hours into the employee's Friday work shift. This means that if the employee's work shift normally starts at 8 a.m., overtime is calculated from noon on Friday until noon on the following Friday for FLSA purposes. Employers must insure that their payroll system is capable of paying FLSA overtime based on FLSA workweeks.

DESIGNATION OF PUBLIC SAFETY WORK PERIODS

Proper designation of a work period is even more critical for fire and police employees. Those employees may be eligible for a separate work period of between 7 and 28 days pursuant to section 207(k) of the FLSA, commonly known as a "7(k)" work period.¹² Overtime is paid based upon a ratio according to the length of the work period - 7.57 hours per day for firefighters and 6.11 hours per day for law enforcement.¹³ Typically municipalities adopt a 28 day work period for law enforcement and a 24 or 27 day work period for fire fighters, although any length of work period between 7 and 28 days is permitted.

Since most municipalities pay employees based on a 14 day pay period, the 7(k) work period may not precisely match up with the pay period. Computation of FLSA overtime for those safety employees requires that the payroll system calculate the hours worked over multiple pay periods to determine whether any FLSA overtime is owed. As noted previously, each FLSA work period stands alone for purposes of computing FLSA overtime, and FLSA overtime cannot be averaged over multiple FLSA work periods.

The FLSA contains a number of specific requirements that must be met for a public safety employee to be eligible for a 7(k) work period. For law enforcement, the most significant requirement is that the employee have the power to arrest.¹⁴ For fire protection employees, the most significant requirement is that the employee have an actual responsibility to engage in fire suppression.¹⁵ This requirement may render fire department employees who only perform EMS services ineligible for a 7(k) work period depending on the circumstances.

Municipalities must be careful to designate section 7(k) work periods that actually correspond to the schedules of public safety employees to avoid inadvertent overtime. For law enforcement employees, a 28 or 14 day work period will normally be the optimal schedule. For fire protection employees, a 27 or 24 day work period will normally be the optimal schedule if they work a platoon schedule that is based on 3 different platoons. If firefighters are placed on a 7(k) work period that does not match their platoon schedule, such as a 14 day or 28 day work period, calculation of hours worked and FLSA overtime owed will be extremely difficult because firefighters on each shift will be regularly scheduled to work varying amounts of hours within the 14 or 28 day work period.

LEVEL PAY PLANS FOR FIREFIGHTERS

Firefighters may negotiate level pay plans with their department, so they are paid as if they worked 56 hours each week. In fact, firefighters who work 24 hour shifts on an “ABC” platoon schedule will not work exactly 56 hours in a week. The assumption that a firefighter works an average of 56 hours per week will result in underpayment of FLSA overtime for some pay periods and overpayment for other periods. The FLSA strictly prohibits the averaging of FLSA overtime over work periods, and the DOL has specifically prohibited this practice regarding firefighters. While it may be possible to set up a level pay plan that is FLSA compliant by prepaying overtime, it requires a great deal of attention to how the level pay plan is created.¹⁶

THE REGULAR RATE OF PAY

The FLSA requires that overtime compensation be paid at one and one-half times the employee’s regular rate of pay.¹⁷ Although the term “regular rate” is often associated with an employee’s base salary or pay, the FLSA has its own specific definition of the term. The FLSA requires that the regular rate of pay include “all remuneration for employment paid to, or on behalf of, the employee,” except those payments that are specifically excluded by statute. There are only seven statutory exclusions from the regular rate of pay, and employers must be careful to identify which statutory exclusion applies if remuneration is excluded from an employee’s regular rate of pay.¹⁸

The regular rate is generally calculated by dividing the compensation that goes into the regular rate in the work period by the hours worked in the work period that the compensation was intended to compensate.¹⁹ Payments for shift differentials, hazardous duty pay, bilingual pay, special assignment pay, and educational incentive pay are examples of specialty pay types that must be included in the regular rate of pay. Payments made to employees for being on unrestricted standby or on call time must be included in the employees’ regular rate of pay.²⁰ Correct computation of the regular rate of pay requires that the on-call amount be included with the compensation for normally scheduled hours for that workweek to determine the regular rate of pay. These payments will result in an FLSA regular rate of pay for overtime purposes that is higher than the employee’s base hourly rate.

Municipalities are obligated to review all payments made to employees to determine whether they must be included in the employee’s FLSA regular rate of pay. Whether a payment is reportable compensation for retirement purposes or considered taxable income for IRS purposes will not be determinative of its FLSA regular rate treatment. The Ninth Circuit recently found an employer to have willfully violated the FLSA because of an erroneous decision made by a junior level payroll employee about payment of overtime.

REGULAR RATE AREAS OF CONCERN

1. CASH BACK IN LIEU OF HEALTH INSURANCE

Payments made to employees who opt-out of an employer's health insurance plan have been a major source of litigation against municipalities since the Ninth Circuit's decision in *Flores v. City of San Gabriel*, 824 F.3d 890 (9th Cir. 2016). *Flores* held that a cash payment made to an employee for opting out of health insurance is remuneration for employment that must be included in that employee's regular rate of pay. Additionally, if the cash payment is made pursuant to a cafeteria plan, and the plan permits employees to recover more than an incidental amount of the plan benefits in cash, the plan is not considered "bona fide" for FLSA purposes.²¹ If the plan is not bona fide, **all** of the employer's contributions to the cafeteria plan must be included in the employees' regular rates of pay.²² A non bona fide plan could result in significant increases in the overtime rates for all of the non-exempt employees in the municipality.²³

The issue of how much cash back from a cafeteria plan is "incidental" is currently unsettled. The Ninth Circuit held in *Flores* that forty percent or more of the plan benefits being paid back to employees in cash is not incidental, but declined to specify what percentage would be incidental. The DOL has opined that cash back payments are incidental if no more than twenty percent of the plan benefits are paid back in cash.²⁴ While DOL opinions are not binding on courts and are only entitled to respect by courts to the extent that the opinion is persuasive, at least one federal court decision has found that providing cash back around twenty percent of plan benefits is incidental.²⁵ Additionally, an employer has a good faith defense to liability under the FLSA if it can prove that it relied upon an official interpretation of the DOL.²⁶

2. SICK LEAVE BUY BACK PAYMENTS

Federal circuit courts have split on the issue of whether buy backs paid to employees for unused sick leave must be included in their regular rate of pay. However, the DOL has taken the position that all leave buy backs are excluded from an employee's regular rate of pay.²⁷ For sick leave buy backs to be excluded, the DOL opines that each sick leave hour must be cashed out at its full value and the employee's sick leave bank must be reduced by an hour. Nonetheless, the DOL also opined that sick leave buy backs should be included in the employee's regular rate of pay if they operate as a de facto attendance bonus.

3. HOLIDAY PAY

Holiday pay may be excluded from the regular rate of pay if it is provided to an employee for not working on a holiday.²⁸ However, some employers provide "holiday in lieu" pay, where an employee receives a fixed amount of holiday pay in a lump sum or percentage amount each pay period or each year, regardless of when the holiday occurs or whether the employee worked that holiday. Several courts have held that holiday in lieu pay is not excludable as pay for time not

worked and must be included in an employee's regular rate of pay.²⁹ However, the Department of Labor has opined that holiday in lieu pay may be excluded from the regular rate of pay.³⁰ Given the number of federal court decisions holding that holiday in lieu pay should be included in the regular rate, and the lack of Ninth Circuit guidance, municipalities should be cautious about relying on the DOL's guidance on this issue.

OFF THE CLOCK WORK

Generally, “[w]ork not requested but suffered or permitted is work time” under the FLSA.³¹ If an employer allows an employee to work, such time will be considered “hours worked” even if the work is carried out before or after normal work hours, during an unpaid meal break or away from the work premises. Work that an employer allows employees to perform will count toward hours worked, even if the employee performs the work on a voluntary basis. The interpretative bulletins provide that work time includes hours an employee voluntarily continues to work at the end of a shift in order to finish an assigned task, correct errors, or prepare time reports or other records. The reason is immaterial. If the employer knows or has reason to believe the employee is continuing to work, the time is work time. This is true even if the employee does not report the time worked on a timesheet or in a timekeeping system.

The FLSA permits employers to adopt overtime policies that prohibit employees from performing unapproved work before or after work hours. However, those policies must be enforced to prevent liability for an employer for off the clock work. The FLSA imposes a stringent burden on management to exercise control and ensure that work is not performed. The DOL interpretative bulletins provide that an employer cannot sit back and accept the benefits of an employee's work without compensating for them even if it has a rule prohibiting that work.³² An employer must show it has enforced its policy through disciplinary and corrective measures to avoid FLSA claims for off the clock work time.

However, an employer that does issue good overtime policies and trains its employees on the importance of following those policies may have a defense to off the clock work claims. If an employer issues a policy requiring employees to accurately record their hours worked including overtime hours worked, the employer has the right to expect their employees will follow the policy, absent some indication to the contrary.³³ An employer is not liable for overtime if the employee affirmatively prevents the employer from learning about the overtime worked by not reporting it despite a strong overtime policy.

The Portal to Portal Act of 1947 was enacted to limit the definition of compensable work under the FLSA to avoid unintended and absurd results. Under that Act, activities that are preliminary or postliminary to the employee's principal activity are only considered hours worked if they are “integral and indispensable to the principal activities that the employee is employed to perform.”³⁴ However, in practice it can be difficult to determine whether an activity is truly integral and indispensable to the employee's principal activity. This poses challenges for municipalities in several respects, particularly for non-exempt employees who work independently or work in the field or at a remote location.

The following are examples of claims non-exempt employees have made for off the clock work that could result in liability for the municipality:

- Working through an unpaid meal break
- Preparing reports after hours or at home
- Coming in early to obtain equipment or supplies for the work shift
- Off-duty maintenance of City equipment
- Answering emails or phone calls outside of work hours
- Monitoring work equipment, machines or events remotely over a computer
- Working after hours from home on a City-issued laptop or mobile device
- Travel that requires an overnight stay
- Attending trainings or classes that are required or recommended by the employer
- Coming in early or staying late to train or mentor employees
- Opening up or closing down a facility
- Waiting for residents or citizens to leave a City facility after hours

In each instance, the municipality may face liability for the activity if the municipality either knew, or should have known, that its employees were performing this uncompensated work. Knowledge can be imputed to the city through its managers, even if top city management does not know of the uncompensated work. Thus, an employer should also consider procedures to monitor that no uncompensated work is being performed, including regular training of employees on overtime procedures and audits of timekeeping and computerized records.

REMOTE WORK ARRANGEMENTS

If an employee resides on an employer's premises, the employee need not be paid for the entire time spent on the premises. In those situations, when an employee engages in personal activities where the employee has complete freedom from job duties, such as eating, sleeping, entertaining, or in some instances leaving the premises, the employee may not be considered to be working. Because it is difficult to determine actual work time, any reasonable agreement of the parties as to what time is and is not hours worked that takes into consideration all pertinent facts is accepted by the DOL.³⁵

When an employee is working at home, it is difficult if not impossible for an employer to monitor the employee's time and determine when the employee is working and when the employee is engaging in personal pursuits. Thus, an employer must rely on an employee to accurately report their time worked in the employer's timekeeping system. Employees who are working remotely should receive training on and be required to acknowledge the importance of accurately reporting their time worked.

As with work on an employer's premises, employers can enter into reasonable agreements with employees to define what time spent at home is considered hours worked, provided that the agreement takes into consideration all pertinent facts. Courts have rejected agreements between employees and employers that were found to not consider all pertinent facts and shortchange the employee.³⁶ In one case involving a police K9 officer, the Ninth Circuit found that the agreement was not reasonable because the city failed to consider the actual time that the K9

officer was spending off-duty caring for his police dog, and instead just relied on the amount of time that neighboring cities were paying. Thus, any agreement between a city and employee regarding work from home must include some reasonable inquiry into how much time an employee is actually working.

Under the DOL's continuous workday rule, all time spent by an employee from the beginning of their first principal activity during the workday until the completion of their last principal activity is hours worked under the FLSA, except for bona fide meal breaks.³⁷ An additional issue with remote work is that some employees are now working in a hybrid arrangement where part of their work day is at home and part of their work day is at their employer's premises. The DOL issued an opinion letter on December 31, 2020 to address the dilemma posed by the continuous workday rule for hybrid work arrangements.³⁸ That opinion letter opines that travel time between an employee's home and the work site is still considered non-compensable commute time, even if the employee starts or finishes the employee's workday at home. Nonetheless, employers should attempt to account for commute time in any remote working agreement.

OVERTIME EXEMPTIONS

Although there are many exemptions from FLSA overtime requirements, the three most common exemptions are the so-called white collar exemptions for executive, administrative and professional employees.³⁹ An employee must meet both the salary and the duties test to qualify for one of those overtime exemptions.

The salary test generally requires that an exempt employee receives a pre-determined amount of pay that is not subject to reduction because of the quality or quantity of work performed.⁴⁰ There is much confusion regarding pay deductions from overtime-exempt public employees for partial day absences. Requiring an employee to use accrued leave for partial day absences is not an improper deduction from pay.⁴¹ Additionally, public sector employers may actually deduct pay for partial day absences if they have a pay system based on principles of public accountability and certain other requirements are met.⁴²

The duties test tends to present more issues for FLSA compliance for public employers. There are specific duties that must be actually performed by the job as its primary duty to meet the executive, administrative or professional exemptions. Although there are multiple requirements for the executive exemption, the key test is generally whether the position supervises two or more full time employees. For the professional exemption, the key requirement is generally whether the position requires a specific degree or course of specialized intellectual study. The administrative exemption tends to present the most issues for public employers because of the vague definition of administrative duties. An employee must perform office or non-manual work directly related to the management or general business operations of the employer or the employer's customers, and exercise discretion and independent judgment with respect to matters of significance. The job classification or bargaining unit is not determinative of exempt status. Rather, exempt status is based upon actual job duties performed by that specific position. A common example of an administrative employee in a municipality is an analyst. Analyst positions can perform a wide range of functions in a municipality. Some analysts may perform

high level duties such as budgeting or human resources that require significant exercise of discretion and independent judgment. Other analyst positions may perform more routine clerical work or data tabulation that does not have sufficient independent judgment to meet the administrative duties test. Employers must insure that each analyst position actually meets the duties test above.

Another area of concern regarding overtime exemptions is first responders. The regulations specify that if the primary duty of an employee is fighting fires, rescuing victims, apprehending criminal suspects, or investigating crimes or fires, the employee is a non-exempt first responder who cannot satisfy any of the white collar exemptions.⁴³ However, high level fire or police employees can still be considered overtime-exempt if their primary duty is executive or administrative even though they respond to major fire or crime scenes.⁴⁴

CONCLUSION

While FLSA compliance can seem like a daunting and complex task for municipalities, many of the potential liability issues for municipalities can be prevented or largely mitigated through a systemic FLSA compliance plan. A critical step in ensuring FLSA compliance is to regularly review the municipality's FLSA compliance through internal reviews of payroll and timekeeping records and exemption classifications. Attorney oversight of the FLSA compliance review is important to both ensure legality and to maintain privilege for the findings of the review process. Additionally, a key proactive measure to avoid liability that is often overlooked is to provide regular FLSA compliance training to the payroll personnel who are actually processing timekeeping data and calculating payroll. These steps can greatly reduce the potential FLSA liability for a municipality and avoid the double damages and associated attorney's fees from an FLSA lawsuit.

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1 *Barrentine v. Arkansas-Best Freight System, Inc.*, 450 U.S. 728, 739 (1981).

2 Id. (quoting President Roosevelt from the Congressional Record and *Overnight Motor Transportation Co. v. Missel*, 316 U.S. 572, 578 (1942)).

3 Pub.L. 89-601, § 102(b).

4 *Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528 (1985).

5 For example, state overtime laws do not apply to municipalities. (IWC Wage Order 4, 1(B)). State meal and rest break provisions do not apply to municipalities except for commercial transit drivers. (IWC Wage Order 9, 1(B)). However, state minimum wage law does apply to municipalities. (*Marquez v. City of Long Beach* (2019) 32 Cal.App.5th 552, 576.)

6 29 U.S.C. § 216(b); *Flores v. City of San Gabriel*, 824 F.3d 890, 905-06 (9th Cir. 2016).

7 29 U.S.C. § 216(b); *Campbell v. City of Los Angeles*, 903 F.3d 1090, 1099-1100 (9th Cir. 2018).

8 29 C.F.R. § 516.2(a)(5).

9 29 U.S.C. § 207(a)(1).

10 29 C.F.R. § 778.103.

11 29 C.F.R. § 778.104.

12 29 U.S.C. § 207(k).

13 29 C.F.R. § 553.230(c).

14 29 C.F.R. § 553.211.

15 29 U.S.C. § 203(y); *Cleveland v. City of Los Angeles*, 420 F.3d 981 (9th Cir. 2005).

16 29 C.F.R. § 778.104; See DOL Administrative Letter Rulings, October 17, 1995 and February 12, 1998.

17 29 U.S.C. § 207(e).

18 29 U.S.C. § 207(e).

19 29 C.F.R. § 778.109.

20 29 C.F.R. § 778.223.

21 29 C.F.R. § 778.215(a)(5).

22 *Flores v. City of San Gabriel*, 824 F.3d 890,903 (9th Cir. 2016).

23 For example, if a cafeteria plan that provides \$1,000 per month in cafeteria benefits to its employees is found to not be bona fide, an employee who earns \$30 per hour could see an increase of the employee’s overtime rate from \$45 per hour to \$53.65 per hour.

24 84 Fed. Reg. 68760-61.

25 *In Re City of Redondo Beach FLSA Litigation*, 2019 WL 6310264 (C.D.Cal. 2019); See *Flores v. City of San Gabriel*, 824 F.3d 890, 903 (2016) (“opinion letters are ‘entitled to respect’ under *Skidmore* only to the extent that the agency’s interpretation has the ‘power to persuade.’”)

26 29 U.S.C. § 259.

27 84 Fed.Reg. 68741-42; See also *Balestrieri v. Menlo Park Fire Protection Dist.*, 800 F.3d 1094 (9th Cir. 2015).

28 29 U.S.C. § 207(e)(2).

29 See *Hart v. City of Alameda*, 2009 WL 1705612 (N.D.Cal. 2009); *McKinnon v. City of Merced*, 2018 WL 6601900 (E.D.Cal. 2018).

30 84 Fed.Reg. 68736, 68742-43.

31 29 C.F.R. § 785.11.

32 29 C.F.R. § 785.13.

33 *Forrester v. Roth’s IGA Foodliner*, 646 F.2d 413 (9th Cir. 1981); *Newton v. City of Henderson*, 47 F.3d 746 (5th Cir. 1995).

34 *Integrity Staffing Solutions v. Busk*, (2014) 574 U.S. 27.

35 29 C.F.R. § 785.23.

36 *Leever v. City of Carson City*, 360 F.3d 1014 (9th Cir. 2004).

37 29 C.F.R. § 790.6(b).

38 DOL Administrative Letter Ruling, December 31, 2020 (FLSA 2020-19).

39 29 C.F.R. Part 541.

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- ⁴⁰ 29 C.F.R. § 541.602(a).
⁴¹ *Barner v. City of Novato*, 17 F.3d 1256, 1261 (9th Cir. 1994).
⁴² 29 C.F.R. § 541.710(a).
⁴³ 29 C.F.R. § 541.3(b)(1).
⁴⁴ *Emmons v. City of Chesapeake*, 982 F.3d 245 (4th Cir. 2020).



Public Contracting: Purchasing Requirements and Renewable Energy/ Energy Efficient Projects

Thursday, May 5, 2022

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**LEAGUE OF CALIFORNIA CITIES
2022 CITY ATTORNEYS SPRING CONFERENCE**

**PUBLIC CONTRACTING: PURCHASING
REQUIREMENTS AND RENEWABLE ENERGY/
ENERGY EFFICIENT PROJECTS**

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Preface

The intent of this paper is to help city attorneys determine what procurement methods are allowed and not allowed when engaging in public contracting. Choosing the right public contracting procurement method is already difficult, but as elected officials become more concerned with the impact of climate change on their communities, city attorneys will be tasked with guiding cities through the state's purchasing requirements for renewable energy and energy efficient projects. These projects may or may not be procured as energy conservation contracts. Further complicating matters, vendors may also propose procurement methods that are viable to some California public agencies but not available to cities.

Therefore, this paper is an attempt to aid city attorneys in understanding the different ways that cities can structure purchases for goods and services, including renewable energy and energy efficient projects. Various procurement methods will be discussed, including: (1) formal or informal request for proposals, (2) sole-source procurement; (3) design-build contracts; (4) cooperative purchasing/"piggybacking", (5) job order contracts; and (6) energy conservation contracts.

The paper covers the advantages and disadvantages of each procurement method to assist city attorneys in deciding which procurement methods are the best (and allowed) for their city given the particular circumstances applicable to their jurisdiction

Disclaimers

We offer this overview of the requirements of California law without regards for the specific regulations that vary in each local agency. We recommend that each local agency and each specific project be evaluated separately for their compliance with local conditions, as well as the restrictions or requirements imposed by California law. This memorandum is not intended to be and should not be relied upon as a legal opinion or guarantee regarding public contracting. This memorandum is only intended to provide information regarding purchasing requirements and renewable energy and energy efficiency projects. Neither you nor any other person should rely exclusively on this memorandum in deciding how a project should be procured or entered into under California law.

Introduction to Public Contracting

Cities are required to adopt policies and procedures governing bidding regulations and purchases of supplies and services by the city. (Gov. Code, § 54202).¹ Such local policies and procedures may not be inconsistent with state statutes. This paper does not address procurement of supplies and services, which may have their own procurement requirements, such as Government Code § 4525 et seq., for contracts for professional services. Rather, the focus of this paper is to address common and emerging issues in public contracting for public projects.

In this context “public contracting” is when cities or other government agencies purchase materials, goods, or services for “public projects” defined under Public Contract Code section 20161 as:

- (a) A project for the erection, improvement, painting, or repair of public buildings and works.
- (b) Work in or about streams, bays, waterfronts, embankments, or other work for protection against overflow.
- (c) Street or sewer work except maintenance or repair.
- (d) Furnishing supplies or materials for any such project, including maintenance or repair of streets or sewers.

The procurement method known as competitive bidding is required for public projects over \$5,000 for general law cities. (Pub. Contract Code, § 20162). Similarly, the Public Contract Code applies to charter cities in the absence of an express exemption, city charter provision, or an ordinance that directly conflicts with the Public Contract Code. (Pub. Contract Code, § 1100.7).

Competitive Bidding Process

The competitive bidding process is central to how government agencies contract for public works projects. The competitive bidding process is intended to protect the public fisc, guard against favoritism, fraud and corruption, waste, and to ensure that cities are receiving a high level of services for the lowest price. (*Chung v. City of Monterey*)

¹ City attorneys should also become familiar with their city’s purchasing regulations before advising their clients on contract procurement, especially as these ordinances may still apply even if no bids are received after the city posts a notice inviting bids and the city no longer has to follow the state’s formal competitive bidding requirement.

Park (2012) 210 Cal. App. 4th 394). The competitive bidding process is the procurement method most often used by cities.

Formal Competitive Bidding

The Public Contract Code applies to virtually all public entities in California. Public agencies², with limited exceptions, have a duty to publicly bid certain contracts, particularly construction contracts, under the Public Contract Code. Specific provisions applicable to cities are set forth in § 20160-§ 20175.2 of the Public Contract Code.

Public Contract Code section 100 contains an express declaration of legislative intent, stating that the purpose of the code is:

- (a) To clarify the law with respect to competitive bidding requirements.
- (b) To ensure full compliance with competitive bidding statutes as a means of protecting the public from misuse of public funds.
- (c) To provide all qualified bidders with a fair opportunity to enter the bidding process, thereby stimulating competition in a manner conducive to sound fiscal practices.
- (d) To eliminate favoritism, fraud, and corruption in the awarding of public contracts.

The importance of competitive bidding stems from the California Constitution and more than 140 years of California Supreme Court precedent precluding all payments on contracts violating the competitive bidding laws. As stated in *Konica Business Machines U.S.A., Inc. v. Regents of University of California* (1988) 206 Cal. App. 3d 449, 456-7:

The purpose of requiring governmental entities to open the contracts process to public bidding is to eliminate favoritism, fraud, and corruption; avoid misuse of public funds; and stimulate advantageous marketplace competition. [citations omitted] Because of the potential for abuse arising from deviations from strict adherence to standards which promote these public benefits, the letting of public contracts universally receives close judicial scrutiny and contracts awarded without strict compliance with bidding requirements will be set aside. This preventative approach is applied even where it is certain there was in fact no corruption or adverse

² As will be discussed *infra*, the applicability of certain procurement procedures and methods available to other non-municipal public agencies are increasingly being marketed to cities when such procurement types are in fact *not* available to cities.

effect upon the bidding process, and the deviations would save the entity money. [citations omitted] The importance of maintaining integrity in government and the ease with which policy goals underlying the requirement for open competitive bidding may be surreptitiously undercut, mandate strict compliance with bidding requirements.

The strong public policy supporting competitive bidding as the required method for public projects for cities in California is difficult to avoid. While some vendors approach cities with examples of projects within California proceeding under other less formal methods in order to avoid the complexities of the formal bidding process, competitive bidding remains the default required procurement method for California cities.

The formal competitive bidding process usually involves public advertisement for the submission of sealed bids, the public opening of bids, and the award of contracts to the lowest responsible bidder that is responsive to the solicitation for bids. This process is almost exclusively governed by the Public Contract Code.³

The notice inviting bids is the first step in the formal competitive bidding process and must be published or posted at least 10 days before the bids are opened. (Pub. Contract Code, § 20164). The notice must be published at least twice, not less than five days apart, in a newspaper that is published in the city and posted in at least three public places in the city designated by ordinance as a place where public notices are posted. (*Id.*). When a city opens the bids, it must choose the lowest responsible bid that is responsive to the notice. If two or more bids have the same cost and are responsive, the city may choose one. (Pub. Contract Code, § 20166). The city also has the authority to reject all bids presented and readvertise the bid or if no bids are received, it no longer has to follow the competitive bidding process. (*Id.*).

It is illegal to split or separate a public project into smaller work orders or contracts in an attempt to avoid competitive bidding requirements. (Pub. Contract Code § 20163). Attorneys should be aware that intentional violation of this requirement is a misdemeanor. (*Id.*)

The advantage of the formal competitive bidding process is that the uniform method is well understood by contractors and city employees, and that it is structured with the intention to obtain the best deal for the city at the lowest cost.

³ If a city has adopted the Uniform Public Construction Cost Accounting Act (Pub. Contract Code §§ 22000 *et seq.*) or the project is valued less than \$5,000, then the Local Agency Public Construction Act (Pub. Contract Code §§ 21160 *et seq.*) will apply.

The disadvantage of the formal competitive bidding process is that the process can be cumbersome and complicated, and in many instances the costs associated with the administration and preparation of the bid process outweigh the cost savings associated with the closed bid process. Staff that is already understaffed must engage in a lengthy paper chase of design, bidding, noticing, and public meetings. The process takes a significant amount of time in what is often a foreign process to new or recently promoted employees. If city staff is unfamiliar with the formal competitive bidding process, a bid protest or legal challenge may also arise. City attorneys should work closely with city staff to ensure that they are comfortable with the formal competitive bidding process to avoid potential issues.

Informal Bidding: the Uniform Public Construction Cost Accounting Act

In response to the issues associated with the formal competitive bidding process, the legislature created the Uniform Public Construction Cost Accounting Act (UPCCAA) (Pub. Contract Code, § 22000-22045). If a city chooses to be subject to the UPCCAA then certain less-formal contracting procedures may be used for certain contracts valued at \$200,000 or less. (Pub. Contract Code, § 22032). Each public agency that elects to become subject to the uniform construction accounting procedures must adopt a resolution accepting the procedures and notify the State Controller that it has adopted a resolution. (Pub. Contract Code, § 22030).⁴ Cities then have to enact an informal bidding ordinance to govern the selection of contractors to perform public projects. (Pub. Contract Code, § 22034). The ordinance must include specified information, such as how notice to contractors will be provided and that City Council may delegate the authority to award informal contracts to the public works director, city manager, purchasing agent, or other appropriate person. (Pub. Contract Code, § 22034). UPCCAA provides a number of specific requirements for this informal contracting procedure. Cities must give notice to contractors describing the project in general terms, how to obtain more detailed information about the project, and state the time and place when bids must be submitted. (*Id.*).

For purposes of UPCCAA, “public project” means any of the following:

- (1) Construction, reconstruction, erection, alteration, renovation, improvement, demolition, and repair work involving any publicly owned, leased, or operated facility.

⁴ The State Controller maintains a list of all such public agencies.

(2) Painting or repainting of any publicly owned, leased, or operated facility.

(3) In the case of a publicly owned utility system, “public project” shall include only the construction, erection, improvement, or repair of dams, reservoirs, powerplants, and electrical transmission lines of 230,000 volts and higher.

(Pub. Contract Code, § 22002(c)).

However, “public project” does **not** include maintenance work, which is defined as all of the following:

(d) (1) Routine, recurring, and usual work for the preservation or protection of any publicly owned or publicly operated facility for its intended purposes.

(2) Minor repainting.

(3) Resurfacing of streets and highways at less than one inch.

(4) Landscape maintenance, including mowing, watering, trimming, pruning, planting, replacement of plants, and servicing of irrigation and sprinkler systems.

(5) Work performed to keep, operate, and maintain publicly owned water, power, or waste disposal systems, including, but not limited to, dams, reservoirs, powerplants, and electrical transmission lines of 230,000 volts and higher.

“Facility” means “any plant, building, structure, ground facility, utility system, subject to the limitation found in paragraph (3) of subdivision (c), real property, streets and highways, or other public work improvement.” (Pub. Contract Code, § 22002(e)).

Just as with the formal competitive bidding process, cities may reject all bids and declare that the project can be done more efficiently by city staff and provide to the lowest responsible bidder at least two business days’ advance notice of the city’s intent to reject the bids. (Pub. Contract Code, § 22038). The city is also required to award the contract to the lowest responsible bidder. (*Id.*). And if no bids are receiving, the city can perform the work itself or by negotiating directly with a contractor. (*Id.*).

City attorneys should recognize opportunities for their clients to engage in the informal bidding process. One advantage of the informal bidding process is that the procurement method is simpler and more efficient than the formal competitive bidding

process, but does not sacrifice the city's vigilance against waste and fraud. Informal bidding can also be run by the public works director or city manager, which frees up city council to focus on other matters.

The disadvantage of the informal competitive bidding process is that cities may not be familiar with the process, because they typically use the formal competitive bidding process and may therefore be subject to a bid protest or legal challenge due to an error caused by this unfamiliarity.

Federally Funded Projects

Cities sometimes accept federal grants for public works projects. When cities accept these funds, they are typically required to comply with federal laws and regulations that govern how these funds must be spent and documentation of the spending. (Gov. Code, § 53702). For instance, cities received funds under the American Rescue Plan Act, which provided funds to state, local, and tribal government to respond to and recover from the COVID-19 public health emergency and resulting fiscal crisis. The Department of the Treasury released a Final Rule for the bill, which provided that funds from the Rescue Plan Act could be used for projects that reduce energy consumption of public-owned treatment facilities, including installing energy efficient lighting, HVAC, and electronic equipment.⁵

The Final Rule also noted that whether cities may spend money on public works projects “which enhance environmental quality, remediate pollution, promote recycling or composting, or increase energy efficiency or electrical grid resilience[,]” depends on whether these projects respond to the disproportionate impacts of the pandemic on certain communities and would depend on the specific issue they address and the project's connection to the public health and economic impacts of the pandemic.

The Department of Energy also supports a number of grant, loan, and financing programs that aid state and local governments.

The Office of Management and Budget (“OMB”), a federal government agency, has issued guidance for how cities and other public agencies that receive awards of federal funds may use the funds. These regulations are entitled Uniform Administrative Requirements, Cost Principles, and Audit Requirements for Federal Awards, which has been termed the “Super Circular.” The Super Circular can be found at 2 Code of Federal Regulations 200. The Super Circular was updated in 2020 and 2021 and the citations in the California Municipal Law Handbook may not be current.

All procurement contracts with federal money involved must be conducted in a manner providing “full and open competition” consistent with the applicable federal procurement rules. (2 C.F.R. § 200.319 (2022)). There are five methods of procurement that a city may use when it receives a federal grant:

- 1) Micropurchases;
- 2) Small purchase procedures;
- 3) Sealed bids (formal advertising);
- 4) Competitive proposals;
- 5) Noncompetitive negotiation.

Micropurchases

A micropurchase is the acquisition of supplies or services using a simplified acquisition procedure. Generally, the threshold for using this procurement method is for purchases of \$10,000 or less. (48 C.F.R. part 2, subpart 2.1).⁶ Cities may award contracts for micropurchases without soliciting competitive quotes if the city can document with research, experience, purchase history or other information that the price is reasonable. (2 C.F.R. § 200.320(a)(1)(ii)). Cities can also use the micropurchase method for contracts up to \$50,000 by ordinance, but the city must maintain documentation that it can make available to federal auditors explaining why it raised the micropurchase threshold and documentation of any of the following:

- 1) A qualification as a low-risk auditee;⁷
- 2) An annual internal institutional risk assessment;⁸ or
- 3) For public agencies, a threshold that is consistent with state law. (2 C.F.R. § 200.320(a)(1)(iv)).

Small Purchase Procedures

⁶ This threshold is generally adjusted for inflation and city attorneys should check the threshold before employing this procurement method.

⁷ A “low-risk auditee” is an agency that meets the requirements in 2 C.F.R. § 200.520 for the preceding two audit cycles, such that an annual audit was performed and the auditor did not identify any deficiencies in internal control or report a substantial doubt about the auditee's ability to continue as a going concern.

⁸ The term “annual internal institutional risk assessment” is not defined in the C.F.R.

A small purchase is the purchase of property, supplies, or services which is greater than the micropurchase threshold but less than \$250,000. (2 C.F.R. § 200.320(a)(2)).⁹ Cities may also establish a small purchase threshold that is less than \$250,000 based on internal controls, and evaluation of risk, and the city's documented procurement procedures. For these small purchases, cities can use "small purchase procedures." Small purchase procedures are when a city gets price or rate quotations from an adequate number of qualified sources. (*Id.*). Cities are still required to comply with state or local small purchase dollar limits under if they develop their own small purchase threshold. If the city does decide to use the small purchase procedure, then price or rate quotations must be obtained from an adequate number of qualified sources. (2 C.F.R. § 200.320(a)(2)(i)).

Sealed Bids

Sealed bids are a procurement method where a city publicly solicits bids and a firm fixed-price contract (lump sum or unit price) is awarded to the lowest responsible bidder whose bid conforms with all material terms and conditions of the invitation for bids. (2 C.F.R. § 200.320(b)). In order for sealed bidding to be a feasible procurement method, the following conditions should be present:

- 1) A complete, adequate, and realistic specification or purchase description is available;
- 2) Two or more responsible bidders are willing and able to effectively compete against one another for the contract; and
- 3) The type of project is suitable for a firm fixed price contract and the selection of the successful contractor can be made primarily based on price. (2 C.F.R. § 200.320(b)(1)(i)).

The sealed bidding procurement method is a type of formal procurement method and cities that use the method must formally advertise the invitation to bid. To use the sealed bid procurement method, cities must abide by the following requirements:

- 1) Cities must publicly advertise and solicit bids from an adequate number of qualified sources and give these sources sufficient time to respond before the bids are opened;

⁹ Similar to the micropurchase threshold, the small purchase threshold is adjusted for inflation regularly. (See 2 C.F.R. § 200.1). The small purchase procurement threshold is sometimes referred to as the "simplified acquisition threshold."

- 2) The invitation for bids must include specifications and attachments allowing bidders to properly respond;
- 3) The bids must be publicly opened at the time and place specified in the invitation for bids; and
- 4) Payment discounts may only be used to determine the low bid when prior experience indicates that such discounts are usually taken advantage of. (2 C.F.R. § 200.320(b)(1)(ii)).

Cities may reject any or all bids if they can demonstrate a sound reason. (*Id.*).

Competitive Proposal Procurement

The competitive proposal procurement method is another type of formal procurement method. Competitive proposal procurement method is typically used when conditions are not appropriate to use the sealed bids process. (2 C.F.R. § 200.320(b)(2)). Under this procurement method, cities publish a request for proposal and a fixed-price or cost reimbursement contract is awarded to the lowest, responsive bidder. A city choosing to use the competitive proposal procurement method must follow four requirements:

- 1) The city's requests for proposals must be publicized and identify all evaluation factors and their relative importance. Proposals must be solicited from an adequate number of qualified offerors. Any response to publicized requests for proposals must be considered to the maximum extent practical;
- 2) The city must have a written method for conducting technical evaluations of the proposals received and making selections;
- 3) Contracts must be awarded to the responsible offeror whose proposal is most advantageous to the city, with price and other factors considered; and
- 4) The city may use competitive proposal procedures for qualifications-based procurement of architectural/engineering ("A/E") professional services, where an offeror's qualifications are evaluated and the most qualified offeror is selected, subject to negotiation of fair and reasonable compensation. (2 C.F.R. § 200.320(b)(2)(i)-(iv)).

The procurement method, where price is not used as a selection factor, can only be used in procurement of A/E professional services. This procurement method is often referred to as “qualifications-based procurement.” Qualifications-based procurement cannot be used to purchase other types of services through A/E firms that are a potential source to perform the proposed effort. (2 C.F.R. § 200.320(b)(2)(iv)).

Noncompetitive Negotiation

Noncompetitive negotiation or noncompetitive procurement is a procurement method where a city solicits a proposal from only a single source or from multiple sources. (2 C.F.R. § 200.320(c)). Noncompetitive negotiation can only be used by cities in five specific circumstances:

- 1) The property or service sought is does not exceed the micropurchase threshold of \$10,000;
- 2) The property or service sought by the city is only available from a single source;
- 3) An emergency exists that will not allow the city to suffer the delay from publicizing a competitive solicitation;
- 4) The city receives written permission from the federal agency that awarded the city the money;
- 5) The city deems competition inadequate after soliciting bids from a number of sources. (2 C.F.R. § 200.320(c)(1)-(5)).

The Green Energy Transition

As elected officials become more concerned with the impact of climate change on their communities, city attorneys will be tasked with guiding cities through the state’s purchasing requirement for renewable energy and energy efficient projects. In 2011, Governor Brown signed SB 411 into law which required California to get 33% of its electricity from renewable sources, such as wind and solar energy, by the year 2020. In 2015, Governor Brown signed SB 350 into law, which increased California’s renewable electricity procurement goal from 33% in 2020 to 50% by 2030.¹⁰ In 2018, that goal was

¹⁰ [Stats. 2015, ch. 547; Sen. Bill No. 571 \(2015–2016 Reg. Sess.\) \(“SB 350”\).](#)

pped to 60% by 2030.¹¹ The California Energy Commission's Renewables Portfolio Standard stipulates that 100% of the state's energy must be carbon-free by 2045.

On their own, elected municipal officials are also charting a clean energy future for their cities. For instance, the City of Los Angeles unveiled a plan in 2021 to become the first major city in the United States to eliminate fossil fuels from its power supply.¹² San Diego's Climate Action Plan, unanimously passed by its City Council in 2015, calls for the City to only use electricity from renewable sources by 2035. In 2008, San Francisco adopted an ordinance amending the City's Environment Code to create greenhouse gas emissions targets and direct various city departments to take necessary actions to meet these goals. As part of the plan to reduce greenhouse gases, the ordinance charges the San Francisco Public Utilities Commission with developing a plan to completely move San Francisco away from using fossil fuels by 2030. In 2007, San Jose adopted Green Vision, a plan for improving the city's sustainability. One of Green Vision's ten goals is to acquire all of San Jose's electricity from renewable sources by 2022.

And it is not just large cities in California that are joining the transition to renewable energy. According to the Sierra Club, 54 jurisdictions in California have adopted building codes to reduce their reliance on gas, including smaller cities such as Solana Beach, Fairfax, Emeryville, Santa Cruz, Windsor, and Davis.¹³ Research by the UCLA Luskin Center for Innovation indicates that the local demand for renewable energy is helping the state exceed its clean energy goals. Research by the Luskin Center found that one of the main drivers of this trend is community choice aggregators, which buy clean energy on behalf of their residents and businesses.¹⁴

So, by choice and state pressure, elected local officials are making the decision to build and invest more in renewable energy, energy efficiency, and energy conservation projects.

Renewable Energy and Energy Efficiency Projects

As renewable energy, energy efficiency, and energy conservation projects become more of a political imperative for municipal elected officials, city attorneys will be tasked with guiding these officials through the procurement process. This section runs down the

¹¹ The State released the first joint agency report and summary document explaining how the State's electricity system can become carbon free by 2045.

¹² Sammy Roth, [Los Angeles now has a road map for 100% Renewable Energy](#), Los Angeles Times (March 24, 2021).

¹³ Matt Gough, [California's Cities Lead the Way to a Gas-Free Future](#), Sierra Club (July 22, 2021).

¹⁴ Michael Einstein, [Local demand is helping California surpass renewable energy targets](#), UCLA Newsroom (February 1, 2021).

six procurement methods which cities may use for public works projects, with particular focus on how these procurement methods can be used for renewable energy and energy efficiency projects.

Formal or Informal Request for Proposals

The City may draft a formal or informal request for proposals to consider when selecting contractors and providers for its public works projects. A request for a proposal (“RFP”) and request for qualifications (“RFQ”) are invitations to contractors and providers to submit proposals for public works contracts. Cities then evaluate these proposals based on price, quality, and other relevant factors. When a City issues an RFQ, it invites contractors to submit statements of qualifications. Cities typically use RFQs when choosing the most qualified service provider is the city’s paramount objective. RFPs and RFQ procurement allow cities to consider multiple selection criteria, not just price. By contrast, with competitive bidding it all boils down to submitting a bid—i.e., a lump sum price—and selection of the responsive bid from responsible bidders is based solely on the best price.

Cities may also employ a two-step process, by first using an RFQ process to narrow a pool of qualified respondents, then inviting only the qualified respondents to submit proposals under an RFP process.

Unlike the competitive bidding process, the legal guardrails around an RFP or RFQ are light. However, public attorneys should ensure that their clients do not use the RFP or RFQ process when competitive bidding is required by statute or a city’s own purchasing requirements. City attorneys should also ensure that submitted proposals are evaluated based on the stated criteria.¹⁵ Otherwise, cities may be forced to redo the RFP or RFQ process. Finally, unlike the competitive bidding process where contractors’ bids must be opened and announced in public and are subject to immediate disclosure as public records, the California Supreme Court has ruled that proposals submitted to public agencies in response to an RFP are not subject to disclosure under the California Public Records Act until the agency has completed negotiations with proposers. (*Michaelis, Montenari & Johnson v. Superior Court* (2006) 38 Cal.4th 1065, 1072-75.) The Supreme Court applied the “catchall” exception set forth in Government Code section 6255 and concluded that the public interest in protecting an agency’s bargaining position during contract negotiations outweighs the public interest in disclosing proposals before the negotiations are concluded.

¹⁵ In *Eel River Disposal & Resource Recovery, Inc. v. County of Humboldt* (2013) 221 Cal.App.4th 209, a county improperly deviated from its own stated evaluation criteria and procedures in its RFP by adding a new criterion (local preference) during the evaluation process.

The advantages of using an RFP or RFQ process when selecting contractors for public works projects is that cities may consider the quality of the services or materials to be provided and are not limited to just considering price as with competitive bidding. Doing so may enable cities to achieve the best services or materials for public benefit. Cities may also negotiate on price with qualified contractors, which may save taxpayer money. The disadvantages of using an RFP or RFQ process when selecting contractors is that it may be more time-consuming than the competitive bidding process as it takes staff time to draft an RFP or RFQ and city attorneys should ensure that city staff do not deviate from the stated evaluation criteria and judge the resulting proposals and statement of qualifications under other factors. Otherwise, cities may be forced to redo the entire process.

Sole-Source Procurement

In order to foster competition and achieve the lowest possible bid price and the highest possible quality of services and materials, cities are generally prohibited from including provisions in their bid documents which limit competition or which require a single source to be the provider of materials or products. (Pub. Contract Code, § 3400.) The motivating concept behind this provision is that competitive bidding is designed to prevent favoritism, cronyism, and kickbacks in the award of public contracts and that restrictions on sole-source procurement encourage private companies to “develop and implement new and ingenious materials, products, and services that function as well, in all essential respects, as materials, products, and services that are required by a contract, but at a lower cost to taxpayers.” (Pub. Contract Code, § 3400, subd. (a).) The prohibition on bidding provisions limiting competition is set forth in Public Contract Code section 3400(b) as follows:

“No agency . . . nor any public officer or person charged with the letting of contracts for the construction, alteration, or repair of public works shall draft or cause to be drafted specifications for bids . . . in a manner that limits the bidding, directly or indirectly, to any one specific concern.”

Public agencies are generally prohibited from “calling for a designated material, product, thing or service by specific brand or trade name unless the specifications list at least two brands or trade names of comparable quality or utility and is followed by the words ‘or equal’ so that bidders may furnish any equal material, product, thing, or service.” The exceptions to this general requirement are set forth in Public Contract Code section 3400. The four statutorily recognized exceptions are:

- (1) A field test or experiment is necessary to determine a product’s suitability for future use;

- (2) the designation of a particular material or product is necessary to match others in use;
- (3) in order to obtain a material that is only available from one source;
or
- (4) to respond to a declaration of emergency.

To take advantage of the fourth exception, the city council must declare an emergency by four-fifths vote. (Pub. Contract Code, § 3400, subd. (c)(4)(A).) The city can also use sole-source procurement when there has been an emergency declaration by the state, state agency, or county. In that scenario, the city council must include the findings for the emergency in the invitation for bid or RFP.

The advantages related to using a sole-source procurement method are that including such a requirement ensures that the required material, product, or service is included and that the goal of the public works project is achieved. The disadvantages related to using a sole-source procurement method are that it may increase the cost of the public works project and it may not be strictly necessary for the city to have required the named material, product, or service. Therefore, city attorneys should also check with city staff when they recommend including a sole-source procurement requirement for a public works project.

Design-Build Contracts

Design-build contracts are public works contracts in which both the design and construction services for the project are contracted from a single entity—often called a design-build entity. (Pub. Contract Code, § 22161, subd. (c)). In contrast, under the traditional design-bid-build method, the design and construction aspects of a public works project are conducted and bid by two different firms: a design firm and a construction firm. The rationale behind the design-build procurement method is that this method of contracting should be used when a contractor can combine functions and reduce project costs and complete the project quicker. (Pub. Contract Code, § 22161, subd. (a)). The design-build method reduces the risk cities face as to “delay claims” that arise out of the “city’s” plans (developed by the design professionals) causing delay claims to the contractor.

Cities may only use design-build contracts for public works projects worth over \$1 million. (Pub. Contract Code, § 22162, subd. (a)). Cities must also design a conflict-of-interest policy for design-build contracts. (Pub. Contract Code, § 22162, subd. (c)).

Cities wishing to enter into a design-build contract must follow a four-step process. First, the city must prepare documents setting the scope and estimated price of the project as well technical plans and specifications covering the quality of materials and equipment to be used. (Pub. Contract Code, § 22164, subd. (a)(1)). The plans must be put together by a licensed design professional (*Id.*)

Second, the city issues a RFQ to create a shortlist of qualified design-build entities for the project. (Pub. Contract Code, § 22164, subd. (b)).

Third, the city determines which companies have the experience, capability, and financial capacity to complete the project. (Pub. Contract Code, § 22164, subd. (b)). In its RFQ, the city must include information about it intends to evaluate potential design-build entities.

Fourth, the city issues an RFP for final selection of a bidder based on competitive bidding or best value including price, design, expertise, life cycle costs, labor force availability, and safety record. (Pub. Contract Code, § 22164, subd. (d)). Then the city awards the contract to a bidder. Design-build entities cannot be prequalified unless they provide an enforceable commitment that they along with all their subcontractors will use “a skilled and trained workforce.” (Pub. Contract Code, § 22164, subd. (c)). This requirement does not apply, however, when the city has a project labor agreement governing the work.¹⁶

City attorneys should be familiar with design-build contracts, especially because many solar power projects are design-build projects. The advantage of design-build contracts is that a city only has to contract with one bidder, making it easier for city staff to coordinate, especially if there are changes to the design of the project. Work may also be started quicker with the initial design of the project. The disadvantage of design-build contracts is that the city may find it difficult to evaluate different design proposals, especially with regard to their constructability and site suitability.

Cooperative Purchasing/“Piggybacking”

Under a local purchasing ordinance, cities may—without prior competitive bidding—contract with suppliers who have been awarded contracts by the state or other local agencies for the purchase of goods, information technology, and services. This is often called “piggybacking” or intra-government purchasing. (Pub. Contract Code, § 10298(a)). The idea behind this procurement method is that cities do not need to conduct

¹⁶ Project labor agreement means a “prehire collective bargaining agreement that establishes terms and conditions of employment for a specific construction project or projects and is an agreement described in Section 158(f) of Title 29 of the United States Code.” (Pub. Contract Code, § 2500).

their own competitive bidding process since one has already been conducted and doing so would just be duplicative.

Such state contracts typically take the form of master agreements, price schedules, or multiple award schedules that allow the state to take advantage of leveraged pricing that can be obtained through the state's buying power. The local agency may make these purchases directly from the vendors or the state may provide assistance to local agencies in making these acquisitions. (See Pub. Contract Code, §§ 10298-10299, 12100-12113).

In contracting for renewable energy projects, city attorneys representing multiple agencies may advise their clients that banding together to increase purchasing power parity is acceptable. Additionally, as far as we are aware the state has not encouraged cities to "piggyback" on renewable energy projects and services that it has contracted for. However, that is likely because the scale of services and materials required by the state is at a scale significantly greater than for municipalities. "Piggybacking" on state renewable and energy efficient projects may be something for city attorneys to keep their eyes on in the years to come.

Job Order Contracts

A general law city may not enter into a job order contract.¹⁷ While counties and other government agencies are permitted to engage in this procurement method, cities are not specifically allowed to. A job order contract is an agreement for a fixed price per unit for the performance of minor construction, renovation, alteration, painting, and repair of existing facilities. A job order contract is generally a multi-year contract on siting of a base year and multiple option years where the delivery of services is guaranteed at a fixed price during the term, but the agency has not yet specified the location or delivery time of the services. When the contract is awarded the specific project to be performed is not identified. These contracts are prohibited for general law cities because there is no provision in state law allowing such contracts. (See 76 Ops Cal Atty Gen 126 (1993)).

City attorneys should advise their clients to avoid job order contracts. This is especially crucial as many solar and renewable energy companies work with entities, such as community college districts and other local agencies, that are eligible for job order contracts and may pressure cities to enter into job order contract arrangements. Every city attorney should inform their clients that agencies subject to the Uniform Public Construction Cost Accounting Act are required to adopt—and bidders permitted to

¹⁷ Counties may enter into job order contracts of less than \$3 million (Pub. Contract Code, § 20128.5). Additionally, there are statutory carveouts for the Los Angeles Unified School District and other non-municipal agencies (See Pub. Contract Code, § 20919 et. seq.).

examine—plans, specifications, and working details for all public projects in excess of \$75,000. (Pub. Contract Code, § 22039, 22040.).

Energy Conservation Contracts

In order to promote energy conservation and the use of renewable energy sources, the Legislature has special contracting procedures for renewable energy and energy efficiency projects. The Government Code defines which projects qualify, such as projects for energy conservation facilities, alternate energy equipment—such as solar, biomass, wind, geothermal, hydroelectric—and conservation measures and services. (Gov. Code, § 4217.11).¹⁸

The Government Code also sets out a separate contracting procedure for these energy conservation contracts. Cities can use future cost avoidance and savings from these energy projects to pay for the upfront costs of energy efficient measures through a guaranteed savings program. This contracting method comes from the Energy Conservation Contract statutes (Gov. Code, § 4217.10-4217.18.)

The law gives cities broad latitude in entering into and structuring these energy conservation contracts. As Government Code section 4217.18 states:

“The provisions of this chapter shall be construed to provide the greatest possible flexibility to public agencies in structuring agreements entered into hereunder so that economic benefits may be maximized and financing and other costs associated with the design and construction of alternate energy projects may be minimized. To this end, public agencies and the entities with whom they contract under this chapter should have great latitude in characterizing components of energy conservation facilities as personal or real property and in granting security interests in leasehold interests and components of the alternate energy facilities to project lenders.”

Therefore, energy conservation contracts are a possible procurement method for cities to explore and employ. Care must be taken to document the required findings and present such in the requisite public hearing.

Hearing Requirement

¹⁸ “Energy conservation facility” means alternate energy equipment, cogeneration equipment, or conservation measures located in public buildings or on land owned by public agencies.

To employ this contracting method, a city has to hold a public hearing that is posted two weeks in advance. (Gov. Code, § 4217.12). The public agency can use the RFP process to select a qualified provider or can choose from a qualified pool of providers.

A hearing is not required if a city is going to impose energy conservation measures related to electrical or thermal energy rates from a public utility, the Public Utilities Commission, or the State Energy Resources Conservation and Development Commission. (Gov. Code, § 4217.15).

Findings Requirement

Competitive bidding is not required for renewable energy and energy efficiency contracts. Instead, renewable energy and energy efficiency projects may be sole-sourced or procured through either a formal or informal request for proposals process under Government Code § 4217.10 *et seq.* if the city council is able to make two findings about the project at a regular meeting, following a public hearing:

1. “That the anticipated cost to the public agency for thermal or electrical energy or conservation services provided by the energy conservation facility under the contract will be less than the anticipated marginal cost to the public agency of thermal, electrical, or other energy that would have been consumed by the public agency in the absence of those purchases.
2. “That the difference, if any, between the fair rental value for the real property subject to the facility ground lease and the agreed rent, is anticipated to be offset by below-market energy purchases or other benefits provided under the energy service contract.”

(Gov. Code, § 4217.12).

The definitions of “Conservation measures”, “Conservation services”, “Energy conservation facility”, and “Energy service contract” are found at subsections (c) through (f) of Government Code § 4217.12.

There is no published case law on what constitutes sufficient findings for a city. However, the statute gives cities broad authority as articulated in Government Code section 4217.18.

Finally, the regular meeting at which the public hearing will be held (and the findings made) must be publicly noticed at least 2 weeks before the proposed meeting date. The resulting contract—whether it be a design-build contract, power purchase

agreement, or other energy services contract— may be on the terms that are deemed to be in the best interest of the city. (Gov. Code, § 4217.13).

Cities may also continue to enter into contracts and leases for energy conservation projects in any other manner authorized by law. (Gov. Code, § 4217.17).

Government Code Section 1090 Issues

Energy conservation contracts also raise issues related to Government Code section 1090, which prohibits public officers, while acting in their official capacities, from making contracts in which they are financially interested. A contract that violates Section 1090 is void. (*Thomson v. Call* (1985) 38 Cal.3d 633, 646.). The Fair Political Practices Commission (“FPPC”) has opined that Government Code section 1090 prohibited the City of Pleasanton from entering into two separate contracts with the same energy services company where the second contract’s scope of work would be established through services performed under the initial contract. (Advice Letter, No. A-20-042; Advice Letter, No. A-19-057.).

Subsequently, the FPPC opined that the Pleasanton could enter into an energy services contract with a company who is given the authority to determine the scope of work for the contract and then performs the work that the city selects, after the contract is amended to reflect the actual work that the city authorizes the company to perform. The FPPC stated that “Section 1090 would not prohibit the City from contracting with a company to both determine the scope of work and then perform the work so long as all of the contemplated services are contained in a single contract.” (Advice Letter, No. A-20-143.).

Since the contract that Pleasanton was proposing required amendment after the company provided options detailing the scope of work it could perform, the FPPC stated that Section 1090 would prohibit Pleasanton from entering two separate contracts with the same energy services company where the scope of work in the subsequent amended contract would be established through services performed under the initial contract. The FPPC’s reasoning is based on the holding that “changes to existing contracts are themselves ‘contracts’ under section 1090.” (See, e.g., *City of Imperial Beach v. Bailey* (1980) 103 Cal.App.3d 191, 193; see also 98 Ops.Cal.Atty.Gen. 102 (2015)). Simply put, Section 1090 prohibits cities from entering into a contract with a company to develop energy related improvement options and then hire that same firm to perform the work.

Qualified Energy Services Companies

A city may also create a pool of qualified energy service companies based on qualifications, experience, pricing, or other pertinent factors from which to award

“energy savings contracts” or contracts for an “energy retrofit project” through a competitive selection process. (Pub Util. Code, § 388). “Energy retrofit project” means a project where a local agency works with a qualified energy service company to identify, develop, design, and implement energy conservation measures in existing facilities to reduce energy or water use or make more efficient use of energy or water.¹⁹ “Energy savings” means a measured and verified reduction in fuel, energy, or water consumption when compared to an established baseline of consumption. (Pub. Util. Code, § 388, subd. (c)(2)).

The pool of qualified energy service companies and contractors must be reestablished by a city at least every 2 years or it will expire. (Pub. Util. Code, § 388, subd. (b)).

Conclusion

Cities have a variety of contract procurement methods at their disposal. City attorneys should be familiar with these methods and the situations in which each contract procurement method is advantageous for their client to use. Additionally, city attorneys should familiarize themselves with the contracting procedure for energy conservation contracts as cities may elect to use this contracting procedure more in the coming years as the push to use clean energy continues to gain in importance for elected officials.

¹⁹ “Qualified energy service company” means a company with a demonstrated ability to provide or arrange for building or facility energy auditors, selection and design of appropriate energy savings measures, project financing, implementation of these measures, and maintenance and ongoing measurement of these measures as to ensure and verify energy savings.



FPPC Committee Update on Providing Conflict of Interest Advice

Thursday, May 5, 2022

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Find the paper for the session **FPPC Committee Update on Providing Conflict of Interest Advice** at the following link:

<https://www.calcities.org/resource/providing-conflict-of-interest-advice>



New Housing Laws: Navigating & Implementing SB 8, 9, 10

Thursday, May 5, 2022

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This paper analyzes Senate Bills (SB) 8, 9 and 10. These bills took effect on January 1, 2022 and are intended to help address California’s housing shortage by expanding opportunities for construction of residential units. The bills change how cities must process housing development projects, including mandating various ministerial approval processes. Local governments do retain some control in crafting zoning standards and regulations. In light of these legislative changes, this paper analyzes the bills and shares practical insights for cities as they implement these laws. This paper also analyzes the experiences of various municipalities, and offers additional options to cities crafting their own regulations.

I. Senate Bill 9

A. The Basics: Summary of SB 9 Provisions

Signed into law on September 16, 2021 and effective on January 1, 2022, SB 9 was widely discussed as the “end of single-family zoning.” SB 9 requires cities to ministerially consider and approve development projects consisting of two-lot subdivisions and/or up to two (2) housing units per lot. Generally, SB 9 overrides all discretionary local subdivision and development standards, but does preserve some authority for municipalities to enact regulations through the adoption of new objective zoning regulations. To be considered for ministerial approval, however, the proposed subdivision or development project must meet certain location and development criteria.

1. SB 9 Projects Must Meet Certain Location Requirements.

To benefit from the mandatory process under SB 9, a proposed two-lot subdivision or two-unit development must meet certain location requirements.¹

The Project must be located in:	The Project cannot be located in:
<p>(1) A single-family residential zone; and</p> <p>(2) Within an “urbanized area” or “urban cluster”, when the project is proposed to be located in a city or an unincorporated area. This definition covers most urban and suburban municipalities in California.</p>	<ul style="list-style-type: none"> ➤ A designated historic district or on a historic or landmark site (unless allowed by the city). ➤ “Sensitive” areas identified under section 65913.4(a)(6)(B)-(K) (the statute created by SB 35), including: <ul style="list-style-type: none"> • Wetlands, earthquake fault zones, and hazardous waste sites • Land designated for agricultural protection by a local ballot measure • Lands subject to “conservation easements” • FEMA-designated flood plains or regulatory floodways • High Fire Hazard Severity Zones (based on CalFire maps)

There are two points worth highlighting. First, although not specified in SB 9, “conservation easements” likely includes those restrictive covenants binding upon successive land owners that are intended to protect against future developments. However, nothing in SB 9 cites

¹ Gov. Code §§ 66411.7(a); 65852.21(a).

to Civil Code section 815 *et seq.*, sections which contain extensive requirements for certain conservation easements created by deed, will, or other restrictive instruments that are binding upon successive owners in perpetuity, and which may only be held by certain non-profit organizations, public entities, and federally recognized tribes. As such, the term “conservation easement” likely also includes an area that is subject to a restrictive covenant to retain the area predominantly in its natural, scenic, agricultural, or open-space conditions even if the restrictive covenant was not prepared or granted pursuant to the process specified in the Civil Code.

Second, “High Fire Hazard Severity Zone” restriction does not apply to sites that have been excluded from the hazard zone designation by a local agency, or sites that have adopted fire hazard mitigation measures.

2. The Project Must Meet Certain Anti-Displacement Requirements.

To qualify for the SB 9 process, a subdivision or development project cannot involve the demolition or alteration of: (a) deed-restricted affordable housing; (b) rent-controlled housing; (c) housing withdrawn from the rental market in the last 15 years pursuant to the Ellis Act; or (d) housing that was occupied by a tenant in the past 3 years.² For SB 9 housing development projects, the project also may not demolish more than 25 percent of the existing unit’s exterior structural walls, unless that site has not been tenant-occupied in the last three years, or if there is a local ordinance permitting such demolition.³

3. A Subdivision Project Must Comply With Certain Restrictions.

SB 9 includes certain restrictions for projects proposing to subdivide lots using the bill’s provisions. Specifically, each lot resulting from the subdivision must be at least 1,200 square feet and must be at least forty percent (40%) of the original lot (i.e., 50-50, 40-60, or a split between those ranges would be permitted).⁴ In addition, lots previously subdivided pursuant to SB 9 cannot be subdivided again using SB 9.⁵ Finally, adjacent parcels may only be subdivided via SB 9 if their owners are independent and not acting “in concert” with each other.⁶

4. If the SB 9 Project meets Criteria (1) – (3) above, as applicable, it must be reviewed and approved ministerially.

If the proposed two-unit development project or lot subdivision satisfies the foregoing criteria, a city must approve the project ministerially. A project under SB 9 could be proposed as unit development or subdivision separately, or combined as one project. As explained further below, cities may impose objective zoning, subdivision, and design review standards that do not conflict with SB 9. However, cities may only deny an SB 9 project that otherwise meets such local standards and state law criteria if their “building official” makes a written finding, based on preponderance of the evidence (i.e., majority of the evidence supports such finding), that the project would have a specific, adverse impact on public health and safety that cannot be mitigated without denying the project. The specific, adverse impact must be based on specific, objective

² Gov. Code §§ 65852.21(a)(3)(A)-(C), 66411.7(a)(3)(D)(i)-(iv).

³ Gov. Code §§ 65852.21(a)(5).

⁴ However, local agencies may adopt a smaller minimum lot size by ordinance (Gov. Code § 66411.7(a)(2)(B)).

⁵ Gov. Code § 66411.7(a)(3)(F).

⁶ Gov. Code §§ 66411.7(a)(1), (a)(2)(F)&(G).

public health or safety standards that were in effect prior to the project application submittal.⁷ This is a high standard.

5. Cities retain certain authority to impose specific requirements on SB 9 projects.

The table below summarizes the permitted and prohibited requirements under SB 9.

	City May Impose/Has Authority	City May Not Impose/No Authority
Subdivision Requirements	<ul style="list-style-type: none"> ➤ Easements for provision of public services ➤ Easements to ensure subdivided lots have access to the public right of way 	<ul style="list-style-type: none"> ➤ Dedication of right-of-way ➤ Construction of offsite improvements ➤ Correction of nonconforming zoning conditions
Objective Standards	<p>Objective zoning standards, subdivision standards, and design standards</p> <p>*Note: adjacent or connected structures must be permitted if they meet building code safety standards and are sufficient to allow separate conveyance.</p>	<ul style="list-style-type: none"> ➤ No setback can be required if unit is built within the footprint of an existing structure ➤ Otherwise, maximum 4’ setback from side and rear yards ➤ Standards cannot physically prevent the development of an 800 square foot unit
Rental Restrictions	<ul style="list-style-type: none"> ➤ Prohibit short term rental of any units created through SB 9 ➤ For lot splits, applicants must submit an affidavit stating intent to occupy one of the units as a principal residence for at least 3 years 	No additional owner occupancy standards allowed.
Parking Requirements	Maximum one parking spot per unit.	<p>No parking spots may be required if a Project site is:</p> <ul style="list-style-type: none"> ➤ Within ½ mile of a high-quality transit corridor or major transit stop <ul style="list-style-type: none"> • An existing rail or bus rapid transit station • A ferry terminal served by either a bus or rail transit service • Fixed route bus service with service intervals no longer than 15 minutes during peak commute hours ➤ Within one block of a car share vehicle
ADU Restrictions	<p>May prohibit ADUs and JADUs:</p> <ul style="list-style-type: none"> ➤ When the lot is subdivided pursuant to SB 9 and there are two units existing/constructed on each lot ➤ When both subdivision and unit construction are done via SB 9 	Nothing in SB 9 authorizes cities to limit the construction of ADUs and JADUs when the lot is not being subdivided.

⁷ Gov. Code §§ 65852.21(d); 66411.7(d).

B. SB 9 Became Effective; Now What?

SB 9 authorizes municipalities to adopt an ordinance to implement the provisions of Government Code sections 65852.21 and 66411.7. Such local ordinances are not subject to the requirements of the California Environmental Quality Act (CEQA).⁸ To date, most jurisdictions have not taken any formal action to implement SB 9, but a number of cities have adopted ordinances to regulate SB 9 projects, as authorized by the statute. While some ordinances simply restate the requirements of state law, others proactively regulate SB 9 units.

In March 2022, the California Housing and Community Development Department (“HCD”) published an SB 9 Fact Sheet (“HCD Fact Sheet”) that provides an overview of the law, its primary requirements, and relationship to other housing laws.

Cities that have not yet adopted an ordinance to implement SB 9 may consider taking certain steps to streamline the administrative process to review and approve an SB 9 application. Examples of these steps may include:

- *Forms.* Create deed restriction forms to prohibit the short-term rental of any units created through SB 9, and to prohibit future SB 9 lot splits and non-residential uses.
- *Affidavit.* Create an owner occupancy affidavit form for applicants seeking an SB 9 lot split.
- *Fees.* Consider which types of fees may now be inapplicable to SB 9 projects due to the ministerial review process. For example, instead of requiring a separate “design review” fee, the costs of any ministerial design review may be incorporated into a single SB 9 application fee.

C. Implementing SB 9: Frequently Encountered Issues

For cities that have adopted an ordinance to implement SB 9, several commonly encountered issues come to mind. We examine those issues in this section.

1. Only “Single-Family Zones” are covered by the statutes.

SB 9 requires a proposed subdivision or housing development project to be located within a “single-family residential zone.” This means that SB 9 does not apply to parcels within multi-family residential, mixed-use zones, and non-residential zones. For a zoning district that permits a combination of single-family residential and other uses, cities should review the land use designation and requirements for such district under the general plan, any applicable specific plans, and the zoning code, to determine whether the predominant, primary use in that district is single-family. If single-family uses are only an ancillary use in that zoning district, then such zone would not be considered a single-family zone and not subject to SB 9. This interpretation is reflected in the HCD SB 9 Fact Sheet and also consistent with the intent of the legislation to increase density in areas reserved for single-family use, rather than mandating the upzoning of multi-family areas or expanding residential uses in non-residential districts.

⁸ Gov. Code §§ 65852.21(j); 66411.7(n).

2. Maximum number of new construction units.

SB 9 produces a number of scenarios pursuant to which housing units may be constructed on whole and subdivided parcels. Housing development projects that propose only one unit are likely subject to SB 9.⁹ Among different variations of these scenarios, the maximum number of units that may be located on an independent lot is four. We illustrate several common scenarios as follows:

Scenario A: If the project proposes only units without subdivision:

If project site is a vacant lot	If project site has an existing primary residence	If project site has existing primary residence + ADU
2 SB 9 units, plus whatever ADUs/JADUs would be allowed on site and in no event more than two. ¹⁰	1 SB 9, plus whatever ADUs/JADUs would be allowed on site, and in no event more than two.	1 SB 9 unit plus whatever ADU/JADU would be allowed on site, and in no event more than two.

Scenario B: If the project proposes both a subdivision and the construction of housing units:

If project site is a vacant lot	If project site has an existing primary residence	If project site has existing primary residence + ADU
After the project site is subdivided, each vacant lot created pursuant to the subdivision may have up to 2 units. These units can be a combination of primary residence, SB 9 unit, ADUs and JADUs.	If the project site is subdivided so that one of the new lots is vacant and the other contains the existing primary residence, the lot with the residence may add 1 SB 9 unit or an ADU or a JADU. The vacant lot may have 2 units of any kind (provided that at least one is a primary unit) but no more than 2 units.	If the project site is subdivided so that one of the new lots is vacant and the other contains the existing primary residence + ADU, the lot with existing home + ADU cannot have more units. The vacant lot may have no more than 2 units.

3. “Offsite” Improvements. What can a city require?

The Subdivision Map Act permits local agencies to require the dedication of rights-of-way, easements, and reasonable “offsite and onsite improvements” for parcels created under a minor subdivision.¹¹ SB 9 creates an exception to this rule and prohibits municipalities from requiring

⁹ Gov. Code section 65952.21(i)(1) specifies that a housing development is considered to contain two residential units if the development “proposes no more than two new units” or “proposes to add one new unit to one existing unit.”

¹⁰ Unless a city is more permissive of ADUs and JADUs than required by state law, the number of permitted ADUs/JADUs depends upon whether the SB 9 units are attached or detached to each other. HCD has opined that if dwelling units are detached from each other, they are not within the definition of a “multifamily dwelling structure.” See Gov. Code § 65852.2(1)(D) which allows “existing multifamily dwelling” to have up to two detached ADUs that “are subject to a height limit of 16 feet and four-foot rear yard and side setbacks.”

¹¹ Gov. Code § 66411.1.

dedications of rights-of-way or the construction of “offsite improvements” as a condition of approving a parcel map for an SB 9 subdivision. This may include dedication of land within the subdivision that are needed for streets and alleys, drainage, parks and open space areas, and scenic easements. However, subdivision ordinances often require the subdivider to construct improvements that are necessary to serve the new parcels but are not intended to enhance or address the impact of the subdivision on neighboring public facilities. For example, cities often require a subdivision to collect and convey its storm water runoff by an approved storm drain system that protects off-site properties from increased runoff. To meet this need, storm drain facilities may need to be constructed outside of the subdivision area.

Do these facilities count as “off-site improvements” even though their intent is to serve the needs of the subdivision rather than alleviate impacts to the surrounding properties? It seems that the answer is “no” based on the nature and purpose of these improvements. Although the statutory language does not provide clear guidance, it appears that SB 9 likely did not intend to prevent cities from requiring improvements necessary for a subdivision to function properly. Instead, SB 9 probably intends to prohibit local agencies from deterring qualifying subdivision projects by requiring subdividers to provide public facilities or dedication of land that are clearly outside the scope of the subdivision. Thus, cities should review their subdivision ordinances with these considerations in mind.

4. Cities may craft objective standards for SB 9 projects consistent with the Housing Crisis Act of 2019 (SB 330).

SB 9 explicitly authorizes local agencies to “impose objective zoning standards, objective subdivision standards, and objective design review standards” provided the standards do not physically preclude the construction of up to two 800 square foot units, subject to certain other restrictions. However, this provision does not directly address the application of the Housing Crisis Act of 2019.

The Housing Crisis Act of 2019, also known as SB 330, prohibits cities from changing zoning of a parcel to a less intensive use or reducing the intensity of land use within an existing zoning district “below what was allowed under the land use designation or zoning ordinances of the affected county or affected city, as applicable, as in effect on January 1, 2018.”¹² Reducing the intensity of land use “includes, but is not limited to, reductions to height, density, or floor area ratio, new or increased open space or lot size requirements, new or increased setback requirements, minimum frontage requirements, or maximum lot coverage limitations, or any other action that would individually or cumulatively reduce the site’s residential development capacity.”¹³

Some argue, including many “YIMBY” housing advocacy groups, that the restrictions in SB 330 effectively prevent cities from adopting any regulations for SB 9 projects that are in any way different than the regulations that apply to single-family homes within the same zoning district. These groups argue that applying different regulations to SB 9 projects would necessarily reduce the intensity of land use since it would create a new restriction different from the status quo. They argue, for example, that adopting a 15-foot height limit for SB 9 projects in a zoning district with a 30-foot height limit for single family homes would violate SB 330 since it would require smaller units than would be possible applying the existing regulation for single family

¹² Gov. Code § 66300(b)(1)(A).

¹³ *Id.*

homes. Under this interpretation, the language in SB 9 authorizing local agencies to impose objective standards simply authorizes a local agency to impose the otherwise applicable standards for that zoning district, but not to adopt any new regulations.

This interpretation of SB 9 relies, however, on an expansive interpretation of SB 330 that is not well supported by the statutory text. SB 330 prohibits reducing the intensity of land use “below what was allowed under the land use designation or zoning ordinances of the affected county or affected city, as applicable, as in effect on January 1, 2018.”¹⁴ Since the typical jurisdiction’s zoning ordinance on that date would not have allowed the projects authorized by SB 9, subjecting SB 9 projects to standards different from what apply to traditional single family homes is not necessarily reducing the intensity of land use below that allowed on January 1, 2018.

Additionally, a reduction in the intensity of land use is defined as an action that would reduce a site’s “residential development capacity.” That phrase is not defined, and is not used anywhere else in the Planning and Zoning Law. However, the most logical way to understand SB 330’s requirement is to prohibit a change in zoning standards that would reduce the number of housing *units* that can be constructed and not the *size* of those units. This is consistent with the findings the Legislature made when adopting SB 330 that the development of more housing units was necessary to address the housing crisis.¹⁵ In the context of multi-family housing, changes in zoning standards, such as a reduction in height, can directly impact the number of housing units that can be built on a site. The same is not necessarily true for SB 9 projects, where state law already restricts the number of units that can be constructed. For example, a strict regulation limiting SB 9 units to 800 square feet regardless of other standards would obviously limit the size of units built pursuant to SB 9, but would not limit the number of units. Accordingly, many types of regulations will arguably not reduce the “residential development capacity” of sites in single family zoning districts. SB 330 does not restrict a city’s ability to adopt a regulation specific to SB 9 projects if the regulation does not reduce “residential development capacity”.

Last, the text of SB 9 does not support this position because both Government Code sections 65852.21 and 66411.7 authorize cities to impose, “notwithstanding any local law”, objective zoning, subdivision, and design review standards. Because SB 9 was enacted after SB 330, the Legislature presumably took existing law into account.¹⁶ Thus, the presence or absence of similar objective standards in a city’s zoning code to other types of residential projects arguably does not impact whether the city may adopt additional objective standards that are only applicable to SB 9 projects as long as such standards are consistent with state law.

5. SB 9 itself does not prohibit cities from imposing affordability restrictions.

Some jurisdictions have adopted ordinances requiring that whenever two units are constructed on a lot through SB 9, at least one of the units must be deed restricted as affordable housing. This type of inclusionary housing requirement mandates that the unit be affordable to and occupied by a household meeting certain income requirements. Although SB 9 does not reference affordability restrictions, a primary sponsor of the bill tweeted that SB 9 allows cities to “apply

¹⁴ *Id.*

¹⁵ See SB 330 (Stats. 2019 ch 654, Sec. 2).

¹⁶ Later enacted legislative provision prevails over a former version on the same subject. *Woods v. Young* (2015) 53 Cal.3d 315, 324 (1991).

whatever affordability provisions they want.”¹⁷ Furthermore, as described above, SB 9 authorizes cities to impose objective zoning standards, such as an inclusionary housing requirement.

Inclusionary housing ordinances constitute a valid exercise of a city’s police power but can become illegally confiscatory if they deny a property owner a fair and reasonable return on their property.¹⁸ Unlike a traditional inclusionary housing ordinance that commonly apply to at or below 15% of a housing development’s units, a similar restriction for an SB 9 project could potentially apply to as many as 50% of the development’s units. Because this percentage exceeds 15%, cities should ensure that there are no constitutional violations and obtain HCD approval, if required.¹⁹

6. Cities should exercise caution when designating landmark and historic property or district, or other sensitive areas.

Cities may prohibit SB 9 units within “a historic district or property included on the State Historic Resources Inventory ... or within a site that is designated or listed as a city or county landmark or historic property or district pursuant to a city or county ordinance.”²⁰

In late 2021, the City of Pasadena adopted an urgency ordinance prohibiting the construction of two units on the same lot on properties with individually designated landmarks or on properties within the City’s Landmark Districts. Subsequently, the California Attorney General’s Office sent Pasadena a letter alleging that this restriction violated SB 9 and that the City could not prohibit the construction of duplex units in the City’s Landmark Districts.²¹ The Attorney General reasoned that while SB 9 prohibits such projects on parcels “listed as a city or county landmark,” no similar restriction applies to projects within a landmark district. Rather, SB 9 only prohibits such projects within districts designated as historic. The Attorney General’s letter distinguished between “landmark districts” and “historic districts” and noted that the City’s ordinance allowed the creation of landmark districts based on “historical, cultural, development, and/or architectural context(s),” and therefore allowed the creation of landmark districts without regard to their historic value. More significantly, the Attorney General’s letter expressed concern that the City’s zoning ordinance only required 60% of the properties in a landmark district to contribute to the characteristics of the landmark district designation, and therefore the restriction on duplex units would potentially apply to parcels that did not themselves have “historical, cultural, development, and or/architectural context(s).” On April 1, 2022, the City of Pasadena transmitted to the Attorney General a nine-page legal analysis and supporting documentation to demonstrate why the Attorney General’s position is incorrect.²²

The Attorney General’s position may have wide ranging impact. Many historic and/or landmark preservation ordinances are drafted broadly, to allow consideration of other factors, such as cultural and architectural context. The Attorney General’s letter suggests SB 9 units may be constructed in any district created under this type of broad ordinance, regardless of the specifics

¹⁷ On August 31, 2021 Senator Scott Weiner tweeted, that “cities can apply whatever affordability provisions they want”: https://twitter.com/Scott_Wiener/status/1432727325850800132?s=20&t=2Y5yNz4SHN9EnUOT8iGtYQ

¹⁸ *California Bldg. Indus. Ass’n v City of San Jose* (2015) 61 Cal.4th 435.

¹⁹ Gov. Code § 65850.01.

²⁰ Gov. Code §§ 65852.21(a)(6), 66411.7(a)(2)(E).

²¹ A copy of the letter is available at <https://oag.ca.gov/news/press-releases/attorney-general-bonta-puts-city-pasadena-notice-violating-state-housing-laws>.

²² See <https://www.cityofpasadena.net/city-manager/news-releases/pasadena-mayor-responds-to-california-attorney-general-bonta-letter-demonstrating-how-pasadena-complies-with-state-housing-law/>.

of that district. Second, historic districts rarely, if ever, are comprised solely of sites that all have historic value. Rather, a few sites will have undoubtedly been redeveloped or otherwise changed before historic preservation efforts began. The Attorney General’s letter appears to imply that SB 9 projects must be allowed on properties in historic districts that do not themselves have historic value, regardless of how such a project may impact surrounding historic properties and the district as a whole. It is unclear whether the Attorney General will pursue any enforcement actions based on this broad interpretation of the law.

SB 9 requirements do not apply to parcels located in one of the sensitive areas enumerated in Government Code section 65913.4(a)(6)(B)-(K), such as high fire hazard severity zones and earthquake fault zones. Cities have relied on this authority to restrict the areas where SB 9 projects are allowed. However, some of these efforts have faced scrutiny, including from the California Attorney General. This is illustrated in the case of the Town of Woodside, where the Town adopted an ordinance which established that all lands in the town were mountain lion sanctuary. The Attorney General sent a letter to Woodside that indicated that this action was “quite clearly – contrary to the law.”²³ The Attorney General noted that the “habitat” of a species is different than its “range.” The Attorney General also noted that an exemption for any specific lot must be based upon substantial evidence. In Woodside’s case, the Attorney General stated that land already developed is, by definition, not a habitat, and municipalities must examine the attributes of individual parcels to make exemption determination under SB 9.

7. SB 9 Summary: Examples of discretion a city does have.

As discussed above, SB 9 allows cities to impose objective zoning, subdivision and design review standards that do not conflict with SB 9. Cities may also elect to impose less stringent requirements than those contained in state law. In addition, there are several requirements that typically would be applicable to housing developments and subdivision projects that SB 9 does not otherwise prohibit. Thus, if municipal regulations do not go “too far” or otherwise violate SB 9 (such as the requirement to allow at least an 800 square foot unit), cities have discretion of whether to include the following regulations in their SB 9 ordinances:

Development Standards:

- **Front Yard Setbacks.** Cities may retain the standard front yard setback requirements, or be more permissive and reduce the mandatory setbacks.²⁴
- **Side and Rear Setbacks.** Cities may be more permissive than the 4 four-foot state law maximums.
- **Height.** SB 9 does not directly regulate minimum or maximum heights or limits on stories.
- **Maximum size.** Must allow units to be at least 800 square feet. But cities may increase the maximum. Some cities, for example, allow SB 9 units to be built up to the maximum building envelope otherwise allowed in the zone (when taking into account the existing original primary dwelling), when taking into consideration height, lot coverage, landscaping requirements, etc.
- **Parking.** At most 1 parking space per unit is allowed – cities can opt to require less parking.

²³ The AG’s press release here: <https://oag.ca.gov/news/press-releases/attorney-general-bonta-memorandum-declaring-woodside-mountain-lion-sanctuary> . The Attorney General’s letter to Woodside is available here: <https://oag.ca.gov/system/files/attachments/press-docs/AG%20Letter%20to%20Woodside%20re%20SB%209.pdf>

²⁴ Gov. Code §§ 65852.21(b)(2)(i); 66411.7(c)(3)(B). Because state law does not prohibit front yard setbacks, they are allowed.

Some jurisdictions have opted to also require parking spaces be covered (i.e., a garage or carport). While not prohibited by SB 9, such requirements cannot physically prevent the construction of an 800 sq. ft. unit. Additionally, cities may wish to consider aesthetic impacts of such requirements if the lot can only accommodate a covered parking space within the front yard setback.

- **Design Requirements.** Cities are authorized to adopt objective design review standards under SB 9 that do not physically preclude construction of an 800 square foot. unit. To be considered “objective”, such standards must involve “no personal or subjective judgement by a public official” and are uniformly verifiable by an external and uniform benchmark that is available and knowable by both the developer and the public official prior to submitting an application.²⁵ Jurisdictions have implemented a number of requirements that would qualify as objective design standards:
 - Eave projections
 - Roof pitch
 - Façade materials and minimum required articulation
 - Color requirements (e.g., matching the color of the primary dwelling)
 - Design requirements for features such as windows, porches, balconies, etc.
 - Exterior lighting direction and shield
 - Height requirements for units, entrances, fences, retaining walls, and landscape
- **Incentives.** Cities may include incentives to comply with specified standards. For example, in exchange for applicants volunteering to comply with setback standards that are more stringent than otherwise allowed by SB 9, a city could allow additional height or stories for such units.

Subdivision Standards

- **Lot Depth.** HCD has stated that lot depth is an example of an acceptable subdivision standard.²⁶
- **Access for parcels and “flag lots”.** Cities may require lots to “have access to, provide access to, or adjoin the public right of way.”²⁷ This means, for example, that a city may require lots to either have direct access to a street of some specified minimum width (e.g., no less than 10 feet of frontage parallel to the street), or to have an easement to allow the same width of road access. When setting the mandatory minimum width, cities often consider the extent to which first responders will have sufficient access. It would be reasonable, for example, for a city to require, as a condition of an urban lot split, that the subdivided lot meet the same access requirements as apply to other lots in the single family zone such as minimum street width requirements, and maximum permissible hose-pull distances from fire hydrants.

Other standards

- **Percolation Test.** Cities are expressly allowed, but not required to, mandate that properties connected to an “onsite wastewater treatment system” (e.g., septic systems) to have “a percolation test completed within the last 5 years, or, if the percolation test has been recertified, within the last 10 years.”²⁸
- **Demolition.** Cities must allow a minimum of 25% of walls to be demolished for sites with

²⁵ Gov. Code §§ 65852.21(i)(2); 66411.7(m)(1).

²⁶ Lot depth is authorized by HCD in SB 9 Fact sheet, page 2.

²⁷ Gov. Code §§ 66411.7(e)(2).

²⁸ Gov. Code § 65852.21(c)(2).

no tenants in the last three years; but cities may allow more demolition than the minimum.²⁹

- **Development Impact Fees.** SB 9 does not limit the collection of impact fees on duplex units. However, limits on the collection of impact fees on ADUs and JADUs continue to apply.³⁰

D. SB 9 - Frequently Asked Questions

Can a city regulate front yard setbacks?

Yes. State law expressly prohibits cities from having side and rear setback requirements in excess of four feet, but says nothing about front yards.³¹ Therefore, requiring front yard setbacks is allowed.³² HCD’s Fact Sheet also supports this conclusion. Page 2 lists “front setbacks” as an example of an “objective development standard.” Page 3 of the HCD Fact Sheet notes that “SB 9 establishes an across-the-board maximum four foot side and rear setbacks,” but does not mention any prohibition on the imposition of front yard setback requirements.

Can a city prohibit more than 4 units?

Yes. As described by HCD, “In no case does SB 9 require a local agency to allow more than four units on a single lot, in any combination of primary units, ADUs, and Junior ADUs.” Moreover, SB 9 itself expressly states that if a lot split occurs, no more than two units (whether primary units, SB 9 units, ADUs, or JADUs) are required to be allowed on a lot.³³ SB 9 only requires allowing a lot to accommodate up to four units.³⁴ Section 65852.21(a) states that at most, two (duplex) units must be allowed on a lot. The statute only requires the addition of up to two new detached accessory dwelling units.³⁵

Can a city require on-site replacement sidewalks and curbs?

Yes. Although cities cannot “impose regulations that require dedications of rights-of-way or the construction of offsite improvements,”³⁶ this prohibition, by its own terms only applies to “offsite” improvements. Typically, a single-family property extends to the centerline of the street, and the city has an easement over that property. Thus, requiring curb or sidewalk improvements on the property would be lawful.³⁷

Can a city require setbacks of at least four feet for structures that are only partially in the same location as a prior structure?

²⁹ See Gov. Code § 65852.21(a)(5).

³⁰ See Gov. Code § 65852.2(f)(3).

³¹ See Gov. Code § 65852.2(b)(1).

³² See Gov. Code §§ 65852.21(b)(1), 66411.7(c)(1) [authorizing regulations not in conflict with SB 9].

³³ Gov. Code § 66411.7(j).

³⁴ HCD Fact Sheet, Page 2 [“SB 9 facilitates the creation of up to four housing units in the lot area typically used for one single-family home.”] See also page 5 [referencing three types of units: a single family residence, a duplex, or a four-plex]; see also page 6 [“SB 9 allows for up to four units...” and SB 9 has an “overall maximum of four units.”]

³⁵ See Gov. Code § 65852.2(e).

³⁶ Gov. Code § 66411.7.

³⁷ Gov. Code § 65852.21(b) allows cities, for duplexes, to adopt “subdivision standards.” Government Code 66411.7, relates to subdivisions, and implicitly allows standards for on-site improvements, by extension, for duplex units, cities may also impose such requirements.

Yes. Although no setback may be required for “a structure constructed in the same location and to the same dimensions as an existing structure”³⁸, cities may require compliance with four foot setbacks for structures that do not have the same footprint.³⁹

Can a city require applicants to record covenants?

Yes. A city is allowed, but not required, to require recordation. Nothing prohibits a city to require the recordation of any covenants. The authors of this paper are aware of at least one city that is expected to require applicants to record their affidavit stating the applicant’s intent to reside on the property for at least three years from the date of the approval of the urban lot split.⁴⁰

Does HCD have enforcement authority over SB 9?

No. HCD has acknowledged that it does not have legal authority to directly enforce SB 9.⁴¹ However, HCD has taken the position that “violations of SB 9 may concurrently violate other housing laws where HCD does have enforcement authority, including but not limited to the laws addressed in this document [such as the Housing Element Law, The Housing Accountability Act, and the Housing Crisis Act of 2019].”

If a lot is in a “Very High Fire Severity Zone”, is it automatically prohibited to build an SB 9 unit?

No. Although compliance with Government Code 65913.4(a)(6)(B)-(K) is mandatory for both duplex units and urban lot splits,⁴² subsection (D) does not automatically prohibit either duplexes or urban lot splits in very high fire severity zones. Rather, subsection (D) has a few exceptions. The most relevant is for “sites that have adopted fire hazard mitigation measures pursuant to existing building standards or state fire mitigation measures applicable to the development.”⁴³ As a result, most SB 9 units would be required to include various fire-safety mitigations to obtain a building permit.

May Cities Require An Applicant to Bring a Structure Into Compliance Prior to Approving an SB 9 project application?

SB 9 specifies that municipalities may not condition the approval of an SB 9 subdivision application on the correction of nonconforming zoning conditions. Nothing in SB 9 states that cities are prohibited from requiring an applicant to correct building code violations or hazardous conditions creating a threat to health and safety. Such conditions are typically a part of the building

³⁸ Gov. Code § 65852.21(b)(2)(B)(i).

³⁹ See Fact Sheet, page 3.

⁴⁰ See Gov. Code § 66411.7 (g)(1).

⁴¹ See Fact sheet page 2.

⁴² See Gov. Code 65852.21(a)(2) [for duplexes]; 66411.7(a)(3)(C) [for urban lot splits].

⁴³ Gov. Code § 65913.4(a)(6)(D) provides in full: “Within a very high fire hazard severity zone, as determined by the Department of Forestry and Fire Protection pursuant to Section 51178, or within a high or very high fire hazard severity zone as indicated on maps adopted by the Department of Forestry and Fire Protection pursuant to Section 4202 of the Public Resources Code. This subparagraph does not apply to sites excluded from the specified hazard zones by a local agency, pursuant to subdivision (b) of Section 51179, or sites that have adopted fire hazard mitigation measures pursuant to existing building standards or state fire mitigation measures applicable to the development.

permit review and issuance process and are intended to create safe and habitable housing conditions.

Can cities still require compliance with other subdivision-related requirements such as tree protection, stormwater control and Model Water Efficient Landscape Ordinance (MWELO)?

Yes. Cities should review such standards to make sure they are written in an objective manner as defined by statute, and that requirements such as tree protection rules do not prevent the construction of an 800 square foot unit. Otherwise, nothing under state law suggests these standards would be overridden.

Does SB 9 state that it applies to charter cities?

Yes. SB 9 states that “local agencies” must ministerially approve a qualifying subdivision or housing development project. SB 9 defines “local agency” to include both general law and charter cities.⁴⁴

Are there any lawsuits challenging SB 9?

Yes. Four Charter cities have sued the state, challenging the legality of SB 9. The four Los Angeles County cities are: Redondo Beach, Carson, Torrance, and Whittier.⁴⁵ The Charter cities argue that, among other things, the state constitution guarantees charter cities “home rule” and SB 9 conflicts with such authority over municipal affairs held by Charter cities. They also argue that the absence of mandated affordability requirement under SB 9 show that the statute isn’t reasonably related to the rationale expressed in the statute (i.e., a lack of affordable housing).

Is there an initiative to overturn SB 9?

There was. “Our Neighborhood Voices” had attempted to qualify for the statewide November 2022 ballot. But on February 18, 2022, the initiative backers announced that they are no longer collecting signatures, but will instead try for the 2024 ballot.⁴⁶

Are there special considerations for the Coastal Zone?

Yes. SB 9 expressly indicates that it does not lessen the applicability of the Coastal Act, except that cities “shall not be required to hold public hearings for coastal development permit applications” for duplexes or urban lot subdivisions.⁴⁷ HCD has not issued any guidance for how SB 9 is to apply in the Coastal Zone. However, on January 21, 2022, the California Coastal Commission issued a thirteen page memorandum analyzing how SB 9 should be applied in the Coastal Zone.⁴⁸

Must cities still ensure compliance with laws protecting tenants and affordable units?

⁴⁴ Gov’t Code §§ 65852.21(i)(3); 66411.7(m)(2).

⁴⁵ See: <https://therealdeal.com/la/2022/04/01/four-la-county-cities-sue-state-on-sb9s-split-resi-lots/>

⁴⁶ See: <https://ourneighborhoodvoices.com/our-neighborhood-voices-now-focusing-on-2024-ballot/>

⁴⁷ Gov. Code § 65852.21(k) [for duplex units]; Gov. Code § 66411.7(o) for urban lot subdivisions.

⁴⁸ <https://documents.coastal.ca.gov/assets/rflg/SB9-Memo.pdf>.

Yes. The Housing Crisis Act of 2019 establishes that if a housing project proposes to demolish existing units, it must create at least as many existing units as will be demolished. There are special protections for “protected units.” These are units which have been rented in the last 5 years to lower income households, units withdrawn under the Ellis Act, units subject to a restrictive rent covenant, or subject to rent control. If units are to be demolished, or tenants displaced, those laws remain in place.⁴⁹

II. Senate Bill 8

In 2019, the Legislature adopted SB 330, the Housing Crisis Act of 2019. The law enacted a number of restrictions on local agencies’ local control and discretion regarding proposed “housing development projects.” Many of SB 330’s provisions were originally scheduled to sunset on January 1, 2025. However, SB 8 extends the date of the current sunset provision. It also changes the definition of “housing development project” in potentially significant ways that impact the application of the Housing Accountability Act. The next two sections review these changes.

A. Extension of SB 330 Requirements

The Housing Crisis Act contains numerous different provisions. One of the significant elements of SB 330 was a requirement that a proposed housing development project be subject only to the ordinances, policies, and standards in effect when a preliminary application is submitted. A preliminary application is submitted when an applicant pays the required permit processing fee and provides certain information specified in Government Code section 65941.1. Many of SB 330’s sections were originally scheduled to sunset on January 1, 2025. SB 8 extends the sunset provision to January 1, 2030.

The following table compiles the SB 330 main provisions that were extended and/or modified by SB 8:

Gov. Code	Regulation	Extend to	Additional changes under SB 8
65905.5	<u>Five Hearing Rule:</u> A housing development project that otherwise complies with objective standards in effect at the time an application is complete under the Permit Streamlining Act must be approved or denied within 5 hearings.	2034	<ul style="list-style-type: none"> ➤ Specifies that 5 hearings includes appeals. ➤ “Housing development project” used in this section includes both discretionary and ministerial projects, and includes a proposal to construct a single dwelling unit (but this does not change the definition of a housing development project under the HAA, which is plural and indicates two units or more). ➤ Applies to projects that submits a preliminary application before 1/1/2030.

⁴⁹ See Gov. Code § 66300.

Gov. Code	Regulation	Extend to	Additional changes under SB 8
65589.5(o)	Part of the HAA that created the preliminary application. Cities cannot disapprove a housing project or approve it at a lower density if project complies with applicable, objective standards in place upon complete preliminary application. A preliminary application remains valid as long as certain subsequent requirements are met.	2034	<ul style="list-style-type: none"> ➤ Affordable housing projects can get the benefit of a preliminary application if, among other requirements, they commence construction within 3.5 years (instead of 2.5 years). ➤ The preliminary application rules apply to housing development projects that submits a preliminary application before 1/1/2030.
65941.1	Specifies information that must be submitted in a preliminary application. Cities may not require additional information.	2030	<ul style="list-style-type: none"> ➤ Clarifies that submission of a preliminary application does not preclude the listing of a tribal cultural resource on a national, state, tribal, or local historic register list on or after the preliminary application submittal date.
65589.5(h) (5), (8) & (9)	Definitions of objective standards, “determined to be complete” (filing of formal planning application) and “deemed complete” (filing of preliminary application).	2030	N/A
65913.10	If the City is required by state or local law or regulation to determine whether a site proposed for housing project is an historic site, it must make that determination at the time the housing project application is deemed complete. The City cannot revisit this determination (it remains valid) while the project application is pending, unless there were additional archaeological, tribal cultural resource discoveries during the course of the project.	2030	N/A
65943	Permit Streamlining Act provision specifying the 30-day timeline pursuant to which cities must review and determine whether a project application (traditional planning application) is complete.	2030	<ul style="list-style-type: none"> ➤ Specifies that a “development project” for the purposes of this section includes a housing development project as defined by Gov. Code section 65905.5, which means that a ministerial project or a project to construct a single dwelling unit would also be subject to this section.

Gov. Code	Regulation	Extend to	Additional changes under SB 8
65950	Timelines under the Permit Streamlining Act to approve projects based on CEQA action. SB 330 shortened some of these timelines.	2030	➤ Specifies that a “development project” for the purposes of this section includes a housing development project as defined by Gov. Code section 65905.5, which means that a ministerial project or a project to construct a single dwelling unit would also be subject to this section.
65940	Permit Streamlining Act provision requiring cities to compile a planning application checklist. An “affected city” as defined under SB 330 must include information necessary to comply with the demolition prohibition under Gov. Code section 66300(d)(1).	2030	➤ Specifies that a “development project” for the purposes of this section includes a housing development project as defined by Gov. Code section 65905.5, which means that a ministerial project or a project to construct a single dwelling unit would also be subject to this section.
66300 & 66301	Requirements and determination related to “affected cities”. For example, affected cities may not adopt a policy that would change a property’s general plan or zoning designation to a less intensive use. Also limits the right to relocation benefits and the right of first refusal during demolitions to lower-income occupants of the protected units only.	2030	<p>➤ Broader definition of what “less intensive use” means.</p> <p>➤ Housing projects that submit a preliminary application before 1/1/2030 would continue to be governed by the Housing Crisis Act of 2019 until 1/1/2034.</p> <p>*Also note that the declaration of a statewide housing emergency is extended from 2025 to 2030.</p>

B. Notable Change: Definition of “Housing Development Project”

The Housing Accountability Act (“HAA”), among other things, prohibits a local agency from disapproving a housing development project, or requiring it to be developed at a lower density, if the proposed project complies with all the applicable, objective standards except in very limited circumstances. The HAA defines a “housing development project” as “a use consisting of any of the following:

- (A) Residential units only.
- (B) Mixed-use developments consisting of residential and nonresidential uses with at least two-thirds of the square footage designated for residential use.
- (C) Transitional housing or supportive housing.”⁵⁰

When originally enacted by SB 330, all sections of the Housing Crisis Act of 2019 used this same definition of a “housing development project.” However, SB 8 altered this definition. While the law still defines housing development project to have the same meaning as contained in the HAA,

⁵⁰ Gov. Code § 65589.5(h)(2).

SB 8 provides that the term includes “projects that involve no discretionary approvals and projects that involve both discretionary and nondiscretionary approvals” and a “proposal to construct a single dwelling unit.” This altered definition applies with respect to requirements for project application review timelines under the Permit Streamlining Act and the five-hearing rule added by SB 330, but does not impact the applicability of the HAA.⁵¹

This change may be significant. While not explicit, the definition of “housing development project” contained in the HAA arguably did not include a single-family home. The definition uses the term “units,” and that plural term is used throughout the HAA. HCD’s *Housing Accountability Act Technical Assistance Advisory* also opined that because the term “units” is plural, a development must consist of more than one unit to qualify under the HAA.⁵² The department further stated that the development can consist of attached or detached units and may occupy more than one parcel, so long as the development is included in the same development application.⁵³ Currently, a project seeking to construct one single-family home is typically not processed and reviewed under the same lens by cities as with other multi-unit development projects or subdivisions. Thus, the change introduced by SB 8 now expands procedural protections and streamlined review to single-unit projects that were arguably not contemplated by the HAA. Such change may be signaling a further change in direction with respect to how single-unit projects are to be handled by cities.

III. Senate Bill 10

SB 10, codified as Government Code section 65913.5, is the final of the three major housing bills enacted by the Legislature during the 2021 legislative session. However, unlike SB 8 and SB 9, SB 10 creates no new mandates or requirements for cities. Rather, SB 10 creates a streamlined process for cities to voluntarily increase residential density up to 10 units per parcel on eligible parcels. Under the law, rezoning actions pursuant to SB 10 are not subject to CEQA.

A. Eligible Parcels

Local agencies may use SB 10 on parcels located within a urban infill site or transit-rich area.⁵⁴ A transit rich-area is defined as a parcel located within one-half mile of (i) an existing rail or bus rapid transit station, (ii) ferry terminal served by either bus or rail services, or (iii) a high-quality bus corridor.⁵⁵ SB 10 defines high-quality bus corridor to mean fixed route bus service that has average services intervals no greater than 15 minutes during the three peak hours between 6 a.m. to 10 a.m., and the three peak hours between 3 p.m. and 7 p.m. on weekdays, 20 minutes between 6 a.m. to 10 p.m. on weekdays, or 30 minutes between 8 a.m. to 10 p.m. on weekends.⁵⁶ Depending on the strength of the local public transportation system, a city may have many or very few parcels qualifying as transit-rich areas.

In contrast, most cities will have at least some, if not many, parcels meeting the broad definition of an urban infill site. Urban infill sites must be: (i) located in a city of which some

⁵¹ Gov. Code § 65905.5(b)(3)(C) states that the new definition does not affect how the HAA’s scope is interpreted.

⁵² See Page 6 of HCD Technical Advisory available at: <https://www.hcd.ca.gov/community-development/housing-element/housing-element-memos/docs/hcd-memo-on-haa-final-sept2020.pdf>

⁵³ *Id.*

⁵⁴ Gov. Code § 65913.5(a).

⁵⁵ Gov. Code § 65913.5(e)(2).

⁵⁶ Gov. Code § 65913.5(e)(1).

portion is within an urbanized area or urban cluster as designated by the United States Census Bureau, (ii) at least 75% of the perimeter of the site must be developed with urban uses, and (iii) the site must be zoned for or have a general plan designation that allows residential use or residential mixed use, with at least two-thirds of the square footage designed for residential use.⁵⁷ The overwhelming majority of cities in California contain territory that is located within an urbanized area or urban cluster.⁵⁸

Even if a parcel qualifies as an urban infill site or within a transit rich area, local agencies may not utilize SB 10 if the parcel is located within a high or very high fire hazard severity zone as determined by the Department of Forestry and Fire Protection, unless fire hazard mitigation measures have been adopted pursuant to existing building standards.⁵⁹ Similarly, SB 10 may not be used on property designated as open-space land or for park or recreational purposes through a local initiative.⁶⁰

B. Required Procedures

To utilize SB 10 to upzone parcels, a city must adopt an ordinance explicitly invoking Government Code section 65913.5, clearly demarcate the areas that will be upzoned pursuant to the law, and make a finding that the increased density is consistent with the City's statutory obligation to affirmatively further fair housing.⁶¹ The adopted ordinance may not reduce the density of any parcel. Significantly, ordinances adopted pursuant to SB 10 can also override voter enacted zoning restrictions if the ordinance is adopted by a two-third's vote of the city council.⁶² Any ordinance rezoning a parcel pursuant to SB 10 must be adopted prior to January 1, 2029.⁶³

C. Environmental Review

An ordinance adopted to rezone parcels pursuant to SB 10 is not a project for the purposes of CEQA.⁶⁴ Similarly, other actions taken to make a city's general plan, municipal code and other regulations consistent with the new zoning, are not projects under CEQA. This allows local agencies that want to upzone parcels to do so relatively quickly, without the delays that complying with CEQA can cause. First, no environmental review is necessary for the upzoning itself, regardless of how many different parcels are being upzoned. Second, the ability of opponents of the upzoning to file CEQA litigation to delay or prevent the upzoning is eliminated.

However, SB 10 excludes only the rezoning process itself from CEQA, and does not exempt the actual residential development projects proposed on upzoned parcels. Often housing projects on parcels rezoned by SB 10 will qualify for an existing CEQA exemption, such as the exemption for new construction of small structures of up to six units in urbanized areas (Class 3 categorical exemption) or the infill exemption (Class 32 categorical exemption). Depending on the

⁵⁷ Gov. Code § 65913.5(e)(3).

⁵⁸ The Census Bureau defines an Urbanized Areas as a geographic area of 50,000 or more people, and a urban cluster as a geographic area of at least 2,500 and less than 50,000 people. See <https://www.census.gov/programs-surveys/geography/guidance/geo-areas/urban-rural/2010-urban-rural.html>.

⁵⁹ Gov. Code § 65913.5(a)(4)(A).

⁶⁰ Gov. Code § 65913.5(a)(4)(A).

⁶¹ Gov. Code § 65913.5(b).

⁶² Gov. Code § 65913.5(b)(4).

⁶³ Gov. Code § 65913.5(a)(2).

⁶⁴ Gov. Code § 65913.5(a)(3).

project, significant time, resources and technical studies may still be necessary to substantiate the exemption. To avoid CEQA processing delays and litigation delays, a city may consider making residential developments of up to 10 units “by-right” or subject only to ministerial approval.

D. Projects Over 10 Units

SB 10 allows jurisdictions to increase the residential density up to 10 units per parcel on eligible parcels. However, if a preproposal project exceeds 10 units on parcels rezoned under the law, that project is not eligible for any CEQA exemption, or any ministerial or by-right process that would otherwise apply.⁶⁵ For example, if a parcel has been rezoned to allow 10 units, an applicant may not use a density bonus to exceed the 10 unit limit or SB 35 to obtain ministerial review.⁶⁶ Notwithstanding this limitation, up to two accessory dwelling units (ADUs) and junior ADUs (JADUs) may be ministerially approved on a parcel; these units would not count toward the 10-unit limit.

If an applicant desires to construct more than 10 units on a parcel zoned under SB 10, the parcel must be rezoned without using the provisions of SB 10. Such an ordinance would not be exempt from CEQA. Importantly, necessary environmental review would be required to study the change in zoning from the zoning that existed before the parcel was upzoned under SB 10.⁶⁷

E. How Important is SB 10?

In recent years, the Legislature has enacted numerous laws restricting or eliminating local control and discretion regarding proposed housing projects. SB 10 differs from most recent legislation in that it does not mandate or require anything. Instead, SB 10 creates an optional tool for cities to use as they try to address the housing crisis within their communities, and particularly so-called “missing middle” housing, for households that do not qualify for deed-restricted affordable housing or rental subsidies. Cities that choose to implement SB 10 will be able to avoid the delays and expense that a typical rezoning would incur. For example, a city that needs to rezone property to meet its regional housing needs assessment for its sixth cycle housing element may be able to use SB 10 to expedite that process and ensure it has a compliant housing element. Making residential project of up to 10 units by-right, when combined with the streamlined rezoning authorized by SB 10, would allow a city to streamline housing production even more. The significance of SB 10 will depend on how many cities decide to utilize its tools.

⁶⁵ Gov. Code § 65913.5(c)(1)

⁶⁶ The Density Bonus Law and SB 35 are two examples of statutes which require ministerial or by-right approval that would otherwise apply but for SB 10’s limitation.

⁶⁷ Gov. Code § 65913.5(c)(2).



Land Use and CEQA Litigation Update

Friday, May 6, 2022

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LAND USE AND CEQA LITIGATION UPDATE
May 6, 2022

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LEAGUE OF CALIFORNIA CITIES
2022 City Attorney Spring Conference
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Cases From August 10, 2021
through March 23, 2022

Table of Cases

FEDERAL CASES	1
<i>Center for Community Action and Environmental Justice v. Federal Aviation Administration</i> (9th Cir. 2021) 18 F.4th 592	1
<i>LA Alliance for Human Rights v. County of Los Angeles</i> (9th Cir. 2021) 14 F.4th 947	3
<i>Garcia v. City of Los Angeles</i> (9th Cir. 2021) 11 F.4th 1113	4
STATE CASES	6
<i>Crenshaw Subway Coalition v. City of Los Angeles</i> (2022) 75 Cal.App.5th 917.....	6
<i>Schmier v. City of Berkeley</i> (2022) 76 Cal.App.5th 549.....	8
<i>Coastal Act Protectors v. City of Los Angeles</i> (2022) 75 Cal.App.5th 526.....	9
<i>Pappas v. State Coastal Conservancy</i> (2021) 73 Cal.App.5th 310, as modified on denial of reh 'g (Jan. 25, 2022).....	10
<i>Bankers Hill 150 v. City of San Diego</i> (2022) 74 Cal.App.5th 755.....	12
<i>Ocean Street Extension Neighborhood Assn. v. City of Santa Cruz</i> (2021) 73 Cal.App.5th 985	14
<i>Save Civita Because Sudberry Won't v. City of San Diego</i> (2021) 72 Cal.App.5th 957, review denied (Mar. 16, 2022)	16
<i>Mission Peak Conservancy v. State Water Resources Control Bd.</i> (2021) 72 Cal.App.5th 873, as modified (Dec. 20, 2021)	19
<i>League to Save Lake Tahoe Mountain Area Preservation Foundation v. County of Placer</i> (2022) 75 Cal.App.5th 63	20
<i>Lejins v. City of Long Beach</i> (2021) 72 Cal.App.5th 303, review denied (Mar. 23, 2022)	26
<i>City of Oxnard v. County of Ventura</i> (2021) 71 Cal.App.5th 1010, as modified on denial of reh 'g (Dec. 14, 2021), review denied (Mar. 9, 2022)	29
<i>Friends, Artists & Neighbors of Elkhorn Slough v. California Coastal Com.</i> (2021) 72 Cal.App.5th 666	30
<i>People v. Venice Suites, LLC</i> (2021) 71 Cal.App.5th 715	33

<i>South Coast Air Quality Management District v. City of Los Angeles</i> (2021) 71 Cal.App.5th 314	34
<i>Farmland Protection Alliance v. County of Yolo</i> (2021) 71 Cal.App.5th 300	36
<i>Save Berkeley’s Neighborhoods v. Regents of the University of California</i> (2021) 70 Cal.App.5th 705, reh’g denied (Nov. 17, 2021)	38
<i>Chevron U.S.A., Inc. v. County of Monterey</i> (2021) 70 Cal.App.5th 153	40
<i>McCann v. City of San Diego</i> (2021) 70 Cal.App.5th 51	41
<i>Protect Tustin Ranch v. City of Tustin</i> (2021) 70 Cal.App.5th 951, review denied (Feb. 9, 2022)	44
<i>Schreiber v. City of Los Angeles</i> (2021) 69 Cal.App.5th 549	46
<i>Muskan Food & Fuel, Inc. v. City of Fresno</i> (2021) 69 Cal.App.5th 372	48
<i>Department of Water Resources Cases</i> (2021) 69 Cal.App.5th 265	49
<i>Central Delta Water Agency v. Department of Water Resources</i> (2021) 69 Cal.App.5th 170 as modified on denial of reh’g (Oct. 21, 2021), review denied (Jan. 5, 2022).....	51
<i>California Renters Legal Advocacy & Education Fund v. City of San Mateo</i> (2021) 68 Cal.App.5th 820	55
<i>City of Escondido v. Pacific Harmony Grove Development, LLC</i> (2021) 68 Cal.App.5th 213	57
<i>Sierra Watch v. County of Placer</i> (2021) 69 Cal.App.5th 86	59
<i>Sierra Watch v. Placer County</i> (2021) 69 Cal.App.5th 1	62
<i>Brown v. Montage at Mission Hills, Inc.</i> (2021) 68 Cal.App.5th 124, review denied (Nov. 17, 2021)	63
<i>Save Our Access-San Gabriel Mountains v. Watershed Conservation Authority</i> (2021) 68 Cal.App.5th 8, review denied (Dec. 15, 2021).....	64
<i>Los Angeles Dept. of Water & Power v. County of Inyo</i> (2021) 67 Cal.App.5th 1018, review denied (Nov. 17, 2021).....	66
<i>Pacific Merchant Shipping Association v. Newsom</i> (2021) 67 Cal.App.5th 711	67
UNREPORTED STATE COURT OF APPEAL CASES	69
<i>East Meadow Action Committee v. Regents of the University of California</i> (Cal. Ct. App., Feb. 4, 2022, No. H048695) 2022 WL 334036 [unreported].....	69

<i>Save Our Rural Town v. County of Los Angeles</i> (Cal. Ct. App., Jan. 26, 2022, No. B309992) 2022 WL 224163 [unreported]	71
<i>Citizens' Committee To Complete the Refuge v. City of Newark</i> (Cal. Ct. App., Dec. 29, 2021, No. A162045) 2021 WL 6694579 [unreported].....	72
<i>Gulli v. San Joaquin Area Flood Control Agency</i> (Cal. Ct. App., Dec. 3, 2021, No. C088010) 2021 WL 5754312, <i>reh'g denied</i> (Jan. 3, 2022), <i>review filed</i> (Jan. 12, 2022) [unreported].....	74
<i>Chinatown Community for Equitable Development v. City of Los Angeles</i> (Cal. Ct. App., Dec. 2, 2021, No. B307157) 2021 WL 5709507, <i>review filed</i> (Jan. 11, 2022) [unreported]	75
<i>Citizens for a Safe and Sewage-Free McKinley Park v. City of Sacramento</i> (Cal. Ct. App., Nov. 24, 2021, No. C090760) 2021 WL 5504230 [unreported]	78
<i>510pacificave v. Piana</i> (Cal. Ct. App., Nov. 22, 2021, No. B304189) 2021 WL 5445999 [unreported].....	82
<i>AIDS Healthcare Foundation v. City of Los Angeles</i> (Cal. Ct. App., Nov. 1, 2021, No. B313529) 2021 WL 5048628, <i>review denied</i> (Jan. 19, 2022) [unreported].....	83
<i>North Coast Rivers Alliance v. Department of Food and Agriculture</i> (Cal. Ct. App., Oct. 15, 2021, No. C086957) 2021 WL 4809691, <i>as modified on denial of reh'g</i> (Nov. 15, 2021) [unreported]	85
<i>Elfin Forest Harmony Grove Town Council v. County of San Diego</i> (Cal. Ct. App., Oct. 14, 2021, No. D077611) 2021 WL 4785748 [unreported].....	89
<i>Genesee Friends v. County of Plumas</i> (Cal. Ct. App., Oct. 12, 2021, No. C091033) 2021 WL 4739082 [unreported]	92
<i>Rock v. Rollinghills Property Owners Assn.</i> (Cal. Ct. App., Sept. 20, 2021, No. A160163) 2021 WL 4260607, <i>reh'g denied</i> (Oct. 13, 2021), <i>review denied</i> (Dec. 15, 2021) [unreported]	94
<i>Environmental Council of Sacramento v. City of Elk Grove</i> (Cal. Ct. App., Aug. 30, 2021, No. C089384) 2021 WL 3854906 [unreported].....	96
<i>"I Am" School, Inc. v. City of Mount Shasta</i> (Cal. Ct. App., Aug. 23, 2021, No. C091575) 2021 WL 3721409, <i>reh'g denied</i> (Sept. 13, 2021), <i>review denied</i> (Nov. 10, 2021) [unreported]	97

FEDERAL CASES

Center for Community Action and Environmental Justice v. Federal Aviation Administration (9th Cir. 2021) 18 F.4th 592.

BACKGROUND: Environmental organizations and State of California petitioned for review of decision by Federal Aviation Administration (FAA) that found no significant environmental impact stemming from construction and operation of an air cargo facility at a public airport, alleging violations of National Environmental Policy Act (NEPA).

HOLDINGS: The Court of Appeals held that: (1) FAA's use of one general study area to evaluate multiple potential environmental impacts of project was not abrogation of its responsibility under NEPA to take "hard look"; (2) FAA's use of reduced study area to analyze hazardous material issues when evaluating project was not arbitrary; (3) FAA's cumulative impacts analysis when evaluating project was not deficient; (4) findings of significant impact in environmental impact report prepared under California Environmental Quality Act did not require FAA to prepare environmental impact statement under NEPA; (5) FAA's calculations regarding truck emissions generated by project were not arbitrary or capricious; and (6) any failure by FAA to explicitly discuss project's adherence to California or federal ozone standards did not render its environmental assessment deficient. Petition denied.

KEY FACTS & ANALYSIS: Petitioners Center for Community Action and Environmental Justice, Sierra Club, Teamsters Local 1932, Shana Saters, and Martha Romero (collectively, CCA) and the State of California (collectively, Petitioners) asked the Ninth Circuit to review Respondent Federal Aviation Administration's (FAA) Record of Decision, which found no significant environmental impact stemming from the construction and operation of an air cargo facility (Project) at the San Bernardino International Airport (Airport). To comply with their duties under the National Environmental Policy Act (NEPA), the FAA issued an Environmental Assessment (EA) that evaluated the environmental effects of the Project. In an effort to prevent execution of the Project, Petitioners alleged error in the EA and the FAA's finding of no significant environmental impact. However, because Petitioners had not established the findings in the EA to be arbitrary and capricious, the Ninth Circuit denied the petition.

In relevant part for this paper, California chiefly asserted that the FAA needed to create an environmental impact statement (EIS) because a California Environmental Impact Report (EIR) prepared under the California Environmental Quality Act (CEQA) found that "[t]he proposed Project could result in significant impacts [on] ... Air Quality, Greenhouse Gas, and Noise[.]" Because CEQA review "closely approximat[ed]" review under NEPA, California argued, "NEPA require[d] the FAA to meaningfully address the substantial questions raised by the prior CEQA analysis that concluded the Project would cause significant and unavoidable environmental impacts."

California did not argue that an EA under NEPA must reach the same conclusion as the CEQA analysis. California's argument assumed, however, that if a CEQA analysis found significant environmental effects stemming from a project, a NEPA analysis was required to explain away

this significance. The Court found this to be untrue. Instead of simply relying on the conclusions in the CEQA report, California was required to identify specific findings in that report that it believed raise substantial questions about environmental impact under NEPA. But California identified only a few such findings, and none of them raised substantial questions as to whether the Project may have a significant effect on the environment for NEPA purposes.

First, although the project would violate CEQA's air quality impact requirements, the EA found that it would not result in new or additional violations of the national air quality standards. Second, California did not refute the EA's rationale for finding no significant impact on greenhouse gas emissions due to the enormity of greenhouse gases worldwide and the relative small size of the Project. Finally, the EA addressed measure to mitigated the noise findings included in the CEQA analysis, and thus was not unsupported in that regard. In sum, California failed to raise a substantial question as to whether the Project might have a significant effect on the environment so as to require an EIS.

Petitioners ("CCA") also asserted that the FAA failed to consider the Project's ability to meet California state air quality and federal ozone standards. Petitioners' arguments invoked 40 C.F.R. § 1508.27(b)(10)'s instruction that evaluating whether a project will have a "significant" environmental impact "requires consideration[] of ... [w]hether the action threatens a violation of Federal, State, or local law or requirements imposed for the protection of the environment." First, the CCA argued that the EA failed to assess whether the Project met the air quality standards set by the California Clean Air Act (CCAA), but the Ninth Circuit declined to consider this argument because the CCA failed to identify a specific potential violation. *Sierra Club v. United States Forest Serv.*, 843 F.2d 1190 (9th Cir. 1988). The Ninth Circuit also found that the EA did discuss the CCAA.

Second, the CCA argued that the EA failed to assess whether the Project met federal ozone standards. The CCA argued that the EA failed to address the Project's compliance with the 2008 and 2015 federal 8-hour ozone standard. However, the EA relied on a South Coast Air Quality Management District (SCAQMD) letter, which addressed the 2008 standard. As for the 2015 federal ozone standard, the letter also addressed how the Project could meet that standard. Because the CCA did not demonstrate a risk of a violation of federal ozone standards and rather argued only that the EA needed to determine whether a risk existed, the CCA did not refute the fact that the Project could be allocated a greater portion of the emissions budget and meet either standard. In sum, the CCA provided no reason to believe that the Project threatened a violation of the federal ozone standards.

Finally, Petitioners argued that the EA failed to assess whether the Project met California's greenhouse gas emission standards. However, the CEQA analysis recognized that the Project would not risk a violation of the California sources of law that Petitioners argued the EA needed to consider. While the CEQA analysis' discussion of the Project's compliance with state standards did not necessarily absolve the FAA of the duty to include such a discussion in the EA, it did suggest that there was no risk of such a violation. Accordingly, the Ninth Circuit found that Petitioners had failed to proffer any specific articulation of how the Project would violate California and federal law. The Ninth Circuit therefore reasoned that there was no reason to believe

that the EA is deficient for purportedly failing to explicitly discuss the Project's adherence to California and federal environmental law.

TAKE-AWAYS: Significant environmental impacts under CEQA may be insufficient to require an Environmental Assessment under NEPA. Specific findings that raise substantial questions about environmental impacts under NEPA are required to trigger an Environmental Assessment.

* * *

LA Alliance for Human Rights v. County of Los Angeles (9th Cir. 2021) 14 F.4th 947.

BACKGROUND: City and county residents experiencing homelessness and located in downtown area encampment and coalition representing business and property owners and other downtown residents brought action against city, county, and various officials, alleging that local government policies and inaction in addressing homelessness, along with various settlements and court orders in prior cases, created a dangerous environment in the downtown area. The United States District Court for the Central District of California granted preliminary injunction to require defendants to provide funding to shelter all downtown area residents experiencing homelessness. Defendants appealed.

HOLDING: The Court of Appeals held that: (1) District Court abused its discretion in relying on extra-record evidence to find facts supporting standing; (2) plaintiffs lacked standing to bring race-based claims; (3) plaintiffs lacked standing to bring due process claim under state-created danger theory; (4) plaintiffs lacked standing to bring due process claim under special relationship theory; (5) plaintiffs lacked standing to bring claim under California statute requiring local governments to provide support for indigent persons; (6) plaintiffs had standing to bring ADA claim; and (7) residents who used wheelchairs for their daily activities failed to demonstrate that law and facts clearly favored their position, in ADA claim, as required to support preliminary injunction. Vacated and remanded.

KEY FACTS & ANALYSIS: Nearly one in four unhoused people in this country live in Los Angeles County (County), and the crisis is worsening. In 2020, over 66,000 individuals were unhoused in the County, a 13% increase over the previous year. Perhaps nowhere is the emergency more apparent than on Los Angeles's Skid Row, which encompasses more than 50 blocks of downtown. Skid Row has become symbolic of the City's homelessness crisis due to its history as an area with a high concentration of unhoused individuals, its extreme density of tent encampments on public sidewalks, and its frequent incidents of violence and disease. In Skid Row and elsewhere in the County, the conditions of street living, lack of sufficient services, and lack of pathways to permanent housing have had a devastating impact on the health and safety of unhoused Angelenos and the communities in which they live. These conditions, and local governments' approach to the issue, have repeatedly been the subject of litigation.

Plaintiff LA Alliance for Human Rights and eight individual plaintiffs sued the County and City of Los Angeles (City) for harms stemming from the proliferation of encampments in the Skid Row area. They alleged that County and City policies and inaction created a dangerous environment in Skid Row, to the detriment of local businesses and residents. After extensive negotiations failed to produce a settlement, the district court issued a sweeping preliminary injunction against the

County and City of Los Angeles and ordered, among other relief: the escrow of \$1 billion to address the homelessness crisis, offers of shelter or housing to all unhoused individuals in Skid Row within 180 days, and numerous audits and reports. The district court’s order was premised on its finding that structural racism—in the form of discriminatory lending, real estate covenants, redlining, freeway construction, eminent domain, exclusionary zoning, and unequal access to shelter and affordable housing—is the driving force behind Los Angeles’s homelessness crisis and its disproportionate impact on the Black community.

However, the Ninth Circuit found that none of Plaintiffs’ claims were based on racial discrimination, and the district court’s order was largely based on unpled claims and theories. Because Plaintiffs did not bring most of the claims upon which relief was granted, they failed to put forth evidence to establish standing. To fill the gap, the district court impermissibly resorted to independent research and extra-record evidence. For these reasons, the Ninth Circuit vacated the preliminary injunction and remanded for further proceedings.

On the large bulk of the bases for the district court’s order, the Ninth Circuit found that the order was based on novel legal theories that the Plaintiffs did not argue, and thus that the district court abused its discretion in granting relief on issues not in the controversy before it. The claims upon which relief was granted included race-based claims, state-created danger, special relationship, equal protection, substantive due process, and deprivation of necessary medical care. Because these claims were not included in Plaintiffs’ complaint, there were likewise inadequate facts alleged to show that Plaintiffs had standing to bring those claims. Because its members lacked standing, LA Alliance for Human Rights also lacked associational standing to bring its claims.

By contrast, two individual Plaintiffs using wheelchairs had standing to bring ADA claims against the City. These individuals had demonstrated that they could not traverse Skid Row due to the encampments. The Ninth Circuit found however, that the ADA claims failed to establish a right to preliminary injunction because the ADA Plaintiffs had not shown a likelihood of success on the merits. The allegations were premised on blocked sidewalks “putting everyone at risk,” and not sufficient to show a likelihood of success on an ADA claim. These claims also failed to present a reasonable solution which would not require clearing city sidewalks through mass enforcement of anti-camping ordinances.

TAKE-AWAYS: Federal court rulings relying on broad social themes introduced by the court as causes for homelessness as in the *LA Alliance* case may be subject to reversal for lack of standing, and for internally inconsistent claims, such as those in this case based on accessibility barriers due to camping blocking sidewalks, the remedy for which was *enforcement* of anti-camping regulations.

* * *

Garcia v. City of Los Angeles (9th Cir. 2021) 11 F.4th 1113.

BACKGROUND: City residents experiencing homelessness and advocacy organizations brought action challenging constitutionality of provision of city ordinance allowing city to discard bulky items of personal property stored in public areas, when such items were not designed as shelters.

The United States District Court for the Central District of California granted plaintiffs’ motion for preliminary injunction to enjoin enforcement of the ordinance. City appealed.

HOLDINGS: The Court of Appeals held that: (1) plaintiffs were likely to succeed on merits of Fourth Amendment challenge to ordinance, supporting preliminary injunction, and (2) bulky items provision was not severable from remainder of ordinance. Affirmed. Bennett, Circuit Judge, filed a dissenting opinion.

KEY FACTS & ANALYSIS: The case involved the City of Los Angeles (City) appealing a preliminary injunction prohibiting it from discarding homeless individuals’ “Bulky Items” that were stored in public areas, as authorized by a provision of its municipal code. The Ninth Circuit agreed with the district court that the Plaintiffs were likely to succeed on their claim that the provision, on its face, violated the Fourth Amendment’s protection against unreasonable seizures. The Ninth Circuit also concluded that the clauses authorizing the discarding of those items were not severable from the remainder of the provision.

Part of the City’s response to the homelessness crisis was section 56.11 of its municipal code (the ordinance), which strictly limited the storage of personal property in public areas. Under most provisions of the ordinance—such as those addressing publicly stored property that was unattended; obstructing City operations; impeding passageways required by the Americans with Disabilities Act; or within ten feet of an entrance, exit, driveway, or loading dock—the City could impound that property and store it for ninety days to give its owner the opportunity to reclaim it. But the City could also, pursuant to the ordinance, discard publicly stored property without impounding it when it constituted an immediate threat to public health or safety or was evidence of a crime or contraband. Finally, the City could discard without first impounding publicly stored personal property when it was a “Bulky Item” that was not designed to be used as a shelter (the Bulky Item Provision).

Acting pursuant to the ordinance, the Los Angeles Bureau of Sanitation, with the assistance of the Los Angeles Police Department, conducted cleanups of homeless encampments. These included both “noticed cleanups, which were either noticed in advance” or “conducted on a regular schedule,” and “rapid response[]” cleanups, which were neither noticed nor scheduled but instead triggered by resident complaints or demands by the City Council. During cleanups, City employees typically prohibited individuals from moving their Bulky Items to another location; rather, they “immediately destroy[ed]” those items by “throwing [them] in the back of a trash compactor, crushing the item[s].”

A group of homeless individuals who have had their personal property destroyed by the City, along with two organizations that advocate for the interests of homeless individuals, brought this litigation. Plaintiffs contended that the Bulky Items Provision, on its face, violated the Fourth Amendment’s protection against unreasonable seizures and the Fourteenth Amendment’s guarantee of procedural due process. Three Plaintiffs who had been specifically injured by the destruction of Bulky Items moved to preliminarily enjoin the City from enforcing the Bulky Items Provision.

The district court granted the requested preliminary injunction, holding that Plaintiffs were likely to succeed on both their Fourth Amendment claim and their Fourteenth Amendment claim. In discussing the Fourth Amendment’s protection against unreasonable seizures, the district court reasoned that the Bulky Items Provision was likely unconstitutional under precedents holding that a warrant or a recognized exception to the warrant requirement must accompany a seizure for it to be reasonable. Turning to Plaintiffs’ procedural due process claim, the court observed that the Provision lacked any notice requirement and thus “provide[d] no process at all.”

The Ninth Circuit, reviewing *de novo*, affirmed. Relying on a related case, *Lavan v. City of Los Angeles*, 693 F.3d 1022 (9th Cir. 2012), the Ninth Circuit found that the Plaintiffs would likely succeed on a claim that the Bulky Items Provision violated the Fourth Amendment on its face. The Ninth Circuit further found that the Bulky Items Provision was not severable, because the Bulky Items Provision was not functionally autonomous from the other provisions in the ordinance, and was necessary for the ordinance’s operation and purpose. If severed, the ordinance would allow the City to remove property from public areas, but would not specify what the City could do with it. The Ninth Circuit found that the Bulky Items Provision was both functionally inseparable in light of the structure of the ordinance, but also in practice. The City had repeatedly insisted that it could not enforce the Bulky Items Provision without the destruction clauses the Ninth Circuit found to be unconstitutional. The provisions were “inextricably connected” to the full enforcement of the ordinance.

DISSENT: The dissent argued that the destruction portion of the Bulky Items Provision was severable, and argued that the preliminary injunction was overbroad, and would cause great harm in exacerbating the homelessness crisis in the City. The dissent argued that the decision should be reversed and remanded for further consideration on severability.

POSTSCRIPT: The League of California Cities filed an Amicus Curiae brief in support of the City and severability of the ordinance.

TAKE-AWAYS: Destruction of the property of individuals experiencing homelessness without due process is an unconstitutional violation of the Fourth Amendment. However, cities are able to impound and provide a recovery procedure for bulky items kept in public areas.

* * *

STATE CASES

Crenshaw Subway Coalition v. City of Los Angeles (2022) 75 Cal.App.5th 917.

BACKGROUND: An advocacy group filed action against city and developer to enjoin neighborhood revitalization project alleging that it violated the Federal Fair Housing Act and California’s Fair Employment and Housing Act (FEHA). The Superior Court, Los Angeles County, entered judgment against advocacy group and they filed an appeal.

HOLDING: The Court of Appeal held that: (1) the California Supreme Court’s depublication of *AIDS Healthcare Foundation v. City of Los Angeles*, 264 Cal.Rptr.3d 128 (*AIDS Healthcare*), did

not mean there was no basis for the trial court’s ruling and that it must automatically be reversed, and (2) advocacy group’s disparate impact claim based on gentrification theory was not cognizable under the Fair Housing Act. Affirmed.

Key FACTS & ANALYSIS: After the City of Los Angeles (City) approved a project aimed at “revitaliz[ing]” a neighborhood in South Los Angeles through the renovation and expansion of an existing shopping mall and the construction of additional office space, a hotel, and new apartments and condominiums, a neighborhood advocacy group (Coalition) sued to enjoin the project under the federal Fair Housing Act (42 U.S.C. § 3601 et seq.) and California’s Fair Employment and Housing Act (FEHA) (Gov. Code, § 12900 et seq.). The group’s lawsuit rested on a “gentrification” theory—namely, that the project would lead to an “influx of new, more affluent residents”; that this influx would lead to “increased rents and increased property values that [would] put pressure” on the low-income residents who currently live near the project site; and that these higher rents will push the low-income residents out of “their neighborhoods.” Because a majority of these low-income residents were Black or Latinx, the group alleged, the project had the effect of making dwellings unavailable because of race and color in violation of the disparate impact prong of the Fair Housing Act (and, thus, by extension, the FEHA).

The case involved two core issues: Did depublicatoin of *AIDS Healthcare* on which the judgment of the trial court was based warrant reversal of the judgment? And is a disparate impact claim based on this gentrification theory cognizable under the Fair Housing Act?

The Court of Appeal held in the negative on both questions.

To begin, the depublication of *AIDS Healthcare* was not dispositive of the appeal. The Court of Appeal stated that its task on appeal was to review the ruling dismissing the Coalition’s claims, not its rationale. The Court of Appeal was also unable to infer disapproval from the depublication.

Second, a gentrification theory of disparate impact was not cognizable under the Fair Housing Act or the FEHA. The Court of Appeal relied significantly on the United States Supreme Court’s decision in *Texas Dept. of Housing and Community Affairs v. Inclusive Communities Project, Inc.* (2015) 576 U.S. 519 (*Inclusive Communities*). The Court of Appeal observed that in no uncertain terms, *Inclusive Communities* held that the Fair Housing Act does not afford relief if such relief caused race to be used and considered in a pervasive and explicit manner in deciding whether to justify governmental or private actions. *Inclusive Communities* further held that the Fair Housing Act does not encompass disparate impact claims that coopt the act into an “instrument to force housing authorities to reorder their priorities” and thereby “displace[] ... valid governmental policies.” *Inclusive Communities* finally held that, while the Fair Housing Act does not categorically prohibit the consideration of race “in certain circumstances and in a proper fashion,” the act will not sanction disparate-impact claims that have the effect of perpetuating racial isolation and segregation.

The gentrification-based theory of liability alleged by the Coalition was not a legally cognizable disparate impact claim under the Fair Housing Act because it ran afoul of the three “cautionary standards” articulated above.

The gentrification theory necessarily injected racial considerations into the City’s decision-making process. That was because this theory was premised on the allegation that the persons displaced by the gentrification were members of minority groups. Further, by requiring a developer either to dedicate every new residential unit to affordable housing and perhaps also to obligate the developer to build additional affordable housing off site in the adjoining neighborhoods, the net effect of the gentrification theory was to summon “the specter of disparate-impact litigation” in a way that would cause “private developers to no longer construct or renovate housing units for low-income individuals.” *Inclusive Communities* found such a theory was not cognizable under the Fair Housing Act.

As the Coalition’s allegations made clear, the evil of gentrification was that it displaced Black and Latinx residents. According to the Coalition, this concentration of Black residents and their Latinx neighbors formed the heart of “Black Los Angeles.” The Court of Appeal observed that the Coalition’s gentrification theory existed to protect this concentration of minority community members, and thus sought to employ the Fair Housing Act as a means of preserving the racial composition of these communities. The Court of Appeal concluded that however politically, culturally, historically, and commercially beneficial such segregation might be for those resulting communities, the Fair Housing Act was designed as a tool for moving towards a more integrated community, not a less integrated one.

The rationale from *Inclusive Communities* applied equally to the FEHA claim.

In the unpublished portion of the opinion, the Court of Appeal found that the Coalition’s California Environmental Quality Act (CEQA) claims were untimely. The Coalition did not file a CEQA challenge to the project until 558 days after City’s planning department approved the vesting tentative tract map and certified the final environmental impact report, the challenge was untimely. Those approvals constituted “approval” for the purposes of CEQA because it constituted a discretionary entitlement for use of the project.

TAKE-AWAY: FEHA will not support disparate impact claims attacking projects that result in gentrification of minority communities when the purpose of the gentrification allegation is to promote the maintenance of segregated communities.

* * *

Schmier v. City of Berkeley (2022) 76 Cal.App.5th 549.

BACKGROUND: In 1996, Kenneth J. Schmier converted two apartment units in Berkeley (City) into condominiums. At that time, the City’s municipal code required that an owner converting an apartment to a condominium execute and record a lien on the property obliging the owner to pay an “Affordable Housing Fee”. Accordingly, Schmier executed two lien agreements as a condition of approval. In 2008, the City revised the formula. In 2019, Schmier advised the City that he intended to sell the condominium. Berkeley demanded that Schmier pay an affordable housing fee of \$147,202.66, as calculated under the old section. Under the new section, the fee would have been significantly less. Schmier filed suit. The trial court sustained Berkeley’s demurrer and dismissed the complaint, finding Schmier’s suit barred by the 90-day statute of limitations set forth

in the Subdivision Map Act, which commenced running more than 20 years earlier when Schmier signed the lien agreements.

HOLDING: Schmier’s complaint was not subject to the 90-day limitations period set forth in the Subdivision Map Act. Reversed.

Key FACTS & ANALYSIS: The suit was not an “action or proceeding to attack, review, set aside, void, or annul the decision” of the City which would be subject to the 90-day limitations period. Schmier was not challenging the legality of any condition of approval, or the liens. Rather, the dispute, which could not possibly have existed at the time of the conversion approval, concerned the meaning of certain language in the lien agreements and the consequences of the City’s alleged rescission of the then-operative Municipal Code provision and enactment of a new provision in its place.

Similarly, even assuming the 90-day statute applied, it could not have begun to run. The events giving rise to the dispute (the new code section) did not exist at the time the parties entered into the lien agreement. Because the challenge was to the City’s interpretation of the agreements, the statute of limitations, even if applicable, would have begun to run from the time the City rejected Schmier’s insistence that the lien agreement was no longer operative when the municipal code provision was rescinded. The judgment was reversed with directions to the superior court to vacate its order sustaining the demurrer without leave to amend and enter a new order overruling the demurrer.

TAKE-AWAYS: The 90-day Map Act statute of limitations may not apply to challenges to subsequent, local legislative amendments, or, alternatively, when, as in this case, the cause of the dispute was based on the city’s action well after its approval under the Map Act and expiration of the then-attached 90-day statute.

* * *

Coastal Act Protectors v. City of Los Angeles (2022) 75 Cal.App.5th 526.

BACKGROUND: An advocacy group filed a petition for writ of mandate alleging that a city ordinance imposing restrictions on short-term vacation rentals was “development” under California Coastal Act for which coastal development permit (CDP) was required. The Superior Court, Los Angeles County, entered judgment in the city’s favor, and the group appealed.

HOLDING: The Court of Appeal held that petition was untimely. Affirmed.

Key FACTS & ANALYSIS: On December 11, 2018, the City of Los Angeles (City) adopted the Home Sharing Ordinance No. 185,931 (Ordinance), which imposes certain restrictions on short-term vacation rentals, and provides mechanisms to enforce those restrictions. In February 2020, appellant Coastal Act Protectors (CAP) sought a writ of mandate to enjoin enforcement of the Ordinance in the Venice coastal zone until the City obtains a CDP. CAP claimed the Ordinance constituted a “development” under the Coastal Act; therefore, CAP contended, the City acted illegally in failing to obtain a CDP before implementing the Ordinance in the Venice coastal zone.

The trial court denied CAP's petition for writ of mandate on two independent grounds: (1) the petition was time-barred by the 90-day statute of limitations in Government Code section 65009, and (2) the Ordinance did not create a change in intensity of use and, therefore, is not a "development" requiring a CDP.

The Court of Appeal agreed with the trial court's holding that the 90-day statute of limitations in Government Code section 65009 subdivision (c)(1)(B) applied, and not, as CAP contended, the three-year statute of limitations in Code of Civil Procedure section 338(a). Because this conclusion was dispositive of the matter, the Court of Appeal declined to decide whether the Ordinance constituted a "development" subject to the CDP requirements of the Coastal Act.

The Court of Appeal relied on *Travis v. County of Santa Cruz* (2004) 33 Cal.4th 757 in which the California Supreme Court concluded that the 90-day statute of limitation did not apply to a preemption claim based on a statute enacted after an ordinance was adopted. Likewise, in *Urban Habitat Program v. City of Pleasanton* (2008) 164 Cal.App.4th 1561, the Court of Appeal found that the 90-day statute of limitations did not apply to claims which contended the City of Pleasanton failed to comply with housing obligations enacted after the city had adopted its zoning ordinances. The Court of Appeal distinguished *Travis* and *Urban Habitat Program* because the Coastal Act requirements at issue predated the Ordinance. Thus, CAP's petition was an action to "attack, review, set aside, void, or annul" the City's decision to adopt a zoning ordinance applicable to the Venice coastal zone without first obtaining a CDP. Accordingly, the 90-day statute of limitations applied.

TAKE-AWAYS: An ordinance challenged based on preempting legislation in existence at the time the ordinance was adopted is subject to the 90-day statute of limitations in Government Code section 65009. An ordinance challenged based on preempting legislation enacted after an ordinance is adopted is subject to the three-year statute of limitations in Code of Civil Procedure section 338.

* * *

Pappas v. State Coastal Conservancy (2021) 73 Cal.App.5th 310, as modified on denial of reh'g (Jan. 25, 2022).

BACKGROUND: Ranch owners association and its owner-members brought class action against state Coastal Commission and Coastal Conservancy, disputing the public's right to recreate along gated ranch community's shoreline. After announcement of proposed settlement in which the state agencies agreed to quitclaim the state's interest in an offer to dedicate (OTD) public access easement granted to the state by a youth organization, a coastal access advocacy group intervened and filed cross-complaint and petition for writ of mandate alleging violations of the Coastal Act and the Bagley-Keene Open Meeting Act against the state agencies. The Superior Court, Santa Barbara County, overruled association's and owner-members' demurrer and granted advocacy group's motion for judgment in lieu of trial on the Coastal Act claim and dismissed the Bagley-Keene Act claim for being time-barred. The association and owner-members appealed, and advocacy group cross-appealed.

HOLDING: The Court of Appeal held that: (1) overruling association's and owner-members' demurrer was warranted; (2) pending litigation exception to the Bagley-Keene Open Meeting Act

did not excuse Coastal Conservancy from adhering to Coastal Act's public hearing requirement; (3) Conservancy's settlement agreement with association and owner-members was a transfer of ownership interest in state land sufficient to trigger Coastal Act's public hearing procedures; (4) association's and owner-members' due process rights were not violated; (5) hearsay evidence supporting advocacy group's claims against state agencies was admissible as to association and owner-members; (6) Coastal Act's public hearing requirement applied to Coastal Commission; and (7) 60-day period for advocacy group to seek writ relief did not expire before it intervened. Affirmed in part, reversed in part, and remanded.

Key FACTS & ANALYSIS: This case addressed whether a purported "public access easement" granted to a state agency four decades ago by the owner of a large coastal parcel in Hollister Ranch (the Ranch) was a property interest subject to the Coastal Act. The Court concluded that it was. The Ranch was a gated community and working cattle ranch on Santa Barbara County's Gaviota Coast. State agencies and civic activists had long quarreled with the Hollister Ranch Owners Association (HROA) and its owner-members (collectively Hollister) over the public's right to recreate along the Ranch's pristine shoreline. The California Coastal Commission and the Coastal Conservancy (collectively State Defendants) settled a contentious case with Hollister over this issue in 2016. Hollister agreed, among other things, to allow pre-approved organizations and school groups to use a small section of beach for recreation and tide pool exploration.

The self-described Gaviota Coastal Trail Alliance (Alliance) considered the settlement a capitulation to Hollister. The trial court permitted the Alliance to intervene as a defendant and to later file a cross-complaint. The Alliance alleged the State Defendants violated, among other laws, the Coastal Act and the Bagley-Keene Open Meeting Act when they settled with Hollister. The Alliance then moved for judgment. The trial court agreed the Conservancy violated Public Resources Code section 30609.5 in the Coastal Act, restricting transfers of state property interests along the coast. It declared the settlement agreements invalid and entered judgment on the cross-complaint against the Conservancy. It found the balance of the Alliance's claimed either moot or barred by the statute of limitations.

Hollister appealed the section 30609.5 ruling. The Alliance cross-appealed the statute of limitations rulings. The Court of Appeal concluded the Commission as well as the Conservancy violated section 30609.5, and otherwise affirmed the judgment.

Hollister contended the trial court erred when it: (1) permitted the Alliance to intervene; (2) overruled Hollister's demurrer to the Alliance's subsequent writ petition; (3) found the Bagley-Keene Act's pending litigation exception did not override section 30609.5's public hearing requirements; (4) found the Conservancy in fact violated section 30609.5 when it settled with Hollister; (5) deprived Hollister of due process by entering judgment before it decided the validity of the OTD; and (6) admitted certain stipulated facts as evidence against Hollister. On cross-appeal, the Alliance contended the trial court erred when it found the limitations periods had expired on certain Bagley-Keene and Coastal Act claims.

First, the Court of Appeal found that the trial court properly exercised its discretion in allowing the Alliance to intervene, citing the court's lengthy discussion, and the generally policy weighing in favor of intervention.

Second, the Court of Appeal found that the trial court properly overruled the demurrer for the same reasons as it properly allowed the Alliance to intervene.

Third, the Court of Appeal found that the pending litigation exemption to the Bagley-Keene Act did not excuse the Conservancy from Adhering to the Coastal Act's restrictions on selling or transferring state lands. The Conservancy could meet in closed session, but could then deliberate and vote in a public setting as required by law.

Fourth, the Court of Appeal found that Section 30609.5 of the Coastal Act applied to the settlement and OTD as a transfer in ownership of state land. The OTD was a "potential accessway" encompassed by the Section.

Fifth, the Court of Appeal found that the trial court did not deprive Hollister of due process by entering judgment against it without deciding the validity of the OTD. The trial court retained the right to proceed on the merits, but Hollister suffered no prejudice from it not deciding the issue at trial.

Sixth, the evidentiary rulings of the trial court were proper under Evidence Code section 1224.

Seventh, the Court of Appeal opined that the trial court erred when it found that Section 30609.5 did not apply to the Commission because the agency did not effect a transfer of state land separate from the Conservancy. The record indicated that the Commission and the Conservancy were united in seeking to effectuate the OTD's unlawful transfer. Thus, both public entities were subject to the Section.

Finally, the Court of Appeal concluded that the trial court correctly ruled that the limitations period expired on the Alliance's Bagley-Keene Act cause of action. This cause of action was subject to the 90 day limitations period contained in Government Code section 11130.3.

In conclusion, the trial court correctly invalidated the State Defendants' settlement agreements with Hollister based on the Conservancy's violation of section 30609.5 of the Coastal Act. Judgment against the Conservancy was affirmed in that respect. Judgment in favor of the Commission, however, was reversed because the record confirmed it too violated Section 30609.5.

TAKE-AWAY: Coastal access easements in favor of the public are state property interests, the transfer of which are subject to the Coastal Act public hearing requirements.

* * *

Bankers Hill 150 v. City of San Diego (2022) 74 Cal.App.5th 755.

Background: A community association filed a petition for writ of mandate challenging city council's decision to approve a development application for a mixed-use building with total of 204 dwelling units. The superior court denied petition. The association appealed.

Holding: The Court of Appeal held that: (1) inconsistencies with development standards resulting from a project's deviation from a setback requirement as an incentive under State Density Bonus Law did not preclude project approval; (2) Density Bonus Law did not permit a city to condition approval of a project on redesign of the project to be shorter through the elimination of a courtyard; (3) sufficient evidence supported a finding that the project was consistent with a specific plan's policy of maintaining view corridors; (4) sufficient evidence supported a finding that the project was consistent with a specific plan's policies governing size of buildings in residential neighborhoods; (5) specific plan's policies governing height transitions did not apply to a parcel where the project would be developed; (6) project was consistent with the general plan's goal of complementing adjacent natural features and environment; and (7) sufficient evidence supported a finding that the project satisfied the specific plan's urban design policies for façade articulation. Affirmed.

Key Facts & Analysis: Bankers Hill 150 and Bankers Hill/Park West Community Association (collectively, the Association) appealed the judgment entered after the trial court denied their petition for writ of mandate challenging a decision by the City of San Diego (City) to approve a development application for a 20-story mixed-use building (Project). The Association challenged the approval on grounds that the building was inconsistent with the neighborhood design, the City's General Plan, and the specific plan for the area. The Court of Appeal affirmed the judgment of the trial court denying the Association's petition. The Project qualified for the benefits of the Density Bonus Law (Gov. Code, § 65915 *et seq.*), and the City was therefore obligated to waive the standards which conflicted with the Project's design.

In challenging the City's approval, the Association focused primarily on the Project's deviation from the City's setback requirements. Due to the inconsistency, the Association contended that the City abused its discretion. The Association contended that, because of the deviation from the setback requirement, the Project did not "maintain and enhance views of Balboa Park," included inadequate "façade articulation," improperly transitioned from the neighboring shorter buildings, and did not respect the scale of neighboring buildings.

The Court of Appeal found that the deviation was granted by the City as a requested incentive under the Density Bonus Law, and the City was required to grant the incentive absent certain findings, which it did not make. In fact, the City Council expressly found to the contrary, although the Court noted it was not required to do so. The grant of the incentive under the Density Bonus Law also defeated the Association's arguments of other inconsistencies with the General Plan and specific plan arising from the incentive.

The Association also argued the Project's design could have been accomplished without a courtyard, which would allow it to be built shorter and wider. The Court rejected this argument, citing precedent that the Density Bonus Law cannot be used to require an applicant to "strip the project of amenities."

The Court also rejected the Association's arguments that the City's findings were not supported by substantial evidence, and found that the specific plan's policies regarding heights of buildings in residential neighborhoods did not apply to the "community commercial" parcel on which the Project was constructed.

Finally, the Court rejected the Association’s argument that the Project did not conform with the General Plan policy to be sensitive to “natural features.” It found that Balboa Park, next to the Project, was not a “natural feature” warranting minimal development under the General Plan because the park modified the natural environment and was a developed urban park and constituted an urban use of the land. As such, the area around Balboa Park was not a “natural feature” warranting minimal development on adjoining parcels.

TAKE-AWAYS: In this case the court affirmed the trial court judgement upholding the City of San Diego’s approval of a development application for a 20-story mixed use project. The court found that, because the project qualified for incentives under the Density Bonus law, the City was obligated to waive the development standards that conflicted with the project design, and which were the basis of the challenge to the City’s project approval.

* * *

Ocean Street Extension Neighborhood Assn. v. City of Santa Cruz (2021) 73 Cal.App.5th 985.

BACKGROUND: A neighborhood association petitioned for writ of mandamus, alleging that a city and its city council violated the California Environmental Quality Act (CEQA) and city’s municipal code in approving project to build a 32-unit residential complex. The Superior Court, Santa Cruz County, issued a limited writ prohibiting the city from allowing the project to proceed unless and until it followed the municipal code regarding slope regulations and the court was satisfied with its compliance. Parties cross-appealed.

HOLDING: The Court of Appeal held that: (1) the city did not violate CEQA by placing discussion of biological resources that were determined to be less than significant with mitigation in initial study rather than in environmental impact report (EIR); (2) final EIR complied with CEQA’s informational mandate; (3) substantial evidence supported city’s determination that mitigation measures complied with CEQA; (4) substantial evidence supported city’s conclusion that project’s objectives were adequate; (5) substantial evidence supported city’s conclusions that cumulative impacts analysis in EIR adequately considered impact of additional water demand in light of city-wide needs; (6) city was entitled to deference in its interpretation of an ordinance developed by the city providing a variation to slope regulations modification procedures; and (7) municipal code provision prohibiting building of new lots within 20 feet of a 30 percent slope did not apply to project to build on one lot of land. Affirmed in part, reversed in part, and remanded with instructions.

Key FACTS & ANALYSIS: In 2010, real parties in interest, Richard Moe, Ruth Moe, Craig Rowell, and Corinda Ray (real parties), applied to the City of Santa Cruz (City) for design and planned development permits and a tentative map to construct a 40-unit development with 10 four-unit buildings on a parcel of land. Following an initial mitigated negative declaration and years of litigation surrounding the impact of the nearby crematory at Santa Cruz Memorial Park, in 2016, the real parties in interest renewed their interest in moving forward with their project. As required by CEQA, the project applicant and the City prepared and circulated the initial study, the draft EIR, the partially recirculated draft EIR, and the final EIR. Following a public hearing, the city council adopted a resolution to certify the EIR and to adopt Alternative 3, a 32-unit housing project.

The Ocean Street Extension Neighborhood Association (OSENA) filed a petition for writ of mandamus, alleging the City and its city council violated CEQA and the Santa Cruz Municipal Code in approving the project.

The trial court concluded the City had complied with CEQA, but it determined the City violated the municipal code, and it issued a limited writ prohibiting the City from allowing the project to proceed unless and until it followed the municipal code and the court was satisfied with its compliance. Following entry of judgment, OSENA appealed, arguing the court erred by concluding the City complied with CEQA's requirements. OSENA contended the City violated CEQA by (1) insufficiently addressing potentially significant biological impacts and mitigation measures in the initial study rather than in the EIR directly, (2) establishing improperly narrow and unreasonable objectives so that alternative options could not be considered meaningfully, and (3) failing to address cumulative impacts adequately. The City cross-appealed, contending the court incorrectly concluded it violated the municipal code by granting a planned development permit (PDP) (Santa Cruz Mun. Code, § 24.08.700) without also requiring the project applicant to comply with the slope modifications regulations (*Id.*, § 24.08.800). The Court of Appeal agreed with the City, and therefore affirmed on CEQA grounds in favor of the City, and reversed on the municipal code issue.

First, the Court of Appeal found that the City did not violate CEQA by placing its discussion of biological resources that were determined to be less than significant with mitigation in an initial study, rather than in its EIRs. Even without the discussion, the EIR complied with its purpose as an informational document. The initial study did not use information about biological resources to decide whether to prepare an EIR or a negative declaration as other environmental factors necessitated the completion of EIR, enabled the City to modify the project to mitigate adverse impacts before the EIR was prepared, helped focus the EIR on effects determined to be significant, and explained reasons potentially significant effects would not be significant. Nothing prohibited the discussion of impacts that were less than significant with mitigation in an initial study rather than in the EIR so long as the EIR complied with its purpose as an informational document.

Second, the Court of Appeal found that the EIR was sufficiently detailed to comply with CEQA's informational mandate. The final EIR provided a sufficient degree of analysis so that decision-makers could intelligently take account of environmental consequences. It focused on significant environmental effects, described feasible mitigation measures, and explained why it determined environmental effects on biological resources would be less than significant with required mitigation measures. The absence of details pertaining to the types of bird that could be impacted by construction, including the likelihood the birds would be at the project site, did not render the EIR insufficient. The EIR mitigation measures for birds applied regardless of type.

Third, the Court of Appeal found that substantial evidence supported the City's determination that its mitigation measures complied with CEQA. The measures contained concrete dates and measurements, and were therefore not vague or deferred under *Lotus v. Department of Transportation* (2014) 223 Cal.App.4th 645. The requirement of a preconstruction survey did not make a mitigation measure a deferred one or one based solely on the discretion of the biologist because it specified the actions taken based on the findings of the survey.

Fourth, the Court of Appeal found that substantial evidence supported the City's conclusion that the project goals were adequate. The EIR considered each of the alternatives and evaluated the degree to which each attained the project objectives and whether the alternatives would eliminate or reduce significant impacts. It compared each of the alternatives to the original proposal and the no-project option, and it recognized that all of the alternatives would reduce the significance of environmental impacts to varying degrees. As required, the EIR provided information about each alternative that showed the major characteristics and significant environmental effects of each one.

Fifth, the Court of Appeal found that substantial evidence supported the City's conclusions that the cumulative impacts analysis in the EIR adequately considered the impact of additional water demand in light of city-wide needs. The City concluded that the water shortfall from residential housing was not cumulatively considerable. The EIR recognized the existing problem of water shortfalls, discussed citywide measures that addressed water supply because of anticipated shortfalls, considered the project's contribution to environmental conditions, and discussed the project's contribution to water consumption in context of other sources also contributing to water consumption. This was adequate under CEQA. Further, the project was required to mitigate water use by installing water conserving fixtures and landscaping, as well as curtailing use based on the severity of the drought and was required to contribute a fee towards water supply issues.

On the municipal code questions, the City was entitled to deference in interpreting its ordinance providing a variation to slope regulations modification procedures. Accordingly, the City complied with its PDP requirements in allowing a variance for development ten feet from a 30-percent or greater slope, such that city did not violate its municipal code by granting the slope modification as part of PDP. The City's interpretation was consistent with the text of ordinance and legislative intent of the PDP to allow creative and innovative design to meet the public interests more readily than through application of the conventional zoning regulations, which were more cumbersome. Moreover, the project was on a single lot of land and did not create new lots, thus, the City's municipal code provision prohibiting building of new lots within 20 feet of a 30 percent slope did not apply. Thus, the Court of Appeal affirmed on the CEQA issues, and reversed, in favor of the City, on the municipal code issues.

TAKE-AWAYS: This case holds that cities may address potentially significant environmental impacts that are reduced to less than significant levels through mitigation in an initial study, and focus the project EIR on significant impacts without violating CEQA, and that cities are entitled to deference on their reasonable interpretation of their own code provisions.

* * *

Save Civita Because Sudberry Won't v. City of San Diego (2021) 72 Cal.App.5th 957, review denied (Mar. 16, 2022).

BACKGROUND: An interest group filed a combined petition for writ of mandate and complaint for declaratory and injunctive relief against a city, challenging city's certification of environmental impact report (EIR) and approval of mixed-use development and road construction project and contending that city violated the California Environmental Quality Act (CEQA), the Planning and

Zoning Law, and the public's due process and fair hearing rights. The Superior Court, San Diego County, entered judgment for the city, and the interest group appealed.

HOLDING: The Court of Appeal held that: (1) as a matter of first impression, where a recirculated EIR stated that it was replacing a prior EIR and the agency made clear the overall nature of the changes, and states that prior comments would not receive responses, the agency could be said to have complied with the CEQA Guidelines requirement that it “summarize the revisions made to the previously circulated draft EIR”; (2) any failure of the city to summarize changes to project's previously circulated programmatic draft EIR was not prejudicial; and (3) city was acting in a quasi-legislative capacity in certifying the final EIR and in approving the amendments to the community plan and the city's general plan, and thus procedural due process protections applicable to quasi-judicial hearings did not apply to those actions. Affirmed.

Key FACTS & ANALYSIS: The City of San Diego (City) certified an EIR for the “Serra Mesa Community Plan [SMCP] Amendment Roadway Connection Project” (Project) and approved an amendment to the SMCP and the City's General Plan to reflect the proposed roadway. The proposed four-lane major road—together with a median, bicycle lanes, and pedestrian pathways—would run in a north/south direction between Phyllis Place in Serra Mesa to Via Alta / Franklin Ridge Road in Mission Valley. Via Alta and Franklin Ridge Road are contained within Civita, a partially built out mixed-use development that the City approved in 2008.

Save Civita Because Sudberry Won't (Save Civita) filed a combined petition for writ of mandate and complaint for declaratory and injunctive relief (Petition / Complaint) against the City, challenging the City's certification of the EIR and approval of the Project. In its Petition / Complaint and briefing, Save Civita contended that the City violated CEQA, the Planning and Zoning Law (Gov. Code, § 65000 *et seq.*), and the public's due-process and fair-hearing rights. The trial court denied the Petition / Complaint in its entirety and entered a judgment in favor of the City.

On appeal, Save Civita raised four claims related to the City's certification of the EIR for the Project. First, Save Civita claimed that the City violated CEQA Guidelines section 15088.5, subdivision (g), in failing to summarize revisions made in the Project's recirculated draft EIR (RE-DEIR). Save Civita also claimed that the Project's final EIR (FEIR) was deficient because it failed to adequately analyze, as an alternative to the Project, a proposal to remove the planned road from that community plan. Save Civita further contended that the FEIR was deficient because it failed to adequately analyze the Project's traffic impacts. Specifically, Save Civita maintained that the FEIR failed to disclose the true margin of error associated with a traffic projection in the FEIR and “ignored obvious traffic hazards,” (capitalization and boldface omitted) that the Project would create on Via Alta and Franklin Ridge Road. Save Civita also claimed that the FEIR failed to adequately discuss the Project's inconsistency with the General Plan's goal of creating pedestrian-friendly communities.

In addition to its EIR / CEQA claims, Save Civita maintained that the Project would have a deleterious effect on the pedestrian-friendly Civita community and that the City therefore violated the Planning and Zoning law in concluding that the Project was consistent with the City's General Plan. Finally, Save Civita maintained that the City acted in a quasi-adjudicatory capacity in

certifying the FEIR and approving the Project and that a City Council member violated the public's procedural due process rights by improperly advocating for the Project prior to its approval.

In a published section of the opinion the Court of Appeal concluded that the City did not violate Guidelines section 15088.5, subdivision (g), in failing to summarize revisions made to the Project's previously circulated programmatic draft EIR (PDEIR) in the RE-DEIR. In a second published section, the Court of Appeal concluded that the City Council acted in a quasi-legislative capacity in certifying the FEIR and approving the Project, and that that determination foreclosed Save Civita's procedural due process claim. In unpublished sections of the opinion, the Court of Appeal rejected the remainder of Save Civita's contentions. The Court of Appeal affirmed the trial court's judgment in favor of the City in its entirety.

Neither the RE-DEIR nor the FEIR Violated CEQA

Guidelines section 15088.5, subdivision (g) required the City to "summarize the revisions made to the previously circulated draft EIR." The Court of Appeal found that the RE-DEIR did not violate the Guidelines when it made the overall nature of changes clear, and stated that comments on the previous EIR would not receive response, as permitted by the Guidelines. However, the Court of Appeal found that even if the City had failed to comply with the Guidelines, the error was not prejudicial, and was merely procedural, the public was not deprived of the opportunity to review and comment on the RE-DEIR.

Alternatives Analysis

In an unpublished portion of the opinion, the Court of Appeal found that the City did not err in not studying amending the Mission Valley Community Plan (MVCP) as an alternative to the project. The proposed alternative would amend the MVCP to remove a proposed road connection from the planning document. The FEIR explained why the City had not selected that alternative for consideration, and had considered other alternatives which did not involve construction of a road. The Court of Appeal agreed with the trial court that this finding was based on substantial evidence. Even if, as Save Civita suggested, the Project changed from being a planning amendment to a road construction project, Save Civita had not presented a persuasive legal argument that such a change would have been improper. Given the overwhelming evidentiary support for the City's conclusion that the MVCP alternative would not have achieved the vast majority of the Project's objectives and would not have meaningfully furthered analysis of the Project, the Court of Appeal concluded that the FEIR was not defective for failing to study that alternative in detail.

Traffic Impacts Analysis

In a separate unpublished opinion, the Court of Appeal also concluded that the FEIR was not defective for failing to adequately analyze the Project's traffic impacts. Save Civita did not demonstrate that the vehicle miles travelled (VMT) calculation was clearly inadequate because it did not disclose the true margin of error associated with the projection. The FEIR explained that its VMT analysis was premised on a "White Paper" that utilized a SANDAG travel demand model. The FEIR also provided a hyperlink to the White Paper, which was contained in the administrative record. The administrative record also indicated that the SANDAG model has been used to prepare

other planning documents, including the City's Climate Action Plan. Save Civita's suggestion that the Project would actually increase VMT was not based on sufficient facts to establish the actual margin of error in the FEIR's VMT analysis. Save Civita also failed to demonstrate how any increased traffic it alleged would result in hazardous conditions it contended the FEIR failed to analyze.

Analysis of General Plan Consistency

In another unpublished opinion, the Court of Appeal found that the FEIR was not defective for failing to discuss purported inconsistencies of the Project with the City's General Plan. The FEIR exhaustively considered the inconsistencies raised by Save Civita.

Procedural Due Process

In a separate published opinion, the Court of Appeal found that the City Council acted in a quasi-legislative, rather than quasi-adjudicative capacity in certifying the FEIR and approving the project, and therefore was not subject to procedural due process requirements applicable to quasi-adjudicative proceedings. Accordingly, Save Civita was not entitled to reversal on the ground that the City violated the public's right to a fair hearing based on evidence that a City Council Member's staff solicited support for the Project.

TAKE-AWAYS: This case upheld a recirculated EIR replacing a prior EIR where the reviewing body summarized the changes from the prior EIR, and indicated comments on the prior EIR will not receive responses. The reviewing body's action in certifying the final EIR and in approving amendments to the community plan and general plan was determined to be quasi-legislative, mooted any alleged procedural due process defects.

* * *

Mission Peak Conservancy v. State Water Resources Control Bd. (2021) 72 Cal.App.5th 873, as modified (Dec. 20, 2021).

BACKGROUND: A conservation group brought action against the State Water Resources Control Board (Board), alleging that it violated the California Environmental Quality Act (CEQA) by granting small domestic use registration to property owners without first conducting environmental review. The Superior Court, Alameda County, sustained the Board's demurrer without leave to amend. Conservation group appealed.

HOLDING: The Court of Appeal held that process of granting domestic use registration to property owners was ministerial. Affirmed.

Key FACTS & ANALYSIS: Mission Peak Conservancy and individual Kelly Abreau (Mission Peak) sued the Board, alleging that it violated CEQA by granting a small domestic use registration to Christopher and Teresa George without first conducting an environmental review. The trial court sustained the Board's demurrer without leave to amend, holding that the registration was exempt from CEQA as a ministerial approval. The Court of Appeal affirmed.

Mission Peak alleged that the Georges registered a small domestic use on a property in Alameda County. On its face, the form met the program requirements. Mission Peak alleged that the form contained false information, and that based on inspections, the Board knew or should have known that the project would not qualify. The petition alleged that the registration process was discretionary and not exempt from CEQA.

The Court of Appeal analyzed the process and found it to be ministerial and exempt from CEQA. The Board was only able to impose general conditions applicable to all registrations, and registration was automatically deemed complete upon receipt of the required registration. The Board had no discretionary authority. Even if the Board made an erroneous ministerial decision, the process over all was not encompassed by CEQA. The Court of Appeal upheld the trial court's decision sustaining the Board's demurrer.

TAKE-AWAY: This case is an example of the inapplicability of CEQA to ministerial approvals.

* * *

League to Save Lake Tahoe Mountain Area Preservation Foundation v. County of Placer (2022)
75 Cal.App.5th 63.

BACKGROUND: Conservation groups filed separate petitions for writ of mandate and complaints alleging that a county's approval of a land use specific plan and rezoning that would permit residential and commercial development of a timberland production zone adjacent to lake basin area subject to environmental threshold carrying capacities pursuant to Clean Water Act did not comply with California Environmental Quality Act (CEQA), and that rezoning did not comply with California Timberland Productivity Act. Following consolidation, the Superior Court, Placer County, issued a writ of mandate directing the county to vacate its certification of environmental impact report (EIR) and approval of project only as they pertained to emergency evacuations for wildfires and other emergencies. Conservation groups appealed and county and land owner cross-appealed, and appeals were consolidated.

HOLDING: The Court of Appeal held that: (1) substantial evidence supported the county's reliance on air-quality data from air basin in which development was located, rather than on data from adjacent air basin; (2) the county abused its discretion by failing to describe the lake's existing water quality; (3) the county did not abuse its discretion by not utilizing regional planning agency's thresholds of significance or environmental standards when analyzing project's impact on adjacent lake basin; (4) substantial evidence supported the county's decision not to recirculate final EIR; (5) mitigation measure for greenhouse gas emissions did not comply with CEQA; (6) substantial evidence supported the county's findings required to immediately rezone from timberland production zone; and (7) the county's failure to address whether any renewable energy features could be incorporated into project violated CEQA.

KEY FACTS & ANALYSIS: These appeals concerned Placer County's (County) approval of a land use specific plan and rezoning to permit residential and commercial development and preserve forest land near Truckee and Lake Tahoe. The plaintiffs and appellants contended the County's environmental review of the project did not comply with CEQA on numerous grounds, and the rezoning did not comply with the California Timberland Productivity Act of 1982 (Gov. Code,

§ 51100 *et seq.*). (Statutory section citations that follow are to the Public Resources Code unless otherwise stated.) The trial court rejected each of plaintiffs' claims except one, a conclusion which the County and real parties in interest contested in their cross-appeal.

Sierra Watch's Appeal

Appellants Sierra Watch contended that:

(1) The EIR violated CEQA by not adequately describing the Lake Tahoe Basin's existing air and water quality, and, due to that failure and the County's decision not to utilize a vehicle-miles-traveled threshold of significance such as one adopted by the Tahoe Regional Planning Agency (TRPA), the EIR violated CEQA by not adequately analyzing the impacts that project-generated traffic may have on the Basin's air quality and Lake Tahoe's water quality; (2) The County violated CEQA by not recirculating the final EIR after it revised the draft EIR to include a new analysis of the project's impacts on climate and by mitigating the impact with an invalid mitigation measure; and (3) The County violated the Timberland Productivity Act by not making certain findings before immediately rezoning the developable portion of the site.

In their cross-appeal, the County and real parties in interest claimed the trial court erred when it found that the EIR did not adequately address the project's impacts on emergency evacuation plans and that substantial evidence did not support the EIR's conclusion that the impact would be less than significant.

Lake Tahoe Basin's Air and Water Quality

Sierra Watch argued that because the project's traffic impacts on the Tahoe Basin's air quality and Lake Tahoe's water quality were potentially significant effects on the environment and on a unique environmental resource, the EIR was obligated to, but did not (1) describe the Tahoe Basin's existing air quality and the lake's water quality as part of its description of the project's regional environmental setting, and (2) analyze the project's impacts on the Basin's air quality and water quality and determine their significance individually and cumulatively. Sierra Watch also criticized the County's decision not to utilize a threshold standard of significance established by TRPA for regulating Basin air and water quality as a method for analyzing the existing setting and evaluating the project's impacts on the Basin.

The draft EIR provided an analysis of air quality in the Tahoe-Truckee region generally. It concluded the project's impacts individually were less than significant and, when mitigated, were cumulatively less than significant. The draft EIR did not address Lake Tahoe's water quality. In the final EIR, the County recognized the TRPA threshold had been used by TRPA as an indicator of vehicle emission impacts on Basin air and water quality. It said the project's in-Basin traffic would not cause the threshold to be exceeded, but it did not utilize the threshold to determine whether the potential impact was significant. It also stated that any impacts to Lake Tahoe's water quality from project-generated traffic were accounted for in a federally-approved water pollution abatement program.

Sierra Watch claimed these analyses did not comply with CEQA's substantive and procedural requirements and were not supported by substantial evidence.

On the one hand, the Court of Appeal disagreed with the assertion that the EIR did not at all address the Basin's existing characteristics and the project's potential impacts on Basin's resources. The EIR described the regional setting, including the Tahoe Basin, in its resource chapters to the extent the County believed the project may affect that resource. The EIR explained existing Basin conditions and the project's potential impacts to those conditions with regard to the project's location, Basin land use, population, employment and housing, biological resources, cultural resources, visual resources, and transportation and circulation.

On the other hand, however, substantial evidence before the County supported a fair argument that project-generated vehicle emissions in the Lake Tahoe Basin could potentially impact the Basin's air and water quality and thus should have been addressed in the draft EIR. Before the County began preparing the EIR, League to Save Lake Tahoe and other environmental organizations responding to the notices of preparation twice stated the project's traffic would increase Basin vehicle miles travelled (VMT) and impact the Basin's air quality and the lake's water quality, and they asked the County to address those potential impacts. These assertions, based on the fact the project would increase in-Basin VMT, constituted substantial evidence that a fair argument could be made that the project would significantly impact the environment in this manner.

The County asserted that these comments did not qualify as substantial evidence because they were interpretations of technical or scientific information that required expert evaluation. They were not. The Court of Appeal found substantial evidence that the in-Basin vehicle traffic which the project would generate might have a significant effect on the Tahoe Basin's air quality and Lake Tahoe's water quality. The issue before the Court of Appeal was whether the EIR sufficiently described the regional setting and analyzed these potential impacts in the manner required by CEQA and whether its conclusions were supported by substantial evidence.

There was no dispute that Lake Tahoe and the Lake Tahoe Basin were unique resources and were entitled to special emphasis in the EIR's description of the existing physical conditions to the extent the project could potentially affect them. (CEQA Guidelines, § 15125(c).) Because the project's in-Basin traffic could potentially impact the Basin's air quality and water quality, CEQA required the EIR to discuss the Basin's existing air and water quality so that the significance of the potential impact could be determined. The Court of Appeal found that substantial evidence supported the County's air impact analysis, but that the County abused its discretion by not describing Lake Tahoe's existing water quality.

The County claimed the EIR's air quality analysis, its discussion of the project's VMT under the TRPA threshold, and its reference to the Lake Tahoe Total Maximum Daily Load (TMDL) adequately addressed the project traffic's potential impact on Lake Tahoe's air and water quality and was supported by substantial evidence. The Court of Appeal agreed in part. The EIR concluded that the project's individual impacts on regional air quality, including emissions of nitrogen from vehicular sources, were not significant. It reached this conclusion by determining that the project's emissions would not exceed a threshold of significance approved by the Placer County Air

Pollution Control District, which includes the Lake Tahoe Air Basin as well as the Mountain Counties Air Basin.

Sierra Watch claimed the EIR's analysis was inadequate. Sierra Watch argued the County was required to utilize TRPA's VMT threshold or the science behind it to determine the significance of the project's impacts, as that was the best science available to evaluate the project's impacts on the Basin's air and water quality. Instead, the EIR did not determine whether the impacts were significant under any standard.

Sierra Watch claimed that although the final EIR addressed the VMT threshold, it did not adopt it as a standard of significance, and even if it had, it applied it incorrectly. Sierra Watch claimed the EIR did not comply with CEQA when it evaluated impacts under the thresholds of significance established by the Air Pollution Control District. It claimed those standards were not designed to protect the Basin's unique resources.

The Court of Appeal found that the County had discretion on whether to apply the TRPA standards. The County did not abuse its discretion in applying different standards. However, although the EIR satisfactorily addressed the project's impacts which emissions may have, it did not adequately address the impacts which crushed abrasives and sediment from project-generated traffic may have on the lake. To the extent the VMT analysis in the final EIR was to be used to address this water quality impact, it was inadequate for reasons raised by Sierra Watch. By not using the VMT threshold as a threshold of significance and by not providing an alternative threshold to measure this impact, the EIR did not determine the significance of the potential impact individually or cumulatively.

Revisions to the Draft EIR Climate Analysis

Sierra Watch also contended the County violated CEQA by not recirculating the draft EIR after adding new information in the final EIR about the project's impact to climate change which allegedly revealed more severe climate impacts. Sierra Watch further claimed that the County violated CEQA by not reconsidering in the final EIR the efficacy of the draft EIR's climate impact mitigation measure in light of the new information added to the final EIR, and because the revisions to that mitigation measure do not guarantee the impact will be mitigated.

The Court of Appeal concluded substantial evidence supported the County's decision not to recirculate the EIR, but also concluded the mitigation measure did not satisfy CEQA. Substantial evidence supported the decision not to recirculate the final EIR because the final EIR did not add significant new information to draft EIR; both concluded that environmental impacts from the project's greenhouse gas emissions were significant, in both short and long term, because they would far exceed air pollution control district's tier one threshold. The County could not speculate on significant future impacts without knowing emissions targets the State would adopt, and draft EIR's use of the tier two threshold, instead of the tier one threshold in the final EIR, did not change actual, quantitative impacts the project would create or that the draft EIR disclosed.

However, the County's mitigation measure did not satisfy CEQA. As written, the measure required a developer to mitigate impacts if the project conflicted with greenhouse gas targets adopted by

the state where those targets were based on “a substantiated linkage” between the project and statewide emission reduction goals. No such targets existed in the case at issue. The final EIR did not discuss how the mitigation measure would apply if no such targets were developed. As a result, the mitigation measure deferred determining the significance of the impact and establishing appropriate mitigation to an undisclosed time in the future. The measure violated CEQA because it would not trigger any mitigation despite significant emissions impacts.

Timberland Productivity Act

Sierra Watch claimed that in approving rezoning for the project, the County did not make findings required by the Timberland Productivity Act (Gov. Code, § 51100 *et seq.*). Instead, the County adopted findings that purported to justify the immediate rezoning on unrelated grounds. The Court of Appeal disagreed and found that the County adopted the required findings, and those findings were supported by substantial evidence.

County’s Appeal

In their appeal, the County and applicants contended the trial court erred when it found that the EIR did not adequately address, and that substantial evidence did not support, the conclusion that the project’s impacts on emergency response and evacuation plans would be less than significant. The Court of Appeal agreed with the County and applicants. Within the methodology chosen by the County, the EIR considered factors to find the impact would be less than significant. The project would not prevent an evacuation using state route 267 or other routes designated in the county evacuation plan. It would mitigate the possible impact by providing two emergency vehicle access routes, one of which could provide an alternate evacuation route. The study relied on by the County addressed route 267’s capacity, and it demonstrated the project could evacuate in a reasonable time under the modeled circumstances. The project further mitigated the impact by providing funding to the first responders for equipment and personnel and by imposing strict fire prevention requirements. The Court of Appeal therefore concluded substantial evidence supported the EIR’s conclusion that the project’s impact on implementation of the County evacuation plan would be less than significant, and that the County adequately addressed emergency response.

On the first petition, the Court of Appeal affirmed the judgment of the trial court in part, except that the Court of Appeal held that the analysis of the project’s impact on Lake Tahoe’s water quality and greenhouse gas emission mitigation measure did not comply with CEQA, and the EIR’s analysis of the project’s impact on evacuation plans was supported by substantial evidence.

California Clean Energy Committee’s Appeal

Appellant California Clean Energy Committee (the Committee) challenged the EIR’s greenhouse gas emission mitigation measure. It also contended the EIR violated CEQA by: (1) Not adequately describing the environmental setting of forest resources or analyzing the project’s cumulative impacts on forest resources; (2) Not addressing feasible measures to mitigate the project’s impact on traffic; (3) Not disclosing the significant impacts that would occur due to the project’s contribution to widening state route 267; and (4) Not discussing whether the project could increase its reliance on renewable energy sources to meet its energy demand.

Cumulative Impacts on Forest Resources

The Committee claimed the EIR's analysis of the project's cumulative impacts on forest resources did not comply with CEQA and as not supported by substantial evidence. The Committee asserted the EIR's analysis violated CEQA because (1) its description of the environmental setting did not acknowledge extensive tree mortality in the County caused by drought and bark beetle infestations; (2) the analysis did not address the project's cumulative impact; (3) the analysis did not compare the project to the physical environment; and (4) the analysis did not include the effect of tree loss due to climate change. The Court of Appeal concluded the EIR complied with CEQA and substantial evidence supported its analysis. The County's determination, that the project's cumulative impact on forest lands and timber resources would be less than significant complied despite the removal of over 37,000 trees in coniferous forest complied with CEQA. The Court agreed with the County that it could not reasonably determine the extent of tree mortality within its borders by drought or bark-beetle infestation. Therefore, the County's such reliance on historical regional projection of loss of commercial forest land due to planned developments was within the County's discretion, and the project's conversion of about 652 acres of forest land would not cause regional conversion projection to be exceeded.

Mitigation of Traffic Impacts

The County found that it did not identify any feasible mitigation measures that would reduce the project's significant and unavoidable impact to traffic congestion on state route 267 except payment of a traffic impact fee that would fund capital improvements to the highway. The Committee contended substantial evidence did not support this finding as the County, in violation of CEQA, did not review a number of suggested transportation demand management measures in the EIR that could feasibly mitigate the impact by reducing the project's future occupants' demand for automobile use. The Court of Appeal agreed with the Committee. The Committee had proposed mitigation measures, which the County did not consider. The commenters requested that the EIR discuss transportation demand management plans and measures to reduce traffic impacts in addition to reducing impacts on the transit system. The County did not claim that the suggested measures were infeasible, but the EIR did not consider them as a means to mitigate impacts on route 267. As a result, substantial evidence did not support the County's finding that no additional feasible mitigation measures were identified to mitigate the project's impact on route 267. The omission of this required analysis was prejudicial error.

Traffic Impact Fee

The Committee next claimed the EIR violated CEQA by not discussing the environmental impacts of widening state route 267, which the project's payment of the traffic impact fee would help fund. The Court of Appeal found no prejudicial error.

The final EIR stated the County had approved the widening as a matter of policy when it approved the Martis Valley Community Plan, and the community plan EIR had addressed the impacts of widening the highway at a program level. The final EIR stated that in the future, if Caltrans moved forward with a project to widen the highway, "the project would be subject to a separate

environmental study to analyze and disclose the impacts of widening the highway.” The widening project had been planned for many years, the public and decision-makers had known of its likely environmental impacts to the extent they could be addressed during that time, no circumstances had changed since the County reviewed the widening’s environmental impacts, the EIR referenced the prior environmental review, that information was publicly available, and the widening would undergo full CEQA review. Although it was error not to reference the EIR regarding the widening, the Court of Appeal concluded that the error was not prejudicial.

Energy Consumption

The Committee finally contended the EIR did not comply with CEQA because, in the EIR’s analysis of the project’s energy consumption, it “did not identify or discuss impacts on renewable energy content as an element of the energy conservation analysis.” Despite being requested to address renewable energy, the County in the final EIR “did not discuss either decreasing reliance on fossil fuels or increasing reliance on renewable energy resources.” The Court of Appeal agreed.

CEQA requires an EIR to analyze a project’s energy consumption. Because the EIR did not address whether any renewable energy features could be incorporated into the project as part of determining whether the project’s impacts on energy resources were significant, it did not comply with CEQA’s procedural requirements, a prejudicial error.

On the second petition, the Court of Appeal affirmed the judgment except to hold that the greenhouse gas emission mitigation measure did not comply with CEQA, substantial evidence did not support the County’s finding that no additional feasible mitigation measures existed to mitigate the project’s traffic impacts on state route 267, and the EIR’s discussion of the project’s energy impacts did not comply with CEQA.

The matter was affirmed in part and reversed in part, and was remanded for further proceedings.

TAKE-AWAYS: In this fact-specific case, the court found the EIR defective and remanded for further proceedings. The court held that the county’s EIR should have analyzed the potentially significant impact of project vehicle traffic on water quality, in part because the county failed to use the vehicle miles travelled threshold as a threshold of significance. The court also found the county deferred determining the project’s greenhouse gas impacts and failed to consider mitigation measures for traffic congestion and whether renewable energy features could be incorporated into the project.

* * *

Lejins v. City of Long Beach (2021) 72 Cal.App.5th 303, review denied (Mar. 23, 2022).

BACKGROUND: Property owners petitioned for writ of mandate challenging a surcharge a city imposed on its water and sewer customers by embedding the surcharge in rates the water department charged its customers for service. The Superior Court, Los Angeles County, granted judgment for owners and awarded them attorney fees. The city appealed.

HOLDING: The Court of Appeal held that: (1) a voter-approved surcharge had been imposed upon parcel or upon person as an incident of property ownership within the meaning of state constitutional provision governing special taxes; (2) voters' approval of surcharge did not prevent it from violating state constitutional provision governing special taxes; and (3) a transfer or surcharge that was not in any way related to costs of providing water and sewer services was prohibited by state constitutional provision governing special taxes. Affirmed.

KEY FACTS & ANALYSIS: Diana Lejins and Angela Kimball (Plaintiffs) filed a petition for writ of mandate in the trial court, challenging a surcharge defendant City of Long Beach (City) imposed on its water and sewer customers by embedding the surcharge in the rates the Long Beach Water Department (Water Department) charged its customers for service.

The surcharge covered transfers of funds from the Water Department to the City's general fund, to be used for unrestricted general revenue purposes. The City contended the surcharge was legally imposed because it was approved by a majority of the City's voters pursuant to article XIII C of the California Constitution. Plaintiffs argued notwithstanding majority voter approval, the surcharge violated article XIII D, which prohibits a local agency from assessing a fee or charge "upon any parcel of property or upon any person as an incident of property ownership" unless the fee or charge satisfied enumerated requirements the City acknowledged were not met. (Art. XIII D, §§ 3, subd. (a) & 6, subd. (b).) The trial court entered judgment in favor of Plaintiffs, concluding the surcharge was unconstitutional and invalid under article XIII D.

The City adopted Measure M, which would amend the City Charter to authorize the Water Department to transfer to the City's general fund any funds from the Water Revenue Fund and/or the Sewer Revenue Fund that the Board of Water Commissioners (Board) determined "to be unnecessary to meet" other obligations of the Water Department, not to exceed 12 percent of the "annual gross revenues of the water works and sewer system, respectively." Measure M would permit the City to use the proceeds from these transfers for "unrestricted general revenue purposes," as the City Council may direct "by budget adoption or other appropriation." Measure M would also authorize, but not require, the Board to fix, and the City Council to approve, "water and sewer rates in an amount sufficient to recover the cost" of any transfers to the general fund that the Board may make. The purpose of Measure M was to provide financial support for general city services. Measure M was approved by the majority of the City's voters.

Following approval of Measure M, the Board passed a resolution fixing water and sewer rates, raising rates for potable and recycled water by 7.2 percent, and leaving sewer rates unchanged. In a Notice of Public Hearing, the Water Department informed customers the proposed increase in water rates was due to the following: *"In June 2018, voters in the city of Long Beach passed Measure M, reauthorizing and affirming the City's historical practice of revenue transfers from the City's utilities to the General Fund, as approved by the City Council and Board of Water Commissioners. The revenue transfer is subject to a cap of twelve percent (12%) of each utility's annual gross revenues, as shown by audited financial reports. All proceeds from utility revenue transfers to the General Fund shall be used to maintain local General Fund services, which include general City services such as police, fire and paramedic response, street repair, parks, libraries and youth/senior programs."* The City Council passed Ordinance No. ORD-18-0022, approving the rates, including the potable and recycled water rates that were increased by 7.2 percent to fund the transfers to the City's general fund authorized by Measure M.

The Measure M surcharge, which the City characterized as a general tax, was embedded in the Water Department customers' utility service charges and was not separately identified in the Water Department's bills to customers. Thus, it was not possible to discern from looking at the bills what percentage of the customers' utility charges made up the Measure M surcharge.

Plaintiffs filed a petition for writ of mandate and complaint for declaratory and injunctive relief, asserting the Measure M surcharge violated California Constitution article XIII D, section 6, subdivision (b) because the rate revenue collected through the surcharge did not benefit the water or sewer utility, was not used for the provision of water and sewer service, and was not a reimbursement of costs incurred in the General Fund for the benefit of the water and sewer utilities. Instead, such rate revenue was used for general governmental purposes. Plaintiffs further asserted, to the extent the City contended the Measure M surcharge was a general tax, article XIII D, section 3, subdivision (a) precluded local governments from imposing general taxes upon any parcel or upon any person as an incident of property ownership. In opposition to the petition for writ of mandate, the City argued article XIII D was inapplicable to a general tax imposed on the use of a property-related service (water and sewer) after approval by a majority of the City's voters pursuant to article XIII C.

The trial court found (1) the Measure M general tax was unconstitutional and invalid under article XIII D; (2) the Measure M general tax was unconstitutional and invalid under article XI, section 7, to the extent the City collected the surcharge from water and sewer utility customers who receive service at a location outside the City; (3) any transfers of the proceeds of the Measure M general tax from the City's Water Revenue Fund and Sewer Revenue Fund to its General Fund were unconstitutional and invalid under article XIII D; and (4) all City ordinances that established and/or fix water or sewer rates were unconstitutional and invalid to the extent that they embed or otherwise imposed the Measure M general tax on the City's water and sewer utility customers. The judgment enjoined the City from making any further transfers of Measure M proceeds to its general fund. The judgment also ordered the issuance of a peremptory writ of mandate.

The Court of Appeal, reviewing *de novo* agreed with the trial court. The Measure M surcharge violated article XIII D as being a surcharge upon a parcel or person incident of property ownership. The definition of "fee" under that article included Measure M. Similarly, the Measure M surcharge was required to comply with article XIII D regardless of voter approval pursuant to article XIII C. Voter approval could not convert the unconstitutional fee into a constitutional one. Finally, because the City conceded Measure M did not comply with article XIII D section 6's requirements, the Court did not analyze whether it complied. Because the Court of Appeal found that Measure M violated article XIII D, it did not consider whether it also violated article XI, section 7.

TAKE-AWAYS: Voter approval of charges for water and sewer service does not exclude them from the definition of fees or charges under the constitutional provisions governing special taxes, or from compliance with the procedural and substantive requirements of Article XIID of the constitution. Water and sewer charges must reimburse the local government for costs associated with the water and sewer services' use of infrastructure, and may not be a fund-raising mechanism for general services. .

POSTSCRIPT: The League of California Cities filed a brief in support of the City. The League of California Cities asserted that the invalidation of the Measure M surcharge on the grounds

provided would mean the invalidation of numerous taxes imposed by local governments throughout California. The Court specified that its holding only considered the validity of Measure M.

* * *

City of Oxnard v. County of Ventura (2021) 71 Cal.App.5th 1010, as modified on denial of reh'g (Dec. 14, 2021), review denied (Mar. 9, 2022).

BACKGROUND: The City of Oxnard (City) brought action against surrounding County of Ventura (County) seeking a preliminary injunction to prevent the County from providing ambulance services within City limits pursuant to joint powers agreement. The Superior Court, Ventura County, denied the City's motion for preliminary injunction. The City appealed.

HOLDING: The Court of Appeal held that: (1) The City lacked authority under the Emergency Medical Services Systems and the Prehospital Emergency Medical Care Personnel Act to resume administration of its own ambulance services; (2) the City's authority to provide and administer ambulance services, even if police power, was subject to limits set forth in the Act; and (3) any withdrawal by the City from joint powers agreement did not provide basis for the City to resume providing ambulance services absent the County's consent. Affirmed.

Key FACTS & ANALYSIS: In 1971, the County, the City, and several other municipalities entered into a joint powers agreement (JPA) regarding ambulance services. Pursuant to the agreement, the County: (1) administered (and paid for) a countywide ambulance system, and (2) was the only party authorized to contract with ambulance service providers on behalf of the other JPA signatories. To implement the JPA, the County established seven exclusive operating areas (EOAs) in which private companies provide ambulance services. The City was located in EOA6, where Gold Coast Ambulance (GCA) was the service provider.

The JPA permitted parties to withdraw from it by providing written notice at least 180 days prior to the end of the fiscal year. Withdrawal became effective at the beginning of the next fiscal year.

In 1980, the Legislature enacted legislation to establish statewide policies for the provision of emergency medical services (EMS) in California. The EMS Act grants counties the authority to designate a local EMS agency to administer services countywide. The EMS Act also includes a "transitional" provision that allows cities that were providing EMS services on June 1, 1980, to continue to do so until they cede the provision of services to the local agency.

Pursuant to the EMS Act, the County established the Ventura County Emergency Medical Services Agency (VCEMSA) as the local EMS agency. For more than 40 years, VCEMSA administered the countywide EMS program, contracted with EMS providers, and submitted EMS plans for state approval. Each plan indicated that VCEMSA was the County's exclusive EMS agency.

In the 2010s, City officials grew dissatisfied with GCA's provision of ambulance services. In December 2020, the City notified the County of its intent to withdraw from the JPA so it could begin administering its own ambulance services effective July 1, 2021. The City requested that the County not approve a contract extension with GCA so it could instead contract with another

ambulance services provider. County officials rejected this request and approved the GCA contract extension.

The City moved for a preliminary injunction to prevent the County from providing ambulance services within City limits after June 30, 2021, claiming it retained authority under the EMS Act to provide such services because it was indirectly contracting for those services through the JPA. The trial court disagreed and denied City's motion.

The City contended the trial court erred when it concluded that the City lacked the authority to contract for its own ambulance services under the EMS Act. The Court of Appeal upheld the trial court's determination. The EMS Act permitted cities to continue to provide only those emergency services they provided on June 1, 1980, and permitted them to exercise only the administrative control that they had already exercised as of that date. Here, the City did not provide ambulance services in June 1980, because the County was providing those services under the JPA.

The City next claimed that the trial court's construction of the EMS Act violated the prohibition against contracting away police powers. Even assuming that the provision of ambulance services was a police power, the exercise of that power was subject to constitutional constraints. As relevant here, a City has the power to "make and enforce" only those "ordinances and regulations [that are] not in conflict with general laws." (Cal. Const., Art. XI, § 7.) The EMS Act was a general law. The City's authority to provide and administer ambulance services was thus subject to the limits set forth in the EMS Act.

Finally, the City claimed that because the County's authority to contract for and provide ambulance services within City limits arose from the JPA, the trial court erred when it concluded that the City could not exclude the County after the City withdrew from the JPA. But since June 1, 1980, the County's authority to provide ambulance services in City limits did not come from the JPA; it came from the EMS Act. Regardless of whether the City withdrew from the JPA, it could not resume providing ambulance services absent the County's consent.

TAKE-AWAYS: The Emergency Services Act only permits cities to continue to provide and administer those emergency services they provided on June 1, 1980. Because Oxnard's emergency services were provided by Ventura County pursuant to a joint powers agreement on June 1, 1980, Oxnard's later withdrawal from the joint powers agreement did not authorize Oxnard to commence providing emergency services it did not provide on June 1, 1980.

* * *

Friends, Artists & Neighbors of Elkhorn Slough v. California Coastal Com. (2021) 72 Cal.App.5th 666.

BACKGROUND: Objectors petitioned for a writ of administrative mandate, alleging that Coastal Commission's (Commission) approval of a coastal development permit for a subdivision development project violated California Environmental Quality Act (CEQA) and California Coastal Act. The Superior Court, Monterey County, denied the petition. Objectors appealed.

HOLDING: The Court of Appeal held that: (1) Commission’s environmental review was incomplete at time it approved permit application, and (2) objectors exhausted administrative remedies under CEQA. Reversed and remanded.

KEY FACTS & ANALYSIS: Respondents Heritage/Western Communities, Ltd and Heritage Development Corporation (collectively, Heritage) sought to develop property in Monterey County. Heritage obtained the requisite government approvals, including a coastal development permit, from Monterey County.

Appellant Friends, Artists and Neighbors of Elkhorn Slough (FANS) filed an appeal with respondent Commission regarding Monterey County’s approval of the coastal development permit. Commission staff prepared a report recommending denial of Heritage’s coastal development permit application primarily due to the lack of adequate water supply. At a public hearing on November 8, 2017, the Commission expressed disagreement with staff’s recommendation and approved Heritage’s permit application. Commission staff thereafter prepared written revised findings to support the Commission’s action, and those revised findings were later adopted by the Commission on September 13, 2018.

Appellants FANS and LandWatch Monterey County (LandWatch) filed a petition for writ of mandate in the trial court, contending that the Commission’s approval of the coastal development permit to Heritage violated the CEQA and the California Coastal Act. The trial court denied the petition and entered judgment against FANS and LandWatch.

On appeal, FANS and LandWatch contended that the trial court erred in denying the petition for writ of mandate and the Commission’s approval of Heritage’s coastal development permit should have been set aside, because the Commission failed to complete the requisite environmental review before approving Heritage’s permit application.

The Commission considered a 2017 staff report prior to project approval. The 2017 report acknowledged that “the proposed project would have significant adverse effects on the environment.” The report also acknowledged that project modifications and design alternatives were necessary to address issues pertaining to (1) oak woodland, (2) water quality, (3) visual resources and community character, (4) agricultural areas, and (5) traffic. However, neither the 2017 staff report nor its addendum contained a complete analysis of mitigation measures or alternatives, as required by CEQA and the Commission’s regulatory program. The 2017 staff report and addendum also did not analyze any specific conditions that were necessary for approval of the project. Instead, because the 2017 staff report was recommending “independently denying the project based on the lack of an adequate water supply,” the 2017 staff report indicated that additional information or documentation regarding these other issues (e.g., oak woodland, water quality, visual resources and community character, agricultural areas, and traffic) was “not warranted at this time,” and that any additional analysis, modification, or alternatives with respect to these other issues was rendered “moot.”

After the project was approved at the November 2017 de novo hearing, Commission staff in a 2018 staff report analyzed for the first time various “components” of the project, mitigation measures, and/or conditions for the project. The 2018 staff report ultimately determined that, after

“review[ing] the relevant coastal resource issues associated with the proposed project,” “the project as proposed appropriately addresses any potential adverse impacts to such coastal resources.” Commission staff further found “that the proposed project avoids significant adverse effects on the environment within the meaning of CEQA. As such, there are no additional feasible alternatives or feasible mitigation measures available which would substantially lessen any significant adverse environmental effects that approval of the proposed project, as modified, would have on the environment within the meaning of CEQA.” This new environmental analysis of various “components,” mitigation measures, and/or conditions for the project that “appropriately address[ed] any potential adverse impacts to ... coastal resources” including habitat impacts, water quality, visual resources, and traffic.

The 2018 staff report thus contained new environmental analysis regarding components, mitigation measures, and/or conditions for the project, and those revised findings (along with modifications proposed by Heritage) were adopted by the Commission at a September 2018 hearing, after project approval. The Commission was required to consider project alternatives, mitigation measures, and conditions for the project before approving the coastal development permit application at the 2017 de novo hearing.

The Court of Appeal also analyzed whether the petitioners exhausted their administrative remedies. In this case, the 2017 staff report prepared prior to the de novo hearing did not contain a complete environmental analysis of alternatives, mitigation measures, and conditions for project approval because commission staff recommended denial of Heritage’s permit application. Despite the staff recommendation to deny the application, the Commission instead approved the project at the 2017 de novo hearing. Thereafter, and prior to the hearing regarding revised findings, FANS and LandWatch in a letter to the Commission dated September 7, 2018, objected to the 2018 staff report regarding revised findings.

On this record, the Court of Appeal found that FANS had preserved the dispositive issue of the appeal, that is, whether the Commission failed to complete the requisite environmental review before approving Heritage’s permit application at the 2017 de novo hearing, which included the question of whether the prevailing commissioners sufficiently stated the basis for their action at the hearing to properly allow staff to prepare a report regarding revised findings.

In sum, the record reflected that the Commission did not complete an analysis of mitigation measures (including conditions for the project) or alternatives, as required under CEQA and the commission’s certified regulatory program, until the 2018 staff report was prepared, which was after the project had already been approved. Under these circumstances, the Commission failed to comply with the requirements of CEQA and the commission’s own regulatory program by approving Heritage’s coastal development permit application without first completing an analysis of mitigation measures (including conditions for the project) and alternatives. Because the Commission did not proceed in accordance with the procedures mandated by law, the Commission abused its discretion in approving the permit application. The Court of Appeal therefore reversed and remanded for an order vacating the decision denying the petition for writ of mandate and entered new judgement granting the petition against the Commission.

TAKE-AWAYS: The environmental review for a coastal development project which was left incomplete because staff recommended denial of the project did not satisfy CEQA requirements

when the Commission chose to approve the project despite the staff recommendation. The Commission should have satisfied CEQA prior to permit approval, and the Commission analysis of project alternatives mitigations after project approval did not suffice.

* * *

People v. Venice Suites, LLC (2021) 71 Cal.App.5th 715.

BACKGROUND: Los Angeles City Attorney's Office, in the name of the People of the State of California (People), brought action against an apartment house owner and operator, alleging violations of the Los Angeles Municipal Code (LAMC), public nuisance, unfair business practices, and false advertising. The Superior Court, Los Angeles County, granted summary adjudication in part for owner and operator, and the People voluntarily dismissed remaining claims. The People appealed.

HOLDING: The Court of Appeal held that: (1) Court of Appeal could exercise its discretion to consider government's legal argument on uncontroverted facts, raised for first time on appeal, that short-term rentals were impliedly prohibited under permissive zoning scheme; (2) residential zone not specifying length of occupancy did not implicitly prevent apartment house from being used for short-term occupancies of 30 days or less; (3) long-term occupancy requirement for apartment house could not be inferred from definition limiting transient occupancy residential structure (TORS) to occupancies of 30 days or less; and (4) zoning code expressly authorizing use of apartment house in zone for human habitation without length of occupancy restriction could not be read in conjunction with rent stabilization ordinance (RSO) or transient occupancy tax ordinance (TOT) to require long-term occupancy. Affirmed.

Key FACTS & ANALYSIS: The People brought suit against Venice Suites, LLC and Carl Lambert (collectively, Venice Suites) for violation of the LAMC and for public nuisance, among other causes of action. Venice Suites owned and operated an "Apartment House" as defined under LAMC section 12.03. The People alleged Venice Suites illegally operated a hotel or transient occupancy residential structure (TORS), in a building only permitted to operate as an Apartment House for long-term tenants and not overnight guests or transient renters. Further, the Apartment House was located in a R3 Multiple Dwelling residential zone, which disallowed short-term occupancy. The trial court granted summary adjudication for Venice Suites on the two causes of action, finding the LAMC did not prohibit short-term occupancy of Apartment Houses in an R3 zone. The People appealed after they voluntarily dismissed the remaining claims.

First the Court of Appeal found that the LAMC did not specify the length of occupancy in an R3 zone. The People alleged that the short term rentals converted the Property into a TORS, which was not permitted in that zone. The Court of Appeal found however, that short term rentals were included in the LAMC's definition of "Apartment House" which was "[a] residential building designed or used for three or more dwelling units or a combination of three or more dwelling units and not more than five guest rooms or suites of rooms." Because the LAMC's definition did not specify occupancy duration, the Court of Appeal found that short term rentals were permitted in Apartment Houses.

Second, the Court of Appeal refused to characterize the Apartment House as a TORS, which was not allowed in the R3 zone. The Apartment House could satisfy both definitions. Moreover, the fact that the City defined TORS and limited occupancy to short term rentals therein, the Court of Appeal did not find an intent to require other dwellings, such as Apartment Houses, to only have long term rentals. While the People contended that the City operated under a permissive zoning scheme, where only expressly permitted uses were authorized, the Court declined to read that into the LAMC. Even under a permissive zoning argument, the LAMC did not provide any guidance as to the length of occupancy in an Apartment House, therefore, the People could not make an argument that the LAMC permitted one timeframe to disallow another.

Finally, the Court of Appeal disagreed with the People that the City's RSO and TOT ordinances concluded that only tenants and non-transient occupants could occupy Apartment Houses. The Court of Appeal found that the RSO only applied to monthly rentals, and that its construction was consistent with the City's TOT ordinance which included apartment houses as a possible transient use. The fact that the RSO was limited to long term use did not compel the conclusion that Apartment Houses were limited to long term occupancy.

TAKE-AWAY: The court found that the definition of apartment houses in the Los Angeles Municipal Code R3 Zone had no minimum length of occupancy requirement, and therefore did not prohibit short term occupancies in apartments in the R3 zone.

* * *

South Coast Air Quality Management District v. City of Los Angeles (2021) 71 Cal.App.5th 314.

BACKGROUND: Labor union moved to permissively intervene in an environmental dispute regarding port terminal brought by environmental group against a city. The Superior Court, Los Angeles County, denied the motion. Labor union appealed.

HOLDING: The Court of Appeal held that trial court reasonably concluded that environmental advocacy group's interest in litigating dispute without involvement of labor union outweighed union's reasons for intervening. Affirmed.

KEY FACTS & ANALYSIS: A labor union, International Longshore and Warehouse Union, Locals 13, 63, and 94 (the Union), moved to intervene in an environmental dispute about the Port of Los Angeles (the Port). The trial court denied the motion because concerns about expanding the case's scope outweighed the Union's interest. The union appealed.

Within the Port is the China Shipping Container Terminal (the Terminal). The Chinese government owned China Shipping (North America) Holding Co., Ltd. (China Shipping), which leased the Terminal long term from various city entities. The Terminal is a significant part of the Port. It and China Shipping handled 17 percent of the Port's cargo in 2019.

The City of Los Angeles, the Los Angeles City Council, the Los Angeles Harbor Department, and the Los Angeles Board of Harbor Commissioners were parties in the underlying case (the City Entities). In 2001, the City Entities issued a permit to China Shipping to build the Terminal.

This project sparked immediate controversy: in the same year, environmental and community groups filed a lawsuit to challenge whether the City Entities, in approving the Terminal project, had complied with the California Environmental Quality Act (the Act).

The parties settled that suit. Part of the settlement required the City Entities to prepare an environmental impact report for the Terminal project. They completed the report in 2008. This report—the 2008 Report—found the project “would have significant and unavoidable adverse environmental impacts to air quality, aesthetics, biological resources, geology, transportation, noise, and water quality sediments and oceanography.” Accordingly, the City Entities adopted more than 50 mitigation measures and several lease measures to reduce these impacts.

The 2008 Report specified the lease with China Shipping would be amended to incorporate the mitigation measures. The lease was never amended to include them. In addition, several measures were implemented only partially, while others were ignored entirely.

In September 2015, the City Entities informed the South Coast Air District (Air District) they intended to prepare a revised environmental analysis for the Terminal to evaluate the unimplemented mitigation measures and to consider modified measures, among other items. After releasing draft reports and holding public hearings, the Board of Harbor Commissioners certified the final supplemental report in October 2019. The City Council approved it in August 2020, so we refer to this report as the 2020 Report. This approval let the Terminal operate under revised conditions.

The 2020 Report eliminated some mitigation measures from the 2008 Report. It also recognized that Terminal emissions would have significant, unavoidable, and increased impacts on air quality, and that the project would exceed a threshold for cancer risk. Again, nothing enforced the mitigation measures: the City Entities did not require a lease amendment. Further, China Shipping wrote it did not intend to implement or to pay for the new measures.

In September 2020, the Air District filed a petition for writ of mandate claiming the City Entities had not enforced the mitigation measures listed in the 2008 Report. The suit likewise challenged the decisions to certify the 2020 Report and to allow the Terminal to operate under allegedly inferior measures. The petition named each of the City Entities as respondents, as well as the following real parties in interest: China Shipping (North America) Holding Co., Ltd.; COSCO Shipping (North America), Inc.; China COSCO Shipping Corporation Limited; and West Basin Container Terminal LLC. These last four entities are collectively referred to as the “China Shipping Entities.” The petition asked the court to, among other things, set aside the approvals for the Terminal project and the permit, pending compliance with the Act. It also asked for the City Entities to nullify certification of the 2020 Report and to disallow continued operation of the Terminal under that permit.

The California Attorney General, and the California Air Resources Board (Board) moved to intervene. Later, the Union also moved to intervene. The trial court denied the Union’s motion, granted a limited mandatory intervention to the Board, and consolidated the action with another led by the Natural Resources Defense Council, Inc. All parties agreed to the consolidation.

The trial court ruled the Union’s interest in the case was speculative and consequential—not direct and immediate, as required for permissive intervention—and the prejudice to existing parties outweighed the reasons supporting intervention. The City Entities and other real parties in interest would support the Union’s interest in jobs. Moreover, the Union had no legal interest in the CEQA issue at stake and was only concerned with the consequences of terminal shutdown. The Union appealed, supported by the City Entities.

The Court of Appeal affirmed on the grounds that the Air District’s interest in litigating the case without Union involvement, which would complicate the already complicated litigation, outweighed the Union’s reasons for intervening. Even if the interest was direct, denying permissive intervention in such circumstances was proper. The Union’s position was duplicated by the City Entities; and thus its interest in litigating directly was not as significant as the Air District’s interest in reducing complexity. A union declaration stated that the income of approximately 3,075 Union members depended on operations at the Terminal, and the Terminal also “provide[d] approximately 80,000 indirect jobs in the Los Angeles region.” The Court of Appeal found that the trial court reasonably could conclude that permitting Union intervention in the lawsuit would spur representatives of the other tens of thousands of jobs connected to the Terminal to enter the fray. That result would be unmanageable.

Because it was reasonable to conclude the reasons opposing Union intervention were weightier than those supporting it, the Court of Appeal concluded that denying permissive intervention by the Union was proper.

TAKE-AWAY: The court held that the union’s interest in jobs of union members at the China Shipping Container Terminal – which project approval was being challenged for failure to satisfy CEQA – was not immediate and direct, as required for permissive intervention, but speculative and consequential, and that the prejudice to the parties to the CEQA litigation outweighed the reasons supporting union intervention.

* * *

Farmland Protection Alliance v. County of Yolo (2021) 71 Cal.App.5th 300.

BACKGROUND: Farmland conservation organizations filed a petition for writ of mandate and complaint for declaratory and injunctive relief, alleging that county’s approval of project to develop bed and breakfast and commercial event facility violated California Environmental Quality Act (CEQA). The Superior Court, Yolo County, granted petition in part. Organizations appealed and developers cross-appealed.

HOLDINGS: The Court of Appeal held that: (1) an agency is required to prepare full environmental impact report when substantial evidence supports a fair argument that any aspect of project may have significant effect on environment, and (2) upon finding that substantial evidence supported a fair argument of significant environmental impacts to three species, the trial court was required to order the county to prepare full environmental impact report, rather than limited report. Reversed and remanded with directions.

KEY FACTS & ANALYSIS: Defendants Yolo County and its board of supervisors (County) adopted a revised mitigated negative declaration and issued a conditional use permit (decision) to real parties in interest Field & Pond, Dahvie James, and Philip Watt (real parties in interest) to operate a bed and breakfast and commercial event facility supported by onsite crop production intended to provide visitors with an education in agricultural operations (project). Farmland Protection Alliance challenged the permit under CEQA. The trial court found substantial evidence supported a fair argument under CEQA that the project may have a significant impact on the tricolored blackbird, the valley elderberry longhorn beetle (beetle), and the golden eagle. The trial court ordered the County to prepare an environmental impact report limited to addressing only the project's impacts on the three species. The trial court further ordered that, pending the further environmental review, the project approval and related mitigation measures would remain in effect and the project could continue to operate.

Plaintiffs and appellants Farmland Protection Alliance and Yolo County Farm Bureau (plaintiffs) appealed. Plaintiffs contended the trial court violated CEQA by: (1) ordering the preparation of a limited environmental impact report, rather than a full environmental impact report, after finding substantial evidence supported a fair argument the project may have significant effects on the three species; (2) finding the fair argument test was not met as to agricultural resource impacts; and (3) allowing the project to continue to operate during the period of further environmental review. Plaintiffs also argued the trial court erred in upholding the County's determination that the project was consistent with the Yolo County Code (Code) and the Williamson Act (also known as the California Land Conservation Act of 1965; Gov. Code, § 51200 et seq.). The County and real parties in interest asserted the trial court appropriately ordered the preparation of a limited environmental impact report under Public Resources Code section 21168.9 and disagreed with the remainder of plaintiffs' arguments.

Real parties in interest cross-appealed, asserting the trial court erred in finding substantial evidence supported a fair argument the project may have significant impacts on the three species.

In the published portion of the opinion, the Court of Appeal concluded section 21168.9 does not authorize a trial court to split a project's environmental review across two types of environmental review documents (i.e., a negative declaration or mitigated negative declaration and an environmental impact report). CEQA requires an agency to prepare a full environmental impact report when substantial evidence supports a fair argument that any aspect of the project may have a significant effect on the environment. The trial court thus erred in ordering the County to prepare a limited environmental impact report after finding the fair argument test had been met as to the three species.

In the unpublished portion of the opinion, the Court of Appeal concluded the trial court did not err in: (1) upholding the County's determination that the project was consistent with the Code and the Williamson Act; and (2) finding substantial evidence supported a fair argument the project might have a significant effect on the beetle.

On the Williamson Act, plaintiffs failed to show that the County abused its discretion when it found that the project would include agricultural operations, and would not significantly impair other agricultural operations. The project was also permitted under the County's Code.

With regard to the beetle, the Court of Appeal found substantial evidence in the record supporting a fair argument that the project, a type of agricultural tourism, would increase the presence of humans in the area, and may have a significant effect on the beetle due to potential damage to elderberry bushes in which beetles live, despite the mitigation measures adopted.

In light of the Court of Appeal's conclusion in the published portion of the opinion and concluding the fair argument test was met as to the beetle, the Court of Appeal thus reversed the trial court's judgment requiring the preparation of a limited environmental impact report and remanded with directions to issue a peremptory writ of mandate directing the County to set aside its decision to adopt the revised mitigated negative declaration and to prepare a full environmental impact report for the project. Having concluded a full environmental impact report was required to be prepared, the Court of Appeal did not consider plaintiffs' and real parties in interest's remaining fair argument challenges as to agricultural resources, the tricolored blackbird, or the golden eagle.

The Court of Appeal also did not consider plaintiffs' argument that the trial court erred in allowing the project to operate while the limited environmental impact report was being prepared, because as of the time of the Court of Appeal's opinion, that issue was moot.

TAKE-AWAYS: Upon a finding that substantial evidence supports a fair argument of significant environmental impact to one aspect of the environment, a full environmental impact report is required. Courts may not allow a project's analysis to be divided where some aspects are analyzed under a mitigated negative declaration, while others are analyzed under an environmental impact report.

* * *

Save Berkeley's Neighborhoods v. Regents of the University of California (2021) 70 Cal.App.5th 705, reh'g denied (Nov. 17, 2021).

BACKGROUND: Environmental interest group filed a petition for writ of mandate pursuant to CEQA against public university regents and developers, seeking to vacate regents' certification of an environmental impact report (EIR) for proposed project to demolish an existing parking structure on campus and to construct a new one with residential living on top and a new academic building. The Superior Court, Alameda County, sustained developers' demurrers to the complaint without leave to amend but declined to dismiss the entire matter after concluding that developers were not indispensable parties. Developers appealed and environmental interest group cross-appealed.

HOLDING: The Court of Appeal held that: (1) trial court's order sustaining developers' demurrers did not violate the final judgment rule; (2) as a matter of first impression, amendments to CEQA clarifying the persons who must be named as a real party in interest provide a bright-line rule as to which persons must be named and served in the CEQA complaint and do not replace the equitable balancing test for evaluating whether the real party in interest is indispensable to the action with a presumption of indispensability; (3) developers were not "indispensable parties" to the action; and (4) regents' notice of determination (NOD) was adequate to start the 30-day limitations period for a challenge to the EIR. Affirmed.

KEY FACTS & ANALYSIS: The Regents of the University of California (Regents) approved a new development for additional academic space and campus housing, and certified a final supplemental environmental impact report (SEIR). On May 17, 2019, the Regents filed a NOD regarding the project, which identified American Campus Communities (ACC) and Collegiate Housing Foundation (CHF) as the parties undertaking the project.

Petitioners Save Berkley's Neighborhoods (SBN) notified the Regents it intended to challenge its adoption of the project and certification of the SEIR. On June 13, 2019, SBN filed a petition for writ of mandate seeking to vacate the certification of the SEIR on the grounds that the approval violated CEQA. The petition named the Regents, Janet Napolitano, as president of the University of California, and Carol T. Christ, as chancellor of University of California, Berkeley, as respondents. SBN then amended the petition to add ACC and CHF as real parties in interest.

ACC and CHF filed demurrers in response to the amended petition. They asserted SBN failed to name them as parties within the applicable statute of limitations, section 21167.6.5(a) required their joinder as real parties in interest, and they were necessary and indispensable parties to the litigation. The trial court sustained the demurrers without leave to amend, but declined to dismiss the entire matter after concluding that ACC and CHF were not indispensable parties.

On appeal, the Court of Appeal found first that the order sustaining the demurrers was appealable under the final judgment rule, because it disposed of all issues between SBN, ACC, and CHF.

Second, the Court of Appeal considered the issue of first impression on whether CEQA's designation of necessary parties pursuant to Public Resources Code sections 21108 and 21167.6.5(a) overrode the general test for indispensable parties under Code of Civil Procedure section 389(b). A review of the legislative history of the CEQA sections led the court to the conclusion that it did not. Rather, the Court found that the CEQA sections applied to determining whether a party was a real party in interest, and, after that determination, courts were required to analyze whether those parties were also indispensable parties under the Code of Civil Procedure.

Third, the Court considered whether ACC and CHF were indispensable parties required for the CEQA action. It found that the trial court did not err in concluding they were not. As developers, their interests were sufficiently aligned with Regents in having the project proceed. ACC and CHF had no economic interests that would be uniquely harmed. The trial court did not err in not dismissing the entire action for failure to join an indispensable party.

SBN cross-appealed the trial court's decision on the ground that the trial court erroneously determined the petition was subject to CEQA's 30-day statute of limitations in section 21167, subdivision (c), alleging that the NOD failed to adequately describe the project. SBN asserted that the SEIR analyzed the impact of student enrollment increase, while the NOD was silent on that analysis. However, the Court found that the project itself was not for the purpose of increasing enrollment, and student population was not a material aspect of the project. The NOD therefore was not required to consider student enrollment. Further, SBN had not demonstrated that this alleged error in the NOD was prejudicial. SBN filed its initial petition within the 30-day limitations period. Moreover, that petition specifically challenged the adequacy of the SEIR's evaluation of student enrollment increases. Thus, any alleged error in the NOD project description did not

interfere with appellants' ability to make an informed decision whether to pursue legal action or its ability to bring a timely challenge. SBN's failure to name and serve ACC and CHF was unrelated to any error in the NOD's project description. Accordingly, the 30-day statute of limitation applied.

TAKE-AWAY: Public Resources Code sections 21108 and 21167.6.5 in CEQA, clarifying who are real parties in interest, do not override Code of Civil Procedure section 389(b)'s balancing test for identifying indispensable parties to an action.

* * *

Chevron U.S.A., Inc. v. County of Monterey (2021) 70 Cal.App.5th 153.

BACKGROUND: Mineral rights holders brought action for declaratory and injunctive relief challenging the validity of county ordinances banning land uses in support of new oil and gas wells and land uses in support of wastewater injection in unincorporated areas of the county. The Superior Court, Monterey County, entered judgment striking down the ordinances. County appealed.

HOLDING: The Court of Appeal held that state law governing oil and gas operational methods and practices preempted county ordinances. Affirmed.

KEY FACTS & ANALYSIS: Appellant Protect Monterey County (PMC) appealed from the trial court's judgment striking down a County ordinance banning "land uses in support of" new oil and gas wells and "land uses in support of" wastewater injection in unincorporated areas of Monterey County. These ordinances were enacted as part of Measure Z, an initiative sponsored by PMC and passed by Monterey County voters. The trial court upheld, in part, a challenge to Measure Z by plaintiffs, numerous oil companies and other mineral rights holders in Monterey County. PMC contended that the trial court erroneously concluded that these two components of Measure Z were preempted by state and federal laws and that they constituted a facial taking of the property of some plaintiffs. PMC also contended that the trial court made prejudicially erroneous evidentiary rulings.

The Court of Appeal found that the trial court correctly concluded that those two components of Measure Z were preempted by Public Resources Code section 3106. Section 3106 explicitly provided that it was the State of California's oil and gas supervisor who had the authority to decide whether to permit an oil and gas drilling operation to drill a new well or to utilize wastewater injection in its operations. These operational aspects of oil drilling operations were committed by section 3106 to the State's discretion and therefore local regulation of these aspects would conflict with section 3106. Measure Z specifically conflicted with section 3106. Section 3106 not only permitted, but encouraged the drilling of new wells and the use of wastewater injection, but also vested the authority in the State to permit that conduct. Since Measure Z prohibited all wastewater injection and new well drilling, it was preempted.

PMC argued that Measure Z was not preempted by state law because "California oil and gas statutes and regulations expressly acknowledge and affirm local authority, precluding a finding that the state has completely occupied the field," and "state law addresses only specific, technical

aspects of oil and gas production, leaving local governments free to exercise their traditional authority over land use, health, and safety to protect communities from harm.” The Court of Appeal, however, agreed with the plaintiffs that section 3106 “mandate[s] that oil and gas producers be allowed to undertake wastewater injection projects properly approved by the Oil and Gas Supervisor and also be allowed to undertake oil and gas well drilling projects properly approved by the Oil and Gas Supervisor.” The Court of Appeal observed that this interpretation was consistent with the legislative history for the section.

PMC next argued that, despite the language of section 3106 lodging the authority to supervise and permit oil and gas operational “methods and practices” throughout the State, the State’s statutes and regulations had “explicitly recognized and preserved local authority.” Yet none of the statutes identified by PMC as preserving local authority reflected that the authority vested in the State by section 3106 to decide whether to permit oil and gas operational “methods and practices” was to be shared with local entities.

The mere fact that some aspects of oil and gas drilling was reserved to local entities did not resolve the question of whether local regulations were preempted by state law. PMC asserted that Measure Z did not regulate the technical aspects of drilling, but it on regulated where and whether drilling could occur. The Court of Appeal disagreed, finding it in direct conflict because it banned the practice section 3106 specifically encouraged and permitted. The fact that state law left room for some local regulation of oil drilling, such as zoning regulations identifying where oil drilling would be permitted in a locality, did not mean that the County had the authority to ban all new wells and all wastewater injection under Measure Z.

Because the Court of Appeal upheld the trial court’s decision on the grounds of state law preemption, the Court of Appeal did not consider whether Measure Z was also preempted by federal law or constituted a facial taking of plaintiffs’ property. The Court of Appeal also did not address PMC’s challenge to the trial court’s evidentiary rulings. The Court of Appeal affirmed the trial court’s judgment.

TAKE-AWAY: The Court of Appeal emphasized that its narrow holding does not in any respect call into question the well-recognized authority of local entities to regulate the *location* of oil drilling operations, a matter not addressed by section 3106 or Measure Z, only the ability of local entities to ban it entirely.

POST-SCRIPT: The League of California Cities filed an Amicus Curiae brief in support of the County, primarily arguing that local regulation of oil and gas drilling was within the police power of local entities, and could rebut the preemption claim.

* * *

McCann v. City of San Diego (2021) 70 Cal.App.5th 51.

BACKGROUND: A property owner petitioned for writ of mandate alleging that a city’s environmental review process related to its decision to approve two sets of projects to convert overhead utility wires to an underground system in several neighborhoods violated the California

Environmental Quality Act (CEQA) by failing to properly consider the environmental impact of these projects. The Superior Court, San Diego County, denied the petition and denied property owner's request for a preliminary injunction. Property owner appealed.

HOLDINGS: The Court of Appeal held that: (1) plaintiff failed to exhaust administrative remedies; (2) city's noticing requirements provided adequate notice for due process purposes; (3) city's administrative appeal process did not result in an improper bifurcation of decision process; (4) city's description for mitigated negative declaration (MND) projects was adequate under CEQA; (5) plaintiff failed to establish substantial evidence to support fair argument that MND projects would have a significant aesthetic impact on neighborhood; (6) plaintiff failed to establish a fair argument of a significant aesthetic impact; (7) city's determination that greenhouse gas emissions were not significant omitted consistency analysis; and (8) plaintiff was not entitled to a preliminary injunction barring city from cutting down or otherwise destroying and removing any pepper trees in property owner's neighborhood. Affirmed in part and reversed in part.

KEY FACTS & ANALYSIS: In 1970, the City of San Diego (City) began its decades-long effort to convert its overhead utility systems, suspended on wooden poles, to an underground system. The local effort mirrored a shift across the state arising from the California Public Utilities Commission's (PUC) decisions to require (1) new construction to install utility lines underground, and (2) utilities to allocate funds to convert existing overhead utility lines to underground. Constrained by the limits of this funding, the City established a separate "Surcharge Fund" in 2002 to provide for increased utility undergrounding.

Given the small scope of projects that could be completed in any one year due to the limited funding, the master plan and accompanying Municipal Code section developed a process to manage the selection and prioritization of undergrounding projects in any given year. The City Council each year would approve a "project allocation" to select blocks to be completed based on the available funding. Once the allocation was approved, City staff would begin its initial work, including environmental review pursuant to CEQA, for each block.

The appeal involved Petitioner McCann's challenge to the approval of two sets of undergrounding projects. Given the different circumstances arising from their different locations, one set was found to be exempt from CEQA and the other set required the preparation of a Mitigated Negative Declaration (MND).

Exempt Projects

Three days before the City Council hearing, McCann sent an e-mail to the City Council raising several issues regarding the exempt projects. In part, she contended that she had not seen the Notice of Right to Appeal, which had been posted on the City's website, and emailed to councilmember and planning email lists.

At the hearing, McCann's counsel spoke in opposition, claiming that the CEQA review was "premature" given there were no precise plans regarding tree removal and the placement of the transformer boxes. When questioned by a councilmember, staff explained that the location of the transformers would be determined during the subsequent design phase. The City Council voted unanimously to approve the creation of the undergrounding districts for the exempt projects.

In February, the City issued two “notices of exemption” for the exempt projects.

MND Projects

In November 2018, the City published a draft MND for an additional nine potential undergrounding districts. Based on earlier discussions with Native American tribes, the City learned that some of the districts included sites with cultural significance. Following further inquiry, the City determined the projects may have a significant impact on cultural resources, but the impact could be mitigated by requiring monitoring by a tribe during trenching. The final MND determined that “although the proposed project could have a significant effect on the environment, there will not be a significant effect in this case because revisions in the project have been made by or agreed to by the project proponent.” As part of this process, the City also considered the aesthetic effect and greenhouse gas emissions of the projects, but found they would have no significant impact.

McCann and her attorney submitted written comments challenging the adequacy of the MND concerning the location of the transformers, the cumulative impact from greenhouse gases, and the effect on trees. Thereafter, the City filed a notice of determination providing notice of the adoption of the MND.

The trial court denied McCann’s writ petition. The trial court found that McCann failed to exhaust her administrative remedies prior to seeking judicial review of the Exempt Projects. The court noted the City provided an administrative appeal to challenge a determination project was exempt from CEQA but McCann did not pursue this remedy and thus, she “may not challenge the City’s approval of the categorical exemption determination.” In the alternative, the court also rejected McCann’s claims that the City (1) violated CEQA by not disclosing the exact location of the transformers; (2) did not provide adequate notice; and (3) improperly determined that a categorical exemption applies.

Regarding the MND Projects, the court found that McCann failed to demonstrate that substantial evidence supported a fair argument that the MND projects may have a significant impact on the environment. Thus, it concluded that no EIR was required.

The Court of Appeal agreed that McCann failed to exhaust administrative remedies with regards to the exempt projects. However, the Court of Appeal reversed the decision of the trial court in part with regard to the MND projects, finding that the City’s determination that MND projects’ greenhouse gas emissions would not be significant was not supported by substantial evidence, and therefore the City erred when it adopted the MND.

With regard to the exempt projects, McCann failed to file an administrative appeal as was required by CEQA. The Court of Appeal found that McCann could not avoid the exhaustion of administrative remedies doctrine through her claims that (1) posting the Notice of Right to Appeal online and sending emails to every councilmember and local planning group violated due process, (2) that the City’s Notice violated CEQA, and (3) that the City improperly bifurcated the environmental determination process. The Court of Appeal found no merit in any of these claims, in part because the City’s action did not impact McCann’s property interests implicating a higher

due process requirement for notice, and because local agencies are expressly permitted to approve a project in one step of environmental review, and consider the application of CEQA in another.

With regard to the MND projects, the Court of Appeal agreed with the trial court that (1) the City did not violate CEQA by segmenting the MND projects rather than considering them as one citywide project because each undergrounding project was independently functional, (2) the City's description of the MND projects was adequate even though it did not indicate the locations of transformers, and (3) substantial evidence did not support a fair argument that the MND projects would have a significant aesthetic impact because the aesthetic impact of transformers fell short of imposing a "substantial" impact. However, the Court of Appeal reversed the decision of the trial court in part, finding that the City's finding that the MND projects would have no significant impact due to greenhouse gas emissions was not supported by substantial evidence.

When the City analyzed the greenhouse gas impacts, it followed its Climate Action Plan (CAP) Checklist, designed to determine compliance with the City's CAP. However, application of the Checklist to the MND project resulted in City staff only analyzing whether the MND projects were consistent with existing land use and zoning designations. The Court of Appeal found that the City erred because it used an inapplicable checklist for the projects. The checklist expressly stated that it did not apply to projects if no certificate of occupancy was required. Therefore, the Court of Appeal found that the City had never analyzed whether the MND projects were consistent with the CAP, which was required for its CEQA review under Section 15183.5 of the CEQA Guidelines.

The Court of Appeal reversed the decision of the trial court with regard to the MND projects, and required the City to perform the requisite CAP analysis.

Finally, the Court of Appeal upheld the trial court's denial of McCann's request for a preliminary injunction with regard to trees that would be cut down on her street as part of the exempt projects, because she failed to establish a likelihood of success on the merits.

TAKE-AWAYS: An individual's due process rights with regard to a CEQA decision are not violated if notice is adequate, regardless of whether they received actual notice. There is a higher notice requirement for decisions impacting property rights.

* * *

Protect Tustin Ranch v. City of Tustin (2021) 70 Cal.App.5th 951, review denied (Feb. 9, 2022).

BACKGROUND: Citizen group petitioned for writ of mandate to set aside city's approval of a proposed project after concluding that it was exempt from the California Environmental Quality Act (CEQA) under the categorical exemption for in-fill development. The Superior Court, Orange County, denied the petition. Citizen group appealed.

HOLDINGS: The Court of Appeal held that: (1) substantial evidence supported city's determination that the size of the project fell within the five-acre limit for the in-fill development exemption from CEQA; (2) citizen group failed to establish that the planned project presented circumstances that were unusual for projects falling in the in-fill development exemption; and (3) substantial evidence supported the city's conclusion that the unusual circumstance exception did not apply. Affirmed.

KEY FACTS & ANALYSIS: The City of Tustin (City) reviewed a gas station project adjacent to a Costco and concluded the project was exempt from CEQA under the categorical exemption for “in-fill development” (Cal. Code Regs., tit. 14, § 15332; infill exemption). After the City approved the project and filed a notice of exemption, appellant Protect Tustin Ranch (Protect) sought a writ of mandate to set aside the City’s approvals due to what it claimed was an erroneous finding by the City that the project was exempt from CEQA. The trial court denied Protect’s petition. Protect contended that the project site was too large for the project to qualify for the in-fill exemption and there were “unusual circumstances” which precluded the City from relying on the exemption.

The project had two components: (1) construction of a 16-pump (32-fuel position) gas station with a canopy, related equipment and landscaping; and (2) demolition of an existing Goodyear Tire Center and adjacent surface parking, all to be replaced with 56 new surface parking stalls. The gas station portion of the project would replace a portion of an existing surface parking lot. Costco’s conditional use permit (CUP) application stated that the site size was 11.97 acres. With City staff believing the project was exempt from review under CEQA, the City planning commission held a public hearing concerning the CUP and considered adopting a notice of exemption for the project. Regarding CEQA, the City staff report stated the following: “This project is Categorical Exempt from further environmental review pursuant to the CEQA Class 32, ‘In-Fill Development Projects’ in that the project is consistent with the City’s General Plan and [the Specific Plan] and occurs within city limits on a project site of no more than five (5) acres substantially surrounded by urban uses. The project site has no value as habitat for endangered, rare, or threatened species. The project can be adequately served by all required utilities and public services. Approval of the project would not result in any significant effects relating to traffic, noise, air quality, or water quality.” It thereafter included a paragraph addressing each of the latter subjects.

The planning commission’s analysis stated, in relevant part: “The project site (consisting of the area where the fueling station and landscape screening will be constructed and the area where the existing Goodyear Tire Center building will be demolished and restriped with surface parking) has a total area of approximately 2.38 acres.”

Ultimately, the planning commission approved the project, adopting a resolution which found the project categorically exempt from environmental review under CEQA pursuant to CEQA Guidelines section 15332 (Class 32, In-Fill Development Projects) (infill exemption). After receiving public comments, the city council adopted a resolution finding the project categorically exempt from CEQA review under the in-fill exemption, with no applicable exceptions, and granting the requested approvals. The City filed a notice of exemption.

In its petition, Protect argued one of the criteria for the claimed in-fill exemption—that the project site be no more than five acres in size—was not met because documents described the project site as occupying nearly 12 acres. It also asserted the City erroneously relied on the exemption because the project fell within the scope of the “unusual circumstances” exception set forth in CEQA Guidelines section 15300.2, subdivision (c).

With regard to the Class 32 in-fill exemption, the Court of Appeal found substantial evidence in the record indicating that the project was less than five acres in size, contrary to Protect’s contentions. Multiple documents confirmed that the area of work was 2.38 acres despite some

documents stating that the “site size” was almost 12 acres. There was therefore no abuse of discretion.

With regard to the unusual circumstances exception, the Court of Appeal agreed with the City that Protect had not met its burden of showing that the exception applied. Protect did not argue that there was evidence the project would have a significant effect on the environment, and therefore the two-prong test from *Berkeley Hillside Preservation v. City of Berkeley* (2015) 60 Cal.4th 1086 applied to the City’s determination that the exception did not apply.

Protect claimed that unusual circumstances applied due to the former operations of the Goodyear Service Center, the large configuration of the gas station, and the planned use of retractable bollards and additional Costco employees to re-route traffic during peak usage. However, Protect did not explain how those features would distinguish the project from others that would qualify for the in-fill exemption, nor did it cite any evidence from the record demonstrating a distinction. As the party challenging the City’s reliance on the in-fill exemption, Protect bore the burden of producing evidence to support the claimed exception.

Moreover, even assuming Protect had articulated and supported an argument of unusual circumstances, substantial evidence supported the City’s conclusion the project was not unusual in relation to other in-fill development which would qualify for the exemption. As for the size of the project, although the proposed gas station would have 16 pumps (32 fuel positions), evidence in the record showed that size was not remarkably different than other Costco gas stations in California. The court also considered that project’s synchronicity with the surrounding area. The project was within an existing and expansive retail center, and substantial evidence showed that the gas station would be in line with the surrounding setting.

TAKE-AWAY: Courts may look to conditions in the immediate vicinity of a proposed project to determine whether a circumstance is unusual, for purposes of the unusual circumstances exception to a categorical exemption from CEQA.

* * *

Schreiber v. City of Los Angeles (2021) 69 Cal.App.5th 549.

BACKGROUND: Neighbors filed a petition for writ of administrative mandamus to challenge city planning commission’s approval of a mixed-use development project that included density bonus incentives and waivers. The Superior Court, Los Angeles County, denied the petition, and the neighbors appealed.

HOLDING: The Court of Appeal held that: (1) developer was not required to show that the incentives granted under the density bonus law would actually result in cost reductions; (2) city ordinance requiring documentation to show that the waiver or modification of any development standards were needed in order to make restricted affordable units economically feasible was therefore preempted by state law; and (3) financial feasibility study was sufficient to support any required finding by city planning commission under the density bonus law that incentives would result in cost reductions. Affirmed.

KEY FACTS & ANALYSIS: The density bonus law (Gov. Code, § 65915 *et seq.*) requires that cities and counties allow increased building density, and grant concessions and waivers of permit requirements, in exchange for an applicant's agreement to dedicate a specified number of dwelling units to low income or very low income households. In this case, the Court of Appeal held that neither the statute nor the Los Angeles City ordinance implementing it requires the applicant to provide financial documentation to prove that the requested concessions will render the development "economically feasible."

Appellants appealed the denial of a petition for writ of administrative mandamus challenging the City of Los Angeles's (City) approval of a development project. Appellants contended: (1) the City abused its discretion when it approved incentives and waivers without obtaining the required financial documentation, and (2) the City's approval of the project was not supported by substantial evidence. The Court of Appeal affirmed.

Appellants contended that Government Code section 65915 required that applicants submit certain financial information to support a request for incentives and waivers under the density bonus law. The City's ordinance also required an applicant to submit information to show the incentives were needed to make the project "economically feasible," however, the City did not apply this ordinance to the project at issue.

The Court of Appeal found that the City could not require proof that incentives were needed to make a project economically feasible. A city or county is not prohibited from requesting or considering information relevant to cost reductions pursuant to subdivisions (a)(2) and (j)(1) of the density bonus law. However, a showing that an incentive was needed to make the project "economically feasible" related to the overall economic viability of the project and was not the same as showing the incentive would result in "cost reductions." The City could not require that an incentive be necessary to make the project "economically feasible" because that information does not "establish eligibility for the concession or incentive or ... demonstrate that the incentive or concession meets the definition set forth in subdivision (k)." (§ 65915, subd. (j)(1).) The City's ordinance conflicted with state law to the extent it required an applicant to demonstrate that an incentive was needed to make a project economically feasible. This requirement was deleted from the state law in 2008. Thus the City's ordinance, although it was not applied, was preempted and could not form a basis to deny the project.

The Court of Appeal also found that the City's approval of the project was supported by substantial evidence. The City did not make a finding that the incentives would not result in cost reductions, and was not required to substantiate this negative finding with evidence. But even if substantial evidence regarding cost reductions was required, a financial feasibility analysis included in the project application was sufficient for this purpose. Although the petitioners challenged portions of the analysis, it was not the Court's role to reweigh that evidence. The Court reiterated that the density bonus law required the City to grant the incentives *unless* it made a finding that they did not result in cost reductions. The City did not make such a finding. The City was not required to make an affirmative finding that the incentives would result in cost reductions, or to cite evidence to establish a fact presumed to be true.

TAKE-AWAYS: The density bonus law does not require a showing that incentives would result in a project cost savings, and a city's ordinance may conflict with state law if it requires that an incentive is necessary to make the project economically feasible.

* * *

Muskan Food & Fuel, Inc. v. City of Fresno (2021) 69 Cal.App.5th 372.

BACKGROUND: Owner of a gas station and convenience store petitioned for writ of mandate seeking to set aside city's approval of a conditional use permit for the development of a neighborhood shopping center across the street from his store. The Superior Court, Fresno County, denied the petition, concluding substantial evidence supported city's zoning decision. Owner appealed, and real parties in interest filed cautionary cross appeals.

HOLDING: The Court of Appeal held that: (1) word "petition," as used in municipal code describing the procedures for appealing city's approval of a conditional use permit, was vague; but (2) meaning of "petition" encompassed both oral and written requests; (3) informal dinner with city council member was not a "petition" to the council member to appeal city planning commission's decision approving a conditional use permit; and (4) e-mail sent to mayor from the president of city's chapter of convenience store association was not a "petition" to appeal city planning commission's decision approving a conditional use permit. Affirmed.

KEY FACTS & ANALYSIS: Appellant Muskan Food & Fuel, Inc. (Muskan Food) filed a petition for writ of mandate to challenge the City of Fresno's (City) approval of a conditional use permit for the development of a neighborhood shopping center across the street from Muskan Food's gas station and convenience store. The proposed development included a specialty grocery store with a license to sell beer, wine and distilled spirits for consumption off the premises. The area had a high concentration of businesses selling alcohol and Muskan Food contended the City misapplied the municipal ordinance restricting permits for new establishments selling alcohol in such areas. The superior court denied the petition, concluding the City did not misinterpret the ordinance and substantial evidence supported the City's decision to approve the conditional use permit.

On appeal, Muskan Food challenged both of these determinations. Real parties in interest filed a cautionary cross-appeal to assure they could challenge the superior court's conclusion that Muskan Food properly exhausted its administrative remedies. Real parties in interest and the City contended the superior court properly decided the case on its merits and, alternatively, the denial of the writ petition should have been upheld because Muskan Food did not exhaust its administrative remedies. The Court of Appeal concluded Muskan Food did not exhaust the administrative appeal process set forth in City's municipal code and this failure barred its lawsuit.

On appeal, the Court of Appeal focused on the administrative exhaustion issue. The City's development code required decisions to be appealed in accordance with the code. The relevant portion of the text read: "Failure by any interested person to petition a Councilmember or the Mayor for an appeal shall constitute a failure to exhaust administrative remedies." Decisions of the director could be appealed to the planning commission by filing a written appeal with the director. Appeals of planning commission decisions could be made to the City Council through a Councilmember.

First the Court found that the word “petition” in the code was vague, and thus construed it as including both written and oral petitions. The Court then turned to the issue of whether Muskan Food had petitioned the Mayor or a Councilmember. The Court found that neither an informal dinner in which the planning commission’s decision was discussed with a councilmember, nor emails to the Mayor raising concerns about the development, requesting the mayor “look into” concerns, were “petitions” for the purpose of the code. Having failed to “petition” as required by the code, the Court of Appeal found that Muskan food failed to exhaust administrative remedies, which was sufficient to affirm the judgment of the trial court without reaching the issue raised in Muskan Food’s appeal.

TAKE-AWAYS: Although the court affirmed the trial court’s finding that the appellants failed to exhaust their administrative remedies in this case, the appellate court’s analysis of the city’s appeal procedures found them vague, and that petitions could be made verbally as well as in writing. In view of this holding, cities may wish to ensure their appeal requirements are clear to avoid arguments that appellants may lodge appeal petitions informally.

* * *

Department of Water Resources Cases (2021) 69 Cal.App.5th 265.

BACKGROUND: County brought action against State Department of Water Resources (DWR) seeking injunctive relief arising from DWR’s alleged violation of county’s well-drilling ordinance by failing to obtain county permits before conducting geotechnical exploration activities for a state water infrastructure project. The Superior Court, San Joaquin County, granted summary judgment for DWR. County appealed.

HOLDINGS: The Court of Appeal held that: (1) mootness exception for recurring issues applied to allow review of issue of whether DWR needed county permits, and (2) Legislature waived DWR’s immunity only with respect to activities defined in water code chapter governing water wells and cathodic protection wells. Affirmed.

KEY FACTS & ANALYSIS: Plaintiff and appellant County of Sacramento (County) appealed from the trial court’s grant of summary judgment in favor of defendant and respondent DWR.

In 2019, the County filed a complaint for injunctive relief alleging that DWR failed to obtain county permits before conducting geotechnical exploration activities related to a state water infrastructure project in the Delta region of Sacramento County. The County noted that its ordinance required all persons, including the state, to obtain county permits before conducting activities including drilling exploratory holes and borings. The County contended that it adopted its ordinance pursuant to division 7, chapter 10 of the Water Code (chapter 10), and the Legislature had expressly waived the state’s sovereign immunity with respect to the chapter’s provisions.

DWR moved for summary judgment. It asserted that, as a state agency acting within its governmental capacity, it was immune from local regulations except where the Legislature expressly waived that immunity. DWR further contended that its activities did not fall within the scope of chapter 10, which was a limited statute governing “wells,” “water wells,” “cathodic protection wells,” and “geothermal heat exchange wells” as those terms are defined in the chapter. The trial court granted the motion, concluding DWR’s exploration activities did not fall within the

scope of chapter 10, and the County was not authorized to expand its regulatory authority over the state beyond that which was expressly authorized by the Legislature.

The County challenged the trial court's ruling. It contended the scope of the Legislature's waiver of sovereign immunity extended beyond activities expressly defined in chapter 10 to include activities governed by an administrative bulletin establishing drilling and boring standards that the Legislature referenced in chapter 10. Alternatively, the County argued that various statements made by DWR created a triable issue of fact as to whether DWR's exploration activities fell within the scope of activities expressly defined by chapter 10. Finally, the County challenged multiple evidentiary rulings made by the trial court.

Published Opinion

The Court of Appeal first addressed the issue of whether the County's appeal was moot because DWR had already completed the activities the County complained of. The Court of Appeal found that the issue was not moot as it was likely to be repeated.

Next, the Court of Appeal concluded that the scope of the Legislature's waiver of the state's immunity extended only to the activities expressly defined in chapter 10, governing water wells and cathodic protection wells. The Court of Appeal concluded that the Legislature's waiver of sovereign immunity of DWR did not extend beyond those activities to include drilling and boring standards contained in a bulletin that the Legislature referenced elsewhere in the chapter, where the Legislature did not incorporate the bulletin's definitions to establish the scope of the chapter. The Court of Appeal found no suggestion in chapter 10 that the definitions in the bulletin superseded those in the statute and therefore concluded it did not encompass the drilling and boring standards.

Unpublished Opinion

In the unpublished portion of the opinion, the Court of Appeal agreed with DWR that the County failed to establish a genuine dispute of material fact as to whether DWR's exploration activities fell within the scope of chapter 10. The County failed to provide any evidence to contradict DWR's express statement that it did not and would not conduct activities within the scope of chapter 10 on the affected parcels. The County had not pointed to any evidence suggesting that DWR obtained groundwater samples on the affected parcels, or that its borings fell within the definition of a "water well" or "monitoring well" in chapter 10. Similarly, while the County pointed to various statements about what might have been necessary to complete DWR's project, it indicated no statements of DWR's intent with respect to the affected parcels that contradicted its declaration.

Finally, the Court of Appeal concluded that the County failed to demonstrate prejudice from the trial court's evidentiary rulings, even assuming error. None of the evidence the County claimed to have been improperly excluded gave rise to a genuine dispute of material fact as to whether DWR's geotechnical activities on the affected parcels constituted an activity within the scope of chapter 10. Accordingly, the Court of Appeal affirmed the judgment.

TAKE-AWAY: Provisions in Chapter 10 of Division 7 of the Water Code waiving sovereign immunity of the Department of Water Resources are limited in scope and only apply to activities expressly described Chapter 10.

* * *

Central Delta Water Agency v. Department of Water Resources (2021) 69 Cal.App.5th 170 as modified on denial of reh'g (Oct. 21, 2021), review denied (Jan. 5, 2022).

BACKGROUND: In one action, regional water agency filed complaint against Department of Water Resources (DWR) under CEQA, seeking writ of mandate, reverse validation, and declaratory and injunctive relief based on challenge to validity of DWR's revised environmental impact report (EIR) that analyzed impact of amendments to state water project (SWP) regarding allocation of water resources to urban and agricultural SWP contractors and conveyance of land to county entities for development of groundwater bank. In two additional actions, nonprofit environmental filed complaints asserting similar challenges. The Superior Court, Sacramento County, issued a limited writ of mandate ordering DWR to decertify the revised EIR only as necessary to address groundwater bank development and denied a motion for attorney fees. Plaintiffs appealed, and appeals were consolidated.

HOLDING: On denial of rehearing, the Court of Appeal held that: (1) DWR did not abuse its discretion in describing in its EIR "proposed" water project for allocation of water resources as "continuing to operate" under prior amendment to SWP contracts; (2) EIR adequately provided for informed decision-making and public participation; (3) water agency's reverse validation action was time-barred; (4) trial court did not abuse its discretion when it issued writ of mandate directing DWR to revise EIR and make new determination whether to continue use and operation of groundwater bank but otherwise left prior approvals of SWP contracts in place; (5) doctrine of *res judicata* did not apply to bar water agency's action challenging revised EIR after original EIR was invalidated in prior action; (6) water agency was not collaterally estopped from challenging validity of revised EIR; (7) motion for attorney fees under attorney general fees statute was governed by 30-day deadline for appeal from judgment in reverse validation case; (8) environmental advocate's case was not subject to automatic stay; and (9) substantial evidence supported DWR's conclusion in revised EIR that conveyance of land to county authority for development of groundwater bank did not effect a substantial adverse change in environment due to crop conversion. Judgments affirmed.

KEY FACTS & ANALYSIS: Three consolidated appeals at issue against DWR involved litigation related to changes in long-term water supply contracts brought about by a water allocation agreement and amendment entitled the "Monterey Agreement" and the "Monterey Amendment".

The SWP is one of the largest water projects in the world, consisting of dams, reservoirs, storage tanks, pumping plants, aqueducts, pipelines, and canals designed to capture, store, and deliver water throughout the state. Each year, the SWP delivers water to about 25 million residents from Napa Valley to San Diego and irrigates about 750,000 acres of farmland. DWR is charged with operating and managing the SWP. During the 1960s, DWR entered into long-term contracts with local and regional water contractors, known as the State Water Project contractors (SWP contractors).

Under the contracts, the SWP contractors received entitlements to an amount of SWP water. Each The SWP contractors agreed to make a proportional payment regardless of the amount of available water. The Kern Water Bank is an approximately 20,000-acre groundwater reserve in Kern

County. In 1988, DWR acquired the Kern Fan Element as part of a plan to develop the Kern Water Bank. DWR ultimately determined it could not develop a state water bank and, in 1993, ceased work on the project.

In 1994, DWR and SWP contractor representatives engaged in mediated negotiations in an effort to settle allocation disputes under the long-term water supply contracts. In December 1994, in Monterey, the parties reached a comprehensive agreement known as the Monterey Agreement. The Monterey Agreement established 14 principles designed to resolve water allocation disputes and operational issues of the SWP. To implement the Monterey Agreement, the parties drafted an amendment to the long-term water supply contracts. This standard amendment and separate amendments to the long-term contracts became known as the Monterey Amendment.

The Monterey Amendment altered water allocation procedures in times of shortage by eliminating the urban preference and mandating that deliveries to both agricultural and urban SWP contractors would, with exceptions, be reduced proportionately. The amendment also authorized permanent sales of water among contractors and implemented various other changes in administration of the SWP. In addition, the Monterey Amendment transferred the 20,000 acres of farmland, the Kern Fan Element, previously considered as the location of the Kern Water Bank, to local Kern County entities so that they could develop the groundwater bank. The parties in the Monterey Amendment and Agreement also rewrote parts of the SWP. A joint powers agency composed of two SWP contractors prepared an environmental impact report on the agreement (the Monterey Agreement EIR), which DWR, as responsible agency, certified in 1995.

In December 1995, a group of plaintiffs, including the Planning and Conservation League (PCL), filed suit challenging the sufficiency of the Monterey Agreement EIR. Among many objections, the PCL plaintiffs argued the Monterey Agreement EIR violated CEQA and the contracts were an invalid transfer in violation of the Water Code. They also alleged DWR, not the two SWP contractors, should have served as the lead agency for purposes of preparing the EIR.

In 1996, the trial court entered an order granting DWR's motion for summary adjudication on the reverse validation cause of action, finding the plaintiffs failed to join Kern County Water Agency as an indispensable party. The court dismissed the reverse validation action. The court subsequently entered a final judgment denying the plaintiffs' application for a writ of mandate to set aside the Monterey Agreement EIR. The court concluded the two SWP contractors were not the proper lead agency under CEQA, but upheld the adequacy of the EIR.

In 2000, the court of appeal reversed the trial court's judgment. It found the Monterey Agreement EIR invalid because it was prepared by the wrong lead agency and because it failed to discuss implementation of the SWP provision as a "no project" alternative. In addition, the court of appeal held the trial court erred in dismissing the reverse validation challenge to the execution of the Monterey Agreement and the Kern Fan Element transfer agreement for failure to name and serve indispensable parties.

The parties engaged in extensive mediated settlement discussions, which led to a comprehensive settlement agreement. Among other things, the settlement agreement provided that the Kern Water Bank Authority, the public entity created to operate the Kern Water Bank, would retain title to the

Kern Water Bank and DWR would study its impacts through a Monterey Plus EIR. The parties also agreed that DWR would act as the lead agency in preparing a Monterey Plus EIR.

In addition, the parties agreed that the Monterey Plus EIR would include analysis of (1) the environmental effects of the pre-Monterey Amendment long-term water supply contracts as part of the no project alternative, (2) the potential environmental impacts of changes in SWP operations and deliveries relating to the implementation of the Monterey Plus project, and (3) an analysis and determination regarding the transfer of development of the Kern Water Bank.

In 2007, DWR released the draft Monterey Plus EIR.

On June 4, 2010, Central Delta Water Agency (Central Delta) filed a first amended petition for writ of mandate and complaint for declaratory and injunctive relief challenging the Monterey Plus EIR under CEQA. Two other districts also filed suit alleging CEQA violations.

The trial court granted DWR's motion to set a special trial on several claims, and found them to be time-barred.

Subsequently, the court tried the CEQA claims. The court found no merit in them, save for one. The trial court questioned the adequacy of DWR's analysis of the Kern Water Bank's potential future impact on groundwater and water quality. The trial court concluded that the Monterey Plus EIR should have further analyzed the impacts associated with the Kern Water Bank, and issued a limited writ of mandate in 2014 ordering a revision to address that issue.

The court also considered whether an attorneys' fees motion was timely.

DWR prepared the "Revised EIR" in compliance with the 2014 Writ. In September 2016, DWR filed its return to the 2014 Writ. The Central Delta plaintiffs did not object to the discharge of the 2014 Writ, but stated their intent, along with other parties, including "Food Safety" to file a new suit challenging the Revised EIR. Subsequently, other parties filed a petition for writ of mandate.

The parties in all cases stipulated the trial court would conduct a single hearing as to whether to discharge the 2014 Writ and on the petition challenging the Revised EIR. Following a hearing, in October 2017 the court issued an order discharging the 2014 Writ and denying the petition challenging the Revised EIR.

The appeal consolidated three separate appeals: (1) the "Central Delta Appeal", (2) the "Biological Diversity Appeal", and (3) the "Food Safety Appeal."

The Central Delta Appeal

On appeal from the 2014 Writ, Central Delta contended: (1) DWR violated CEQA by failing to make a proper project decision; (2) the Monterey Plus EIR failed to analyze one article of the SWP in the no project alternatives; (3) Central Delta's validation claims were not time-barred; and (4) the trial court was required to order DWR to void its project approvals relating to the Kern Water Bank.

Kern Water Bank Authority, et al. cross-appealed, arguing Central Delta’s challenge to the 2010 Monterey Plus EIR was barred by *res judicata* and Central Delta lacked standing to bring suit. The court affirmed the judgment but denied the cross complaint.

First, because DWR was operating pursuant to the Monterey Amendment while preparing the Monterey Plus EIR, the report accurately described the practical result of carrying out the proposed SWP as “continuing.” The Monterey Plus EIR also accurately described the no project alternatives as returning to operation of the SWP in accordance with the pre-Monterey Amendment long-term water supply contracts. As a result DWR did not err in determining it could carry out the SWP “simply by deciding to continue operating under the Monterey Amendment.”

Second, even without considering the impact of every article of the SWP, the Court of Appeal found that the analysis of the “no project alternative” to operate under the SWP was sufficient for CEQA purposes. The analysis explained the objective of the SWP and the Monterey Agreement and Amendment. The description provided enough information to the public of the effects of operating under the “no project” alternative.

Third, Central Delta’s reverse validation claims were time-barred under Code of Civil Procedure section 860 *et seq.* While the settlement agreement required DWR to set aside its Monterey EIR, it was not required to set aside the Monterey Agreement and Amendment. The new EIR did not restart the statute of limitations as to the underlying agreements.

Fourth, the trial court did not err by issuing a limited writ of mandate on the Revised EIR. Because the errors in the Monterey Plus EIR were limited, the limited writ of mandate was appropriate, and not an abuse of discretion under CEQA.

Finally, the Court denied the cross-appeal. *Res Judicata* did not bar the claims of a previous group of petitioners who challenged an earlier EIR. The underlying cause of action was different than an earlier proceeding which involved the validity of a previous EIR. The challenges to the Monterey Plus EIR which did not exist at the time of the original case were distinct from those in the earlier action. Moreover, collateral estoppel did not bar the claims, because there was no privity between the petitioners in the current and former case, because the litigants in the former case stated explicitly that they disavowed any intent to act on behalf of others.

The Biological Diversity Appeal

The Biological Diversity Appeal involved an action for attorney’s fees. The motion was untimely because the 30-day deadline applicable to the appellant’s reverse validation claims applied, even when the appellants made CEQA claims as well, and argued CEQA’s 60-day limit should apply.

The Food Safety Appeal

The Food Safety Appeal argued that Code of Civil Procedure section 916 automatically stayed the trial court’s consideration of its challenge to the Revised EIR, because prior litigation on the

Monterey Plus EIR sought some of the same remedies. The trial court denied the stay. The court acknowledged that the issue was moot due to the consolidated cases, and turned to the merits.

On the merits, the Food Safety Appeal contended that DWR failed to adequately address the impacts caused by the transfer of the Kern Water Bank, in terms of both (1) the relationship between the transfer and an increase in the planting of permanent crops and (2) the impact of this crop conversion on water supply and reliability. According to the appellant, the Revised EIR's conclusion that the Kern Water Bank transfer did not cause crop conversion in the water bank service area was not supported by substantial evidence, nor was the report's analysis of the impacts to regional and statewide water supplies caused by crop conversion.

The trial court reviewed the record and found the Revised EIR adequately addressed the reality of crop conversion, its causes, and potential impact on the environment. The Revised EIR concluded the Kern Water Bank was not the primary cause of crop conversion, a conclusion the trial court determined was supported by substantial evidence. The evidence before the trial court revealed the primary forces behind crop conversion were the higher commodity price of permanent crops as compared to annual crops, making them more valuable to growers, and the need for growers to plant more valuable crops to cover the costs of implementing more efficient irrigation systems. This trend toward permanent crops was not new nor unique to the area served by the Kern Water Bank. The Court of Appeal analyzed the evidence reviewed by the trial court which involved multiple sources supporting the finding that although the Kern Water Bank increased the water supply reliability in the area it serviced, the environmental impact of the Kern Water Bank on crop conversion was less than significant, because SWP contractors would have requested same amount of water with or without the bank, and evidence showed that, in decades prior to the Revised EIR, the SWP had been supply-limited, not demand-limited, and therefore, there was no reason to expect that SWP contractors would have requested less water without the Kern Water Bank.

TAKE-AWAYS: In this fact-specific, complex, and protracted case involving environmental analysis of amendments to the massive State Water Project for capture, storage and delivery of water throughout the state, the court made a number of related holdings, including: that the Project EIR accurately described the Project as continuing under prior amendments to the Project; that the trial court did not abuse its discretion in ordering the Department of Water Resources to revise the Project EIR and make a new determination about whether to continue use of a groundwater bank; and that conveyance of land to a county authority for development of a groundwater bank did not result in substantial, adverse environmental change due to crop conversion.

* * *

California Renters Legal Advocacy & Education Fund v. City of San Mateo (2021) 68 Cal.App.5th 820.

BACKGROUND: Renters advocacy organization petitioned for writ of administrative mandamus seeking to compel a city to approve an application to build a four-story, ten-unit apartment building, and claiming that city's denial of the application for failure to satisfy city's design guidelines for multifamily homes violated the Housing Accountability Act (Gov. Code, § 65589.5 (HAA)), restricting a local government's ability to deny applications to build housing that complied with the general plan, zoning, and design review standards that were objective, if

substantial evidence would allow reasonable person to conclude that a project complied with those standards. Following bench trial, the Superior Court, San Mateo County, denied the petition and, subsequently, denied organization's motion for new trial. Organization appealed.

HOLDING: The Court of Appeal held that: (1) HAA applied to height standards in city's multi-family design guidelines; (2) height guidelines violated HAA by not providing objective standards; (3) HAA did not violate city's constitutional right to home rule; (4) HAA was not unconstitutional delegation of municipal functions; and (5) HAA did not violate procedural due process rights of project opponents. Reversed.

KEY FACTS & ANALYSIS: After the City of San Mateo (City) denied an application to build a ten-unit apartment building, petitioners California Renters Legal Advocacy and Education Fund, Victoria Fierce, and John Moon (CARLA) sought a writ of administrative mandamus seeking to compel the project's approval. The trial court denied the petition, ruling that the project did not satisfy the City's design guidelines for multifamily homes and that, to the extent the HAA required the City to ignore its own guidelines, it was an unconstitutional infringement on the City's right to home rule and an unconstitutional delegation of municipal powers. The Court of Appeal reversed.

Relevant here, the City's guidelines for housing provided as follows: "Most multi[-]family neighborhoods in San Mateo are 1 to 4 stories in height. When the changes in height are gradual, the scale is compatible and visually interesting. If height varies by more than 1 story between buildings, a transition or step in height is necessary. Any portion of a building constructed taller than surrounding structures should have the taller section built to a width that acknowledges the traditional building width pattern of the City—generally 30 to 50 feet in width." Importantly, the HAA only allows a city to deny a project for inconsistency with design standards which would reduce density. when those standards are objective. (*See* Gov. Code, § 65589.5(j)(1).) The City denied the project due to inconsistency with its height standards, particularly stating that the project was "too tall" compared to the surrounding buildings.

The Court observed that two separate standards of review applied to its analysis. Whether the standards were objective was a question of law, to be reviewed *de novo*. Whether the building project complied with those standards was a question of fact, to be reviewed for substantial evidence.

On the first issue, the guidelines were not objective standards. The court focused on the definition of "objective" in the HAA, which defines it as "involving no personal or subjective judgment by a public official and being uniformly verifiable by reference to an external and uniform benchmark or criterion available and knowable by both the development applicant or proponent and the public official." (Gov. Code, § 65589.5(h)(8).) In this case, the City's guidelines for height were not objective because the applicable portion provided "a transition or step in height is necessary." This invariably left discretion into what could be an adequate transition other than a step in height, such as a tree line beside the property. Because the Court found that the guidelines were not objective, there was no need to analyze whether the project complied with them.

The second major issue analyzed by the Court was the constitutionality of the HAA.

First, the Court found that the HAA was not an unconstitutional infringement on the City’s “home rule” as a charter city. Although building standards were an area of municipal concern, the housing crisis was an area of statewide concern, and the HAA was reasonably related to resolving the California housing crisis and narrowly tailored to avoid interfering with local government by allowing them to impose objective standards. The Court highlighted the “escape valves” in the HAA, such as for standards which would not reduce density, or the ability of a city to deny a project which would result in an unavoidable impact on health and safety.

Second, the HAA was not an unconstitutional delegation of municipal functions because the HAA did not divest the City of its final decision making authority to approve, conditionally approve, or deny a project. The governing body retained authority to exercise decision-making authority: to determine whether there was substantial evidence from which a reasonable person could conclude the project was consistent with the city’s applicable objective requirements; to deny or reduce the density of a project that did not meet such standards or that causes an unavoidable adverse impact on public health or safety; and to impose conditions of approval that did not reduce the project’s density where applicable objective standards are met. (Gov. Code, § 65589.5(f)(4) & (j).)

Third, the HAA did not violate due process rights of neighboring landowners by depriving them of a meaningful opportunity to be heard before a housing development is approved. The HAA still allowed opponents to seek to demonstrate that a project did not comply with the City’s objective standards. Nor did the statute prevent neighbors from presenting, or the agency from considering, evidence that conditions of approval that did not reduce density could mitigate undesirable effects on neighbors, or that the project would have an unavoidable “specific, adverse impact upon the public health or safety” if approved at the proposed density.

Accordingly, the Court of Appeal reversed the decision of the trial court, and ordered the trial court to issue a writ of mandate directing the City to vacate its action upholding the City’s denial of the project, and reconsider the challenge to the City’s decision in accordance with the opinion.

TAKE-AWAYS: Local governments should carefully draft zoning and development standards which are statutorily required to be “objective”. This holding represents a case where a court has taken a rigid position on what qualifies as objective under the HAA.

* * *

City of Escondido v. Pacific Harmony Grove Development, LLC (2021) 68 Cal.App.5th 213.

BACKGROUND: City brought an eminent domain action against land owners, which sought to acquire a strip of the owners’ land by condemnation. Following bench trial on bifurcated issue of valuation of land, the Superior Court, San Diego County, entered judgment in favor of the city. Owners appealed.

HOLDING: The Court of Appeal held that: (1) dedication requirement was constitutional; (2) it was reasonably probable that city would impose dedication requirement in exchange for permit to further develop land; (3) dedication requirement arose four years prior to date of probable inclusion; and (4) condemnation action was not unreasonably delayed for purpose of precondemnation damages. Affirmed.

Key FACTS & ANALYSIS: The City of Escondido (City) sought to acquire by condemnation from Pacific Harmony Grove Development, LLC and Mission Valley Corporate Center, Ltd. (Owners) a 72-foot-wide strip of land (the strip) across a mostly undeveloped 17.72-acre parcel (the Property) to join two disconnected segments of Citracado Parkway, a major road that runs through portions of the City's industrial areas on either side of the Property.

The City argued below that the strip should be valued under the *Porterville* doctrine (*City of Porterville v. Young* (1987) 195 Cal.App.3d 1260 (*Porterville*)), which values condemned property at its undeveloped state (here, about \$50,000) when the condemning agency can establish that (1) it would have conditioned development of the remainder of the property on dedication of the condemned portion, and (2) such a dedication requirement would be constitutional under *Nollan v. California Coastal Commission* (1987) 483 U.S. 825 (*Nollan*) and *Dolan v. City of Tigard* (1994) 512 U.S. 374 (*Dolan*), which require that a dedication requirement have an essential nexus and be roughly proportional to the public interest that would be served by denying development approval.

Owners argued the *Porterville* doctrine did not apply, and that the court should instead apply the "project effect rule," which disregards for valuation purposes a condemner's belated imposition of a dedication requirement as a means to drive down the price of property the condemner is likely to condemn. Owners maintained the City violated this rule by imposing dedication requirements on the Property long after it became probable that the City would condemn the strip to complete the Citracado Parkway extension project. Thus, Owners maintained the strip should be valued based on its highest and best use, without regard for the dedication requirement (about \$960,176).

Owners also argued they were entitled to precondemnation damages caused by the City's unreasonable delay in pursuing condemnation proceedings and other unreasonable conduct. The City countered that it did not engage in unreasonable delay or conduct because it commenced condemnation proceedings shortly after it annexed the Property from county jurisdiction in 2015.

After a four-day bench trial, the court issued a comprehensive statement of decision ruling in the City's favor on all issues. The parties then stipulated to a judgment, which the court entered. Owners appealed, contending the trial court erred by finding the *Porterville* doctrine applied, the project effect rule did not, and the City was not liable for precondemnation damages. The Court of Appeal affirmed the judgment of the trial court.

On the issue of whether to apply the *Porterville* doctrine or the project effect rule, the Court of Appeal found that the dedication requirement satisfied both the *Nollan* and *Dolan* tests. Under *Nollan*, the dedication for a roadway was related to the public interest in mitigating traffic impacts. Under *Dolan*, the burdens of the dedication did not exceed the overall impacts of developing the property. It would cost \$2.38 million to build such a road entirely within the Property, and \$4.6 million to build such a road that connected to the existing northern segment of Citracado Parkway. Under both the City's and Owners' valuation, the benefits versus burden weighed towards the constitutionality of the dedication. Likewise, under the second portion of the *Porterville* analysis, it was reasonably probable that the City would impose the dedication requirement as a condition of development of the Property, were Owners to apply for such development.

The Court of Appeal agreed with the trial court that the project effect rule did not apply. The dedication requirement arose in 2002 when the City fixed the location of Citracado Parkway across the Property in its general plan and circulation element. Under the circumstances, applying the project effect rule to require that Owners be compensated for an industrial use of the strip that they should never reasonably have expected to make would have resulted in the type of windfall the *Porterville* doctrine sought to avoid.

Finally, the Court of Appeal disagreed with Owners' argument that the City was required to pay precondemnation damages because it did not seek to condemn the property until 10 years after an agreement for hospital construction which the owners contended irrevocably committed the City to constructing Citracado Parkway through the Property. The Court of Appeal agreed with the trial court that this delay was reasonable. First, the timeframe was reasonable considering the size of the project and the time it would take to gather the necessary funding. Second, the City could not have approved any development of the Property until 2015 when it annexed the Property from the County. Moreover, until the annexation, the Property was zoned for low-density residential use. The City's up-zoning of the property to industrial use during the annexation undoubtedly benefited, rather than harmed, Owners. Third, Owners had never sought City approval to develop the Property. The Court could not see how the City's delay unreasonably restrained Owners' development of the Property when Owners never sought to develop it.

The Court of Appeal opined that at its core, Owners' precondemnation damages claim was based not so much on the City's failure to condemn the strip sooner, but rather, on the notion that the City might condemn it at all.

TAKE-AWAYS: In this case the court upheld Escondido's dedication requirement and denied the property owners' claim for precondemnation damages. The case includes discussion of the *Porterville* analysis and project effect rules for property valuation in condemnation cases.

* * *

Sierra Watch v. County of Placer (2021) 69 Cal.App.5th 86.

BACKGROUND: Environmental organization filed petition for writ of mandate and complaint alleging that county's environmental review of proposed resort development near Lake Tahoe was inadequate under CEQA, including with respect to discussion of environmental setting and construction noise mitigation measures. The Superior Court, Placer County, rejected organization's claims. Organization appealed.

HOLDING: The Court of Appeal held that: (1) discussion of lake's water quality in environmental setting section of environmental impact report (EIR) was inadequate; (2) discussion of air quality for lake basin in EIR's environmental setting section was adequate; (3) EIR's discussion of development's traffic impacts on lake's water quality and lake basin's air quality was inadequate; (4) county's failure to disclose duration of construction noise at any specific location within development did not render EIR inadequate; (5) county's failure to consider noise impact occurring further than 50 feet from expected construction activity rendered EIR inadequate; (6) EIR's discussion of impact of construction noise on residents was adequate; and (7) county's inclusion

of additional mitigation measures for construction noise to benefit school, but not other nearby buildings, was not arbitrary. Reversed.

KEY FACTS & ANALYSIS: In 2016, Placer County (County) approved a project to develop a resort on about 94 acres in Olympic Valley — the site of the 1960 Winter Olympics. Petitioner Sierra Watch afterward challenged the County’s approval under CEQA. In Sierra Watch’s view, the County’s analysis fell short. In particular, Sierra Watch maintained, the County (1) failed to sufficiently consider Lake Tahoe in its analysis, (2) insufficiently evaluated the project’s impacts on fire evacuation plans for the region, (3) inadequately evaluated and mitigated the project’s noise impacts, (4) failed to allow for sufficient public review of the project’s climate change impacts, (5) failed to consider appropriate mitigation for the project’s climate change impacts, (6) overlooked feasible mitigation options for the project’s traffic impacts, and (7) wrongly relied on deferred mitigation to address the project’s impacts on regional transit. The trial court rejected all Sierra Watch’s arguments.

The Court of Appeal considered each argument.

On the first Argument, the County’s EIR never meaningfully discussed Lake Tahoe in its description of the environmental setting. In its discussion of the environmental setting for “Hydrology and Water Quality,” the draft EIR offered only one parenthetical reference to Lake Tahoe, stating: “The plan area is located within the low elevation portion of the approximately eight square mile Squaw Creek watershed, a tributary to the middle reach of the Truckee River (downstream of Lake Tahoe).” Nowhere in this sentence, or elsewhere, did the draft EIR discuss the importance of Lake Tahoe, its characteristics, or its current condition. Due to the significance of Lake Tahoe, the EIR inadequately addressed it. However, the Court of Appeal agreed with the trial court that the EIR adequately assessed air pollutants originating from traffic when it mentioned the types of pollutants in the area, and that vehicle traffic was one source. The Court of Appeal also found that the EIR failed to meaningfully assess the impact of the project’s traffic impact on Lake Tahoe air quality. The EIR provided mixed messages on the project’s potential impacts to Lake Tahoe and the basin from increased traffic. On the one hand, it said the project would not result in an exceedance of Tahoe Regional Planning Agency (TRPA’s) cumulative vehicle miles travelled (VMT) threshold for the Lake Tahoe Basin. But on the other hand, it showed the project would likely exceed TRPA’s project-level threshold of significance for traffic in the basin.

Rather than follow one of TRPA’s approaches, however, the EIR simply declared that TRPA’s thresholds were inapplicable because the project was not located in the basin. But if TRPA standards were inapplicable, what standards did apply? The EIR never answered the question. Nor did it supply any meaningful information to evaluate the significance of a daily addition of 23,842 VMT on Lake Tahoe’s water quality and the basin’s air quality. Nor did it even offer any clear conclusion on whether this additional traffic would significantly impact Lake Tahoe and the basin. It instead simply supplied some discussion about TRPA’s thresholds of significance and then said “the TRPA thresholds are not used as standards of significance in this EIR.” The Court found this to be inadequate under CEQA.

On the second argument, the Court of Appeal determined that the EIR fatally underestimated the impact of the project on fire evacuation times because it wrongly assumed emergency responders would provide traffic control at key intersections. The EIR's misleading estimation of evacuation times rendered it inadequate.

On the third claim, the County's failure to disclose duration of construction noise at any specific location in EIR did not render the EIR inadequate. The EIR did disclose the duration of construction and the noise for at least one part of project, and the EIR sufficiently demonstrated why specific detail about duration of construction noise at each specific location within development was not possible, including that development would be constructed over 25 years, that building location within development was flexible, and that there was no specific construction schedule. The EIR listed noise level ranges, explained the significance, and specifically acknowledged that construction would annoy residents. Additionally, the Court opined that the County's inclusion of mitigation measures for construction noise near schools, but not other buildings, was not arbitrary and capricious, due to the sensitivity of schools to noise and the infeasibility of imposing measures on all nearby buildings.

The remaining portions of the opinion are unreported.

On the fourth claim, the Court of Appeal found that the County was not required to recirculate its EIR when it changed its climate change analysis between the draft and final EIR pursuant to changing law. While the draft and final EIRs applied different standards to the climate change analysis, the impacts disclosed in the final EIR were also revealed in the draft EIR. There was therefore no new significant information not included in the draft EIR which would require recirculation to the public under Public Resources Code section 21092.1.

On the fifth claim, the Court of Appeal rejected Sierra Watch's claim that the EIR failed to reconsider the draft EIR's climate mitigation analysis. The Court found that the County had adequately considered climate mitigation. The County was not required to consider impacts that had no possibility of occurring. The Court also declined to hear two additional arguments it considered to be "undeveloped."

On the sixth claim, the County had adequately considered mitigation measures for traffic impacts including public transportations and shuttles. Although the County declined to adopt them due to "limited benefit."

Finally, on the seventh claim, the Court of Appeal agreed with Sierra Watch that the EIR improperly relied on deferred mitigation to address traffic impacts. The draft EIR said the project would increase demand on the existing public transit system (known as Tahoe Area Regional Transit or TART) and would, as a result, have a potentially significant impact on transit. But it said that the developer's commitment either to provide "fair share funding" to TART or to form a "Community Service Area (CSA) or a Community Facilities District (CFD) to fund the costs of increased transit services" would mitigate this impact to a less-than-significant level. It then noted how transit services could potentially be increased, stating that "[i]ncreased service may consist of more frequent headways, longer hours of operations, and/or different routes." The final EIR added little new, though it did include some detail on how the "fair share funding" would be calculated:

“The fair share would be based on an engineer’s report and would establish the project’s financial contribution to additional transit services.” The EIR’s mitigation measure for transit impacts included no performance standard at all. Nor did it provide any analysis supporting its conclusion that the project’s impacts on transit would be rendered less than significant. Rather than supply this analysis, the EIR simply required the developer to provide an unspecified amount of funding to increase transit service by an unspecified amount in the future, and then, without any analysis, concluded that this vague offer to increase transit service would reduce impacts to a less-than-significant level..

TAKE-AWAYS: This fact-specific case provides an example of analysis of vehicle miles traveled and evacuation time impacts in relation to a proposed development project near Lake Tahoe, and of how deferred mitigation of transportation impacts fails to satisfy CEQA requirements.

* * *

Sierra Watch v. Placer County (2021) 69 Cal.App.5th 1.

BACKGROUND: Environmental organization filed petition for writ of mandate and complaint for injunctive and declarative relief alleging that approval of resort development project by county board of supervisors violated the Ralph M. Brown Act based on county’s failure to make memorandum explaining change to proposed development agreement available for public inspection at time it was sent to board less than 72 hours before open meeting. Following bench trial, the Superior Court, Placer County, denied petition. Environmental organization appealed.

HOLDING: The Court of Appeal held that county violated Ralph M. Brown Act by placing copy of memorandum in county clerk’s office after hours. Affirmed in part and reversed in part.

Key FACTS & ANALYSIS: In 2016, Placer County (the County) approved a project to develop a resort on about 94 acres near Lake Tahoe. Sierra Watch afterward challenged the County’s approval in two lawsuits, both of which are briefed in this paper.

This appeal concerns Sierra Watch’s Brown Act allegations and involved two of the act’s requirements. The first claim concerned section 54957.5 of the Brown Act. Under that statute, in the event a county distributes to its board of supervisors any writing pertinent to an upcoming board meeting less than 72 hours before that meeting, the county must make that writing “available for public inspection” at a county office “at the time the writing is distributed” to the board. The case involved two competing interpretations of this statute.

The Court of Appeal considered the issue of whether the writing had to be placed in the county office, or whether it had to actually be available for public inspection in that office to satisfy the public distribution requirement. In this case, the County placed the writing in a county office at a time the office was closed to the public (5:40 PM). The Court of Appeal found that the writing was not actually available for public inspection until the office reopens to the public, and so was not available at the time required under section 54957.5 because the writing was distributed to the Board of Supervisors (Board) at 5:40 PM, but was not available for public inspection until the county office opened the next day.

Sierra Watch's second claim concerned section 54954.2 of the Brown Act. Under that statute, counties must post an agenda before each board meeting "containing a brief general description of each item of business to be transacted or discussed at the meeting." The County here, in its agenda, informed the public that its board would consider approving a development agreement that its planning commission had recommended. But in the end, the County's board never considered that particular agreement. It instead considered and then approved a materially revised development agreement that County staff, in consultation with the project applicant and another party, had prepared the night before the meeting. In other words, the Board only considered a version of the agreement that the Planning Commission had never considered, even though the agenda indicated that the Board would consider the agreement that the commission had actually considered. This issue was whether the board's consideration of this revised agreement, rather than the one referenced on the County's agenda, rendered its agenda misleading. The Court of Appeal found that it did in an unpublished portion of the opinion.

The Court of Appeal therefore reversed in part, finding the County's conduct violated the Brown Act. However, the Court of Appeal also rejected Sierra Watch's request to vacate the County approvals because it found that the Sierra watch had failed to show prejudice from the violation. Since the agreement considered was only finalized the night prior, even if the County had complied with the Brown Act, it would not have been able to review the agreement before the meeting. Because Sierra Watch failed to show that the County's violation deprived it of a fair opportunity to participate at the County's meeting, the Court of Appeal declined to find that nullification of the County's approval was warranted.

TAKE-AWAYS: Under Section 54957.5 of the Brown Act, which requires that materials pertaining to an agenda item that are provided to a majority of the legislative body less than 72 hours prior to the public meeting must be made available to the public at the same time, the materials must actually be available to the public. However, the Brown Act violation in this case did not support invalidation of the County's approval of a resort project.

* * *

Brown v. Montage at Mission Hills, Inc. (2021) 68 Cal.App.5th 124, review denied (Nov. 17, 2021).

BACKGROUND: Owner of a condominium unit brought an action against owner's association seeking, among other claims, declaratory judgment that she was exempt from the association's amendment to their governing documents which prohibited the renting of properties in the association for less than 30 days. The Superior Court, Riverside County, granted association's motion for summary judgment and denied owner's motion for summary adjudication. Owner appealed.

HOLDING: The Court of Appeal held that: (1) owner of condominium unit was exempt from restriction on short term rentals; (2) owner's association failed to preserve for consideration on appeal argument that short term rentals were limited licenses rendering such guests of owners licensees rather than tenants; and (3) owner of condominium unit was exempt from prohibition against "business or commercial activities" to extent that it prohibited her right to rent her property. Reversed with directions.

Key FACTS & ANALYSIS: Sixteen years after a condominium owner bought a unit, her home owners' association (HOA) prohibited short term rentals. She sought declaratory relief that she was exempt from that requirement pursuant to Civil Code section 4740.

Section 4740, subdivision (a) states that an owner of a property in a common interest development shall not be subject to a provision in its regulations "that prohibits the rental or leasing of any of the separate interests in that common interest development" unless that provision "was effective prior to the date the owner acquired title to their separate interest." The sole issue on appeal was whether section 4740 exempted the owner from the restriction on rentals added to the governing documents after the owner had acquired title to her condominium. The Court concluded that it did. The statute did not differentiate between short term and long term rentals, and short term rentals constituted a "rental" for the purposes of section 4740. Moreover, the history of the Davis-Stirling Act applicable to common interest developments indicated that Civil Code section 4740 would apply to both rental prohibitions and restrictions. Finally, the court found that the defendant HOA had failed to preserve its argument that because short term rentals were limited licenses to use property, renters were not "tenants" for the purposes of the Davis-Stirling Act (Civ. Code, § 4000 *et seq.*).

TAKE-AWAYS: In this case the court held that Civil Code Section 4740, which provides that rental restrictions on owners in common interest developments do not apply to owners that acquired their interest before the imposition of the restriction, excused the appellant common interest holder from complying with the restriction.

* * *

Save Our Access-San Gabriel Mountains v. Watershed Conservation Authority (2021) 68 Cal.App.5th 8, review denied (Dec. 15, 2021).

BACKGROUND: Advocacy group petitioned for writ of mandate ordering conservation authority to set aside its approval of proposed project to improve national forest under California Environmental Quality Act (CEQA), alleging various deficiencies in environmental impact report (EIR) that was certified by authority. The Superior Court, Los Angeles County, granted petition in part and issued writ of mandate ordering authority to articulate and substantiate parking baseline, and subsequently awarded group \$154,000 in attorney fees. Group and authority appealed, and appeals were consolidated.

HOLDING: The Court of Appeal held that: (1) EIR did not "gloss over" project's parking reduction, and thus did not violate CEQA on such basis; (2) EIR was only required to address parking reduction to extent reduction had secondary impact on environment; (3) EIR sufficiently evaluated alternative proposals; and (4) project did not conflict with land management plan or presidential proclamation pertaining to forest. Reversed.

Key FACTS & ANALYSIS: This case concerned environmental review of an improvement project in the Angeles National Forest. Defendant Watershed Conservation Authority (WCA or defendant) certified the EIR for the project under CEQA. Plaintiff Save Our Access-San Gabriel Mountains challenged defendant's certification of the EIR. The EIR addressed the usual extensive range of potential impacts on the environment, on biological resources, cultural resources, water quality, air quality, and more. The trial court rejected plaintiff's claims that CEQA required the defendant

to consider additional project alternatives, and that the project was inconsistent with applicable land use plans, but issued a writ of mandate requiring defendant to “articulat[e] and substantiat[e] an adequate parking baseline” for the project, and to “reassess[] the significance of the impacts resulting from the ... project’s parking reduction.” The court found those two issues were severable and the rest of the defendant’s project activities did not violate CEQA. Both parties appealed from the judgment.

The appeal addressed only three points: a reduction in available parking; the fact the EIR did not analyze multiple alternatives to the project, instead analyzing a single “no project” alternative; and alleged conflicts with land management plans.

The Angeles National Forest is a designated National Monument. The project site was within the monument. It encompassed “the riverbed, public roads ..., and all existing recreational facilities within the project site.” It was among the most popular recreation areas for weekend use, and “heavy use combined with the lack of facilities had resulted in the degradation of the area,” including damage to vegetation, soil compaction and erosion, stream alteration, high levels of litter deposition, and water quality impairment due to excessive trash. The project was proposed “to better manage the heavy recreation use while balancing the need for long-term resource protection.”

The plaintiff contended that the centerpiece of the project was a reduction of parking. The plaintiff alleged the EIR glossed over the reduction. However, the Court of Appeal found that the draft EIR clearly listed the reduction of parking. The Court of Appeal likewise rejected the remaining alleged CEQA violations and found sufficient discussion in the draft EIR. The Court of Appeal noted that reducing parking would actually have a positive impact on the environment. The Court of Appeal cited to *San Franciscans Upholding the Downtown Plan v. City & County of San Francisco* (2002) 102 Cal.App.4th 656, and stated that a reduction of parking availability was not an environmental impact. Under the circumstances, it was reasonable to determine that individuals who could not find parking would recreate elsewhere.

The plaintiff next contended that the EIR’s analysis of alternatives violated CEQA, and in addition that the EIR failed to analyze the project’s alleged conflicts with certain land use policies. The draft EIR only analyzed a no project alternative, and the project itself, and stated that as a result of planning workshops, those were the only alternatives suitable to reasonably achieve the purpose of the project. The EIR also described “alternatives considered but eliminated from full analysis.” This consisted of a “forest closure alternative” suggested by the California Department of Fish and Wildlife. This alternative would have closed “all or a portion of the project site to adequately protect biological resources during the breeding season of the Santa Ana sucker (March 1 through August 1).” The draft EIR described the reasons for eliminating this alternative from full analysis, including that recreation use would be restricted during the time of year when most use currently occurs. The Court of Appeal observed that analyzing only the no project alternative was not *de facto* a violation of CEQA. The plaintiff failed to show that it was manifestly unreasonable for the agency to determine that other suggested alternatives were not feasible and adequate. The Court of Appeal also agreed with the trial court that the project was not inconsistent with the applicable land management plan or the proclamation that the forest was a national monument.

Finding no violation of CEQA, the Court of Appeal reversed the judgement of the trial court, with directions to enter a new judgment denying petition for writ of mandate in its entirety.

TAKE-AWAY: This fact-specific case holds that reducing parking availability in the Angeles National Forest, based on the circumstances and objectives to be achieved, resulted in environmental benefits and was not an environmental impact subject to CEQA.

* * *

Los Angeles Dept. of Water & Power v. County of Inyo (2021) 67 Cal.App.5th 1018, review denied (Nov. 17, 2021).

BACKGROUND: City department of water and power filed petition for writ of mandate, alleging that county, which sought to acquire city department's landfill sites in county by eminent domain, failed to properly identify the true nature and scope of its "project" under the California Environmental Quality Act (CEQA). Following transfer, the Superior Court, Kern County, entered judgment and issued writ, and county appealed.

HOLDING: The Court of Appeal held that: (1) county did not provide adequate notice that CEQA exemptions would be considered at public meeting, and (2) categorical CEQA exemption for existing "facilities" does not include unlined landfills. Affirmed.

Key FACTS & ANALYSIS: The County of Inyo (County) appealed from a judgment and issuance of a peremptory writ of mandate in a proceeding under CEQA. The trial court issued the writ of mandate after determining (1) County's description of the activity constituting its project was too narrow and, thus, did not comply with CEQA and (2) the project, when properly defined, was not exempt from CEQA's requirements.

The project included County's use of condemnation proceedings to acquire fee simple title to three sites it leases and uses for landfills and County's continued operation of the landfills. In arguing that the project was exempt from CEQA, County relied on the commonsense exemption and the existing facilities exemption. (See Guidelines, §§ 15061, subd. (b)(3) [commonsense exemption], 15301, subd. (a) [existing facilities exemption].)

In the published portions of the opinion, the Court of Appeal addressed exhaustion of administrative remedies and the interpretation of the existing facilities exemption. The Court of Appeal concluded that the issue exhaustion requirement does not apply to challenges to the exemptions because County did not provide adequate notice that CEQA exemptions would be considered at the public hearing held by its Board of Supervisors. The agenda request form the hearing of County's Board of Supervisors did not mention CEQA or any exemption, and nothing in the administrative record showed the public was notified before the hearing of County's possible reliance on CEQA exemptions. As a result of the lack of notice, County did not provide an "opportunity for members of the public to raise ... objections" to its reliance on those exemptions. (§ 21177, subd. (e).) Therefore, the issue exhaustion requirement did not apply to objections to County's reliance on the exemptions.

The Court of Appeal found that the word “facilities” was ambiguous—that is, reasonably susceptible to more than one interpretation—because it could be interpreted to include or exclude unlined landfills. The Court of Appeal resolved the ambiguity by interpreting “facilities” to exclude unlined landfills. Therefore, County misinterpreted the Guidelines and violated CEQA when it concluded the existing facilities exemption applied to the project.

In the unpublished portion of the opinion, the Court of Appeal concluded County committed two other CEQA violations. First, it improperly described the project as constituting only the proposed condemnation proceedings and a mere change in ownership of the landfill sites, the County did not include the nature and extent of the project, the development of new groundwater rights, the import of waste, and the remaining operational life of the landfills. Second, the unduly narrow project description caused County to erroneously conclude the commonsense exemption under CEQA applied.

The CEQA violations justified the trial court’s issuance of a writ of mandate vacating County’s approval of condemnation proceedings for each of the three landfills.

TAKE-AWAYS: The holding in this case serves as a reminder of the importance of including actions under CEQA in legislative body agenda descriptions to avoid challenges based on inadequate opportunity for the public to raise objections under CEQA. In this case the court held that the existing facilities exemption did not apply to the unlined landfills at issue.

* * *

Pacific Merchant Shipping Association v. Newsom (2021) 67 Cal.App.5th 711.

BACKGROUND: Plaintiffs filed an action against the Governor of the State of California and professional baseball team, alleging that the Governor’s authority to certify a baseball park development project for streamlined environmental review had expired. The Superior Court, Alameda County, granted Governor’s and baseball team’s motions for judgment on the pleadings and upheld the Governor’s ongoing certification authority. Plaintiffs appealed.

HOLDING: The Court of Appeal held that special statute providing fast-track judicial review of challenges to baseball park development project did not impose a deadline for Governor to certify the project for streamlined environmental review. Affirmed.

Key FACTS & ANALYSIS: This appeal concerns special legislation enacted to facilitate the construction of a new baseball park and mixed-use development project at the Howard Terminal site in the City of Oakland (Howard Terminal Project). Under section 21168.6.7 of the Public Resources Code, the Howard Terminal Project was eligible to qualify for expedited administrative and judicial review under the California Environmental Quality Act (CEQA) if the Governor of the State of California certified that the project met an enumerated set of job-creation, environmental protection, sustainable housing, and transit and transportation infrastructure conditions.

In March 2020, Pacific Merchant Shipping Association, Harbor Trucking Association, California Trucking Association, and Schnitzer Steel Industries, Inc. (collectively, petitioners) filed the

instant action challenging the authority of Governor Gavin Newsom to certify the project for streamlined environmental review. Specifically, petitioners claimed that, under section 21168.6.7, the Governor's authority to certify the project had expired on January 1, 2020. The Governor, the City of Oakland, and real party in interest Oakland Athletics Investment Group, LLC (Real Party and collectively, respondents) filed motions for judgment on the pleadings, arguing that section 21168.6 contained no deadline for certification by the Governor. The trial court sided with respondents' reading of the statute and upheld the Governor's ongoing certification authority. On February 11, 2021, the Governor certified the Howard Terminal Project for expedited CEQA review.

Assembly Bill 734 was special legislation applicable solely to the Howard Terminal Project. According to the Legislature, a special statute was necessary "because of the unique need for the development of a sports and mixed-use project in the City of Oakland in an expeditious manner."

In parallel with the Legislature's consideration of Assembly Bill 734, the Legislature concurrently enacted Assembly Bill 987, special legislation providing the same type of streamlined CEQA review for the "Inglewood Project," for the Los Angeles Clippers' basketball arena. Assembly Bill 987 adopted similar requirements with respect to Leadership in Energy and Environmental Design (LEED) certification, trip reduction, job creation, greenhouse gas neutrality, recycling, enforcement of environmental and mitigation measures, and allocation of costs. The legislation also required certification by the Governor and incorporated the Guidelines from Assembly Bill 900 (Guidelines) "to the extent the guidelines are applicable and do not conflict with specific requirements" of the special statute.

Assembly Bill 900 established fast-track administrative and judicial review procedures for an "environmental leadership development project" that met certain conditions, including the creation of high-wage, high-skilled jobs, no net additional emission of greenhouse gases, and the payment of certain costs by the project applicant. Under this legislation, the Governor was required to certify that the project met these statutory criteria to qualify for fast-track status. Once certified, Assembly Bill 900 established that certain CEQA court challenges must "be resolved, to the extent feasible, within 270 days." As originally enacted, Assembly Bill 900 contained no deadline for the Governor's certification of a leadership project. The relevant version of Assembly Bill 900 required the Governor to certify a leadership project by January 1, 2020 and the lead agency to approve the project by the sunset date, January 1, 2021.

Assembly Bill 987 differed from Assembly Bill 734 in two notable respects. First, Assembly Bill 987 stated that an EIR must be certified by the lead agency prior to January 1, 2025, or the statute would be repealed as of that date. Conversely, Assembly Bill 734 contained no express deadlines for certification by the Governor or project approval by a lead agency. Second, Assembly Bill 987 encouraged the California Air Quality Board (CARB) "to make its determination no later than 120 calendar days after receiving an application for review of the methodology and calculations of the [Inglewood Project's] greenhouse gas emissions," while no such expedited review or encouragement of CARB appears in Assembly Bill 734.

On November 20, 2018, shortly after the Governor signed Assembly Bill 734 into law, the City of Oakland issued a notice of preparation of a draft EIR for the Howard Terminal Project. In January

2019, the Governor updated the Guidelines to state that they applied to projects requesting streamlined judicial review under Assembly Bills 734 and 987 “to the extent the Guidelines are applicable and do not conflict with the language contained within those statutes.” In March 2019, Real Party submitted an application to the Governor for certification of the project under Assembly Bill 734. However, unlike the Inglewood Project, which was certified by the Governor prior to January 1, 2020, the Howard Terminal Project was still in the certification process during 2020. In particular, CARB was still evaluating whether the Howard Terminal Project would meet its greenhouse gas reduction targets under Assembly Bill 734. It was not until August 25, 2020, over 16 months after Real Party submitted its application, that CARB finally issued its determination that the Howard Terminal Project “will meet the [greenhouse gas] requirements provided by AB 734.”

The sole question on appeal was whether the Governor’s power to certify the Howard Terminal Project for expedited CEQA review expired on January 1, 2020, because subdivision (e)(2) of section 21168.6.7 incorporated the certification deadline from the Guidelines into Assembly Bill 734. The Court of Appeal found that a fair reading of this legislative history supported respondents’ position that the Assembly Bill 900 deadlines were not meant to be imported into Assembly Bill 734. The initial analysis of the bill by the Senate Committee on Environmental Quality focused on the ways in which Assembly Bill 734 was substantively weaker than Assembly Bill 900 with respect to environmental protections and the scope of judicial review. Both that committee and the Senate Judiciary Committee questioned whether the Howard Terminal Project should proceed as standalone legislation or be subject to the Assembly Bill 900 process. Enforcement of a one-year certification deadline prior to the expiration of Assembly Bill 900 was never mentioned. Furthermore, the author expressly acknowledged that the project could not be accomplished under the existing Assembly Bill 900 expiration date without further extension of the deadlines.

The Court of Appeal found that the legislative purpose of Assembly Bill 734 also supported the above interpretation. Considering the size of the project, a one-year deadline for certification would undermine the purpose of the legislation to allow the project to proceed. The Court of Appeal found that the more reasonable interpretation of Subdivision (e)(2) of Assembly Bill 734 was that the Guidelines were not incorporated. The Court of Appeal therefore concluded that the Governor was authorized to certify the project when he did.

TAKE-AWAY: This fact-specific case upheld the applicability of special legislation permitting fast-tracking of environmental review for the Howard Terminal ballpark and mixed-use development project.

* * *

UNREPORTED STATE COURT OF APPEAL CASES

East Meadow Action Committee v. Regents of the University of California (Cal. Ct. App., Feb. 4, 2022, No. H048695) 2022 WL 334036 [unreported].

BACKGROUND: This case arises from the proposal of the University of California, Santa Cruz (UC Santa Cruz), to build new student housing in accordance with the 2005 long range development

plan (LRDP) for the campus. The 2005 LRDP was accompanied by the 2005 program environmental impact report (EIR) that was prepared pursuant to the California Environmental Quality Act (CEQA) to evaluate the environmental effects of the campus growth anticipated in the 2005 LRDP. In 2019, respondents the Regents of the University of California (Regents) approved the Student Housing West [SHW] project, which included building family student housing on a portion of the UC Santa Cruz campus known as the East Meadow. The project-level EIR for the SHW project was tiered from the 2005 LRDP program EIR.

East Meadow Action Committee, “an unincorporated association of current and former [UC Santa Cruz] staff, students, and alumni, as well as residents and taxpayers of and within the City of Santa Cruz and the County of Santa Cruz,” challenged the Regents’ approval of the SHW project by filing a petition for writ of mandamus alleging violations of CEQA’s requirements for environmental review.

The trial court granted the petition for writ of mandamus to the extent it asserted that the Regents’ findings regarding the infeasibility of the SHW project alternatives did not comply with CEQA, and denied the petition as to all other claims of CEQA violations. The court ordered that a peremptory writ of mandate issue directing the Regents to correct the CEQA error regarding the infeasibility of the project alternatives, and staying all SHW project activities until the error was corrected.

In its appeal, East Meadow Action Committee contended that the trial court erred because : (1) tiering the SHW project EIR from the 2005 LRDP program EIR was improper; (2) the SHW project EIR failed to analyze cumulative impacts; and (3) the trial court improperly limited the scope of the peremptory writ of mandate.

HOLDING: The Court of Appeal, affirmed, finding no error.

Key FACTS & ANALYSIS: Regarding the claim that the SHW project EIR was improperly tiered from the 2005 LRDP program EIR, the trial court found that the SHW project EIR could be tiered because the amendment to the 2005 LRDP redesignated the site and the statutory scheme allowed tiering from a broad program EIR where a site-specific analysis was conducted for the portions of a project not adequately addressed in the program EIR. Under Public Resources Code section 21094, subdivision (b) tiering “applies only to a later project which the lead agency determines (1) is consistent with the program, plan, policy, or ordinance for which an environmental impact report has been prepared and certified, (2) is consistent with applicable local land use plans and zoning of the city ... in which the later project would be located, and (3) is not subject to Section 21166 [EIR required when substantial changes in the project require major revisions of a previously-prepared EIR].”

The Court of Appeal observed that one of the purposes of the 2005 LRDP was to plan for the development of the UC Santa Cruz campus to accommodate growth in campus enrollment through 2020. The campus development anticipated in the 2005 LRDP expressly included developing additional student housing for undergraduates, graduate students, and students with families. The 2005 LRDP specifically stated that the development plan included replacement of existing family student housing and the development of additional family student housing in other locations on

campus. Therefore, development of family student housing on the site, as analyzed in the SHW project EIR, was consistent with the 2005 LRDP as it pertained to family student housing. The change in land use designation to the site at issue was also expressly contemplated in the 2005 LRDP. The Court of Appeal accordingly affirmed that tiering was properly used from the 2005 LRDP.

With regard to analysis of cumulative impacts, East Meadow Action Committee argued that the Respondents could not tier the SHW Project EIR from the 2005 LRDP EIR due to alleged conflicts between the documents, and inconsistencies with the program and policy adopted in 2005. However, because the Court of Appeal found that the SHW project was consistent with the 2005 LRDP within the meaning of Public Resources Code section 21094(b), the Court of Appeal found no merit in the contentions. East Meadow Action Committee failed to meet its burden to show that the SHW project EIR's discussion of cumulative impacts with respect to the site was inadequate under CEQA.

With regard to the trial court's limited writ of mandate, the trial court ruled that the Regents had violated CEQA by improperly rejecting the alternatives to the SHW project as economically infeasible on the basis of a non-public cost analysis that was delegated to a three-member committee. The trial court therefore ordered that a peremptory writ issue directing the Board of Regents as a whole to correct the CEQA error by reconsidering the Regents' approvals of the SHW project and the feasibility of the project alternatives, and stayed all SHW project activities until the Regents complied with the peremptory writ. The merits of that ruling were not at issue on appeal. East Meadow Action Committee failed to meet its burden to show that the trial court abused its discretion in limiting the scope of the peremptory writ to a correction of the sole CEQA error found by the court and staying SHW project activities until the error was corrected. The trial court had the discretion under CEQA to leave the project approval in place.

* * *

Save Our Rural Town v. County of Los Angeles (Cal. Ct. App., Jan. 26, 2022, No. B309992) 2022 WL 224163 [unreported].

BACKGROUND: Save Our Rural Town (SORT) appealed from the trial court judgment denying its writ petition. The trial court found that the OurCounty environmental strategy plan (OurCounty) adopted by Los Angeles County was not a project under the California Environmental Quality Act (CEQA) and therefore did not yet require a formal environmental review.

HOLDING: The Court of Appeal affirmed, concluding that that OurCounty was merely aspirational and insufficiently concrete to amount to a project under CEQA.

Key FACTS & ANALYSIS: In 2016, the Los Angeles County Board of Supervisors established a Chief Sustainability Office (CSO) "to create a vision for making our communities healthier, more equitable, economically stronger, more resilient, and more sustainable." The CSO also was "tasked with developing, implementing, and updating a new Countywide Sustainability Plan." Its formal efforts to create such a plan, including stakeholder workshops, presentations to "business, civic, and community organizations across the region," "expos" in each of the county's supervisorial

regions, and circulation of a “discussion draft,” began in late 2017 and continued through mid-2019.

OurCounty contained 12 “broad, aspirational, and cross-cutting goals.” The goals, defined by the plan as “[b]road, aspirational statement[s] of what we want to achieve,” were supported by 37 “strategies,” defined as “[l]ong-range approach or approaches that we take to achieve a goal,” and 159 “actions,” defined as “[s]pecific policy, program[s], or tool[s] we use to support a strategy.” The plan identified certain targets for particular jurisdictions. OurCounty expressly provided that, “[a]s a strategic plan,” it “does not supersede land use plans that have been adopted by the Regional Planning Commission and Board of Supervisors, including the County’s General Plan and various community, neighborhood, and area plans.” The CSO also advised commenters that “the plan will not be legally enforceable,” and “was not intended to be a new policy document with enforceability that acted as an ordinance, general plan or have land use and zoning designation/regulation authority.”

SORT filed a verified petition for writ of mandate and complaint for declaratory and injunctive relief in January 2020. It alleged the County violated CEQA by failing to prepare an environmental impact report (EIR) or consider the environmental factors of OurCounty.

The Court of Appeal agreed with the trial court that the County’s commitment to moving ahead with an aspirational plan did not somehow make it tangible enough to constitute a project under CEQA requiring environmental review. Unlike precedential cases relied upon by SORT, OurCounty only contained high-level strategy, and did not require or commit to any concrete development. For example, a goal to increase renewable energy could be accomplished with a variety of methods, and in a variety of locations. Without specification on how the plan would be implemented, it was not sufficiently concrete to be a project under CEQA.

* * *

Citizens’ Committee To Complete the Refuge v. City of Newark (Cal. Ct. App., Dec. 29, 2021, No. A162045) 2021 WL 6694579 [unreported].

BACKGROUND: Citizens’ Committee to Complete the Refuge (CCCR) and Center for Biological Diversity appealed from the denial of their petition for writ of mandate under the California Environmental Quality Act (CEQA). Plaintiffs argued the City of Newark (City) violated CEQA when it approved a housing development project by relying on the environmental impact report (EIR) from its approval of a specific plan without conducting further environmental review.

HOLDING: The Court of Appeal concluded the City’s project was exempt from further CEQA review under Government Code section 65457 because it implemented and was consistent with the specific plan, and substantial evidence supported the City’s conclusion that no project changes, changed circumstances, or new information required additional analysis. The Court of Appeal also determined that the City’s deferral of analysis of potential flood control projects to address sea level rise in the latter half of this century was proper. The judgment of the trial court was affirmed.

Key FACTS & ANALYSIS: In 2010, the City certified an EIR on the specific plan for particular areas “Areas 3 and 4”, approved the specific plan for Areas 3 and 4, and entered into a development

agreement for the specific plan. The specific plan allowed development of up to 1,260 residential units as well as a golf course and related facilities. One subarea could contain only recreational uses such as the golf course.

The City's revised EIR's (REIR) analysis of environmental impacts was "based on the potential environmental impacts of the maximum development permitted by the Specific Plan."

The REIR further stated that the City would proceed under CEQA Guidelines section 15168. But the REIR also quoted the statement in CEQA Guidelines section 15168, subdivision (c)(5) that, with an adequately detailed analysis in a program EIR, "many subsequent activities could be found to be within the scope of the project described in the program EIR, and no further environmental documents would be required."

In 2019, applicants submitted a proposed subdivision map for approval of residential lots below what was authorized by the specific plan. To determine whether the REIR sufficiently addressed the environmental impacts of the proposed subdivision map, the City prepared a checklist comparing the REIR's analysis of the impacts of the specific plan with the impacts of the subdivision map. The checklist included supporting materials. The checklist concluded the construction would be consistent with the specific plan, and there were no changed circumstances or new information that might trigger the need for additional environmental review. The City posted the checklist for public comment and responded to those comments. The City then approved the subdivision map based on the analysis in the checklist.

Plaintiffs challenged the map and checklist via a petition for writ of mandate and complaint for injunctive relief. The trial court denied appellants' writ petition, concluding the administrative record contained substantial evidence to support the City's determination that further environmental review after the REIR was not necessary.

The Court of Appeal agreed.

First, regarding escape habitat for a "harvest mouse", the specific plan REIR already addressed the loss of upland escape habitat, so the subdivision map's impact on such habitat was not new. The subdivision map's change of developing less of the habitat did not require a new EIR.

Second, the applicants removed plans for the golf course. The petitioners argued this removed another escape habitat and constituted a substantial change. However, the REIR's finding of no significant impact from the development did not depend on the golf course continuing to provide a habitat. Moreover, the abandonment of the golf course resulted in less development than planned for in the specific plan. Even if development could occur there in the future, the City could not be faulted for not considered development that was not currently proposed.

Third, the REIR disclosed indirect impacts to the harvest mouse due to development. Because the subdivision map would develop fewer acres than the specific plan, in total the impacts on the harvest mouse would be reduced.

The only aspect of the subdivision map that appellants identified which the REIR did not already address is the fact that the western sides of the raised and filled developed areas would be armored with riprap. However, this information was not “of substantial importance.”

Finally, the plaintiffs’ arguments that rising sea level required a new EIR were misplaced. The REIR noted that the rate of sea level rise was uncertain. Sea level rise was not an impact caused by the project, so neither the REIR nor the City’s CEQA checklist was required to discuss the effects of sea level rise on the project at all.

* * *

Gulli v. San Joaquin Area Flood Control Agency (Cal. Ct. App., Dec. 3, 2021, No. C088010) 2021 WL 5754312, reh’g denied (Jan. 3, 2022), review filed (Jan. 12, 2022) [unreported].

BACKGROUND: Plaintiff Dominick Gulli’s company, Green Mountain Engineering, was one of two companies to submit proposals to build a flood gate to address potential flooding in Stockton. Gulli’s proposal, which claimed a flood gate was unnecessary, was not selected by defendant San Joaquin Area Flood Control Agency (Agency). After the Agency certified a final Environmental Impact Report (EIR) and approved the selected project, Gulli petitioned for a writ of mandate, seeking, among other things, to vacate the EIR, suspend all activity, and require the Agency to contract with him. The trial court ultimately denied Gulli’s petition.

HOLDING: The Court of Appeal affirmed.

Key FACTS & ANALYSIS: On appeal, Gulli contended: (1) the administrative record did not conform to Public Resources Code section 21167.62; (2) the selected project was not needed for flood protection; and (3) the EIR failed to inform the public and elected officials of various environmental consequences. Many contentions were grounded on the belief that Gulli’s solution was superior, as well as expert disagreement with the Agency’s determinations. Gulli argued on appeal that the flood control issue could be best addressed “by simply buying diesel pumps and piping such that if a 100-year storm rains in Stockton and the power goes out the pumps can evacuate the water into the river.” The Court based its opinion on the grounds that the law is clear that disagreement amongst experts does not make an EIR inadequate.

In 2008, the Federal Emergency Management Agency (FEMA), revoked accreditation of levees surrounding the Smith Canal in Stockton. The surrounding area became a “special flood hazard area,” an area expected to be inundated by a 100-year flood. To address the flood risk and reacquire FEMA accreditation, the Agency evaluated several options, ultimately concluding the most cost-effective alternative was constructing a fixed flood wall and gate structure at the mouth of the Smith Canal.

In July 2013, with the Agency’s authorization, proposals to build the Smith Canal Gate were sought from engineering firms. Two firms responded with proposals; one was Gulli’s company, Green Mountain Engineering. In the proposal, Gulli suggested an alternative to a gate. The other firm was unanimously selected, and the Agency entered into a consultant contract with it.

After commenting on the draft EIR and EIR , Gulli, acting in pro per, petitioned for a writ of mandate. In his petition, he argued the selected gate proposal would damage the environment more than other possible solutions. He sought to, inter alia, vacate the EIR, suspend all activity, require the Agency to “thoroughly and completely review alternatives to rehabilitate the levees,” and require that the Agency contract with him. After a series of successful demurrers to certain causes of action, Gulli filed his third amended petition. In it, Gulli requested more circumscribed relief, limiting his causes of actions to CEQA claims.

First, the Court of Appeal declined to consider additional evidence under Code of Civil Procedure section 909. The Court of Appeal found no exceptional circumstances to justify considering additional evidence under that section, particularly because Gulli failed to specify which additional evidence he wanted the court to consider.

Second, Gulli contended the record failed to comply with section 21167.6, subdivision (e) and argued that counsel for the Agency determined the contents of the record; the record failed to include prejudicial information; the record was burdensome, duplicative and unorganized; documents in the record were illegally redacted; and he was not allowed to correct, supplement, or augment the record. The Court of Appeal found no error. None of the arguments raised demonstrated an error on the part of the trial court regarding the scope of the record. None were more than perfunctory claims. The Court of Appeal therefore concluded that substantial evidence supported the finding that the record complied with section 21167.6.

Third, Gulli contended that the project was not needed for flood protection. The Court of Appeal declined to hear the argument that the Agency withheld information from the EIR and failed to recirculate it, because Gulli did not appropriately plead it, referring instead to trial court briefs. The Court of Appeal did consider the argument that the selected firm’s project was not appropriate, the Court indicated that the argument was a dispute among experts, which was not sufficient to render an EIR insufficient. Third, the Court of Appeal declined to consider the allegations that the “map revision” was obtained through filing a false federal document. The Court of Appeal found that it was not clear which document the allegation was referring to.

Fourth, Gulli argued the EIR failed to address two particular public comments. The Court found to the contrary—the one had been directly addressed, and that while the EIR did not respond specifically to the second, its examination on the same topic indicated that no prejudice resulted. The Court rejected the remaining claims. Gulli could not rely on a difference of opinion to show noncompliance with CEQA. Contentions not raised before the trial court could not be considered. Issues not raised during the CEQA process were barred under exhaustion of administrative remedies, and the remaining argument held no merit.

* * *

Chinatown Community for Equitable Development v. City of Los Angeles (Cal. Ct. App., Dec. 2, 2021, No. B307157) 2021 WL 5709507, review filed (Jan. 11, 2022) [unreported].

BACKGROUND: Chinatown Community for Equitable Development (CCED) appealed from a trial court judgment denying its petition for writ of mandate and complaint for declaratory relief (petition). CCED filed the petition following the decision by respondents City of Los Angeles, Los

Angeles City Council, and Los Angeles Department of City Planning (city) to approve a 725-unit, mixed-use development (project) proposed by real party in interest and respondent Atlas Capital Group, LLC (Atlas).

CCED claimed that the trial court misinterpreted the law in rendering its decision that Measure JJJ, a voter-approved initiative, did not apply to the project because Atlas's map application was deemed complete six months prior to Measure JJJ's effective date.

CCED further challenged the trial court's determination that substantial evidence supported respondents' compliance with the California Environmental Quality Act (CEQA). Specifically, CCED claimed that substantial evidence did not support the conclusion contained in the environmental impact report (EIR) that no significant hazards existed. CCED claimed that evidence of project site remediation and cleanup of soil contamination on the site occurring prior to 2003 did not support the conclusion of no significant hazards due to certain modifications of the project since it was initially proposed.

Finally, CCED claimed the city was required to recirculate the EIR based on significant new information and revisions in the final EIR, including revisions to the methane mitigation plan and removal of the project's designation as a project required to comply with footnote 12 of the Central City North Community Plan (Footnote 12).

HOLDING: The Court of Appeal found that under the applicable Government Code sections governing the approval process and the vesting of a developer's rights, Measure JJJ was not applicable to the project. The Court of Appeal further found that CCED failed to meet its burden of showing that there was insufficient evidence to support the less than significant hazards finding and the decision not to recirculate the EIR. Therefore, the Court of Appeal affirmed the judgment.

KEY FACTS & ANALYSIS:

Measure JJJ

Measure JJJ was a voter-initiative which imposed certain affordability and labor requirements on new developments such as the project.

The Court of Appeal found that Measure JJJ did not apply to the project, because Measure JJJ became effective approximately 6 months after the project was deemed complete by operation of law pursuant to the Subdivision Map Act. (Gov. Code, § 65943, subd. (a).) CCED claimed that the trial court erred in construing the city's approval of the project's vesting tentative tract map to grant a vested right to proceed with the project because the project was conditioned on the city council ultimately approving the project's general plan amendment and zoning and height district changes. However, CCED failed to cite any authority to support a claim that the vesting under the Subdivision Map Act did not apply when an applicant was also seeking a zone change or general plan amendment. CCED further argued that Measure JJJ was not a general plan, specific plan, zoning, or subdivision ordinance. CCED claimed that Atlas did not have a vested right to approval of its requests and the city's voters were free to impose additional conditions such as Measure JJJ's affordability and labor standards as part of its approval of those conditions through a voter initiative such as Measure JJJ. The Court of Appeal found no reason to categorize Measure JJJ and the subsequent amendments to the municipal code as anything other than changes in standards that

the Subdivision Map Act intended to cover. Contrary to CCED's argument Measure JJJ was proposed as an ordinance from its inception. Regardless of its origin once Measure JJJ, as a voter initiative, was enacted by the city in December 2016 through ordinance No. 184745, it became a generally applicable land use ordinance. In short, the city and the trial court properly concluded that Measure JJJ was inapplicable to the project.

Finding of No Significant Hazards

The EIR concluded that the project would result in a less than significant impact—that it would not expose persons to substantial risk—from reasonably foreseeable conditions involving the release of hazardous materials in the environment. CCED contended that substantial evidence did not support this conclusion. Specifically, CCED contended that the groundwater and soil contamination could have significant impacts on outdoor workers and construction workers because the project departed from proposed uses initially assumed by a 2003 “No Further Action” determination letter issued by the Los Angeles Regional Water Quality Control Board (LARWQCB). The No Further Action letter prohibited residential use of the ground floor. It also noted that at that time the project included no underground structures, green areas, or unpaved areas. CCED claimed that the project departed from the proposed use of the land at the time of the 2003 determination, therefore the EIR could no longer rely on the 2003 No Further Action letter. Because there was no recent sampling or investigation, CCED contended that the EIR's reliance on the No Further Action letter was insufficient. However, the EIR had documented what had occurred since the No Further Action letter and had discussed the investigation and of the soil contamination at the site. It further discussed the lack of ground-level residential uses, and the impact of construction activities. The Court of Appeal found that substantial evidence supported the conclusion of less than significant hazards regarding soil contamination. The Court of Appeal further found that CCED failed to show a significant enough departure from the proposed use of the land in the 2003 letter that would render the letter insufficient support for the city's conclusion. The No Further Action letter did not suggest that design changes such as those challenged would present obstacles or change the conclusion of the No Further Action letter that “the health risks associated with residual contamination left in soils at the Site would not exceed—and most likely [would] be less than—those estimated for the protection of human health.” Further, there was evidence in the record that the city provided written notice to the water board that the project had been revised to include underground parking. The city received written reassurance in response that “unless additional contamination is encountered during future activities at the site (such as during the excavation work for the subterranean parking structure), no further review [was] needed from the [LARWQCB].”

Finally, CCED failed to show that the city was required to recirculate the EIR. CCED argued that the city was required to recirculate the EIR for two reasons: first, because the city revised the final EIR to include a methane mitigation plan to mitigate methane hazards from the project; and second, because the city revised the EIR to remove the project's Footnote 12 designation and the associated general plan amendment. On the first claim, several public comments on the draft EIR (DEIR) concerned its failure to describe in detail the project's methane mitigation system. The city provided comprehensive responses to these comments. The city explained that the DEIR acknowledged that the project site is located in a city-designated methane zone, which means that methane was a condition of the existing setting, not an impact of the project. As such the methane did not need to be mitigated by the project. Instead, this condition, which existed in the setting,

had to be addressed through regulatory compliance. The additional information in the final EIR with regard to the methane mitigation plan merely clarified and amplified this information. In response to public requests the city provided details regarding the methane mitigation plan required by the Methane Code, as well as available testing results. The Court of Appeal found that this amplified or clarified the DEIR, and therefore the city was not required to recirculate the EIR. On the second claim, the city was not required to recirculate the EIR when it deleted reference to Footnote 12, from which Atlas sought deviation. The removal of the Footnote 12 designation did not deprive the public of a meaningful opportunity to comment on a substantial adverse environmental effect of the project or a feasible project alternative or mitigation measure that would clearly reduce such an effect. Rather, the Court of Appeal opined that the removed text related to an affordable housing proposal that was never formally adopted. Removing a request to deviate from an inapplicable legal requirement regarding affordable housing did not concern an environmental effect and therefore was not “ ‘significant new information’ “ requiring recirculation of an EIR under the applicable law.

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Citizens for a Safe and Sewage-Free McKinley Park v. City of Sacramento (Cal. Ct. App., Nov. 24, 2021, No. C090760) 2021 WL 5504230 [unreported].

BACKGROUND: The City of Sacramento (City) operated a combined sewer and storm water system that serves over 200,000 residents in downtown Sacramento and surrounding areas, including the McKinley Park area in East Sacramento. This case involved a challenge under the California Environmental Quality Act (CEQA) to the McKinley Water Vault Project (the project), designed to reduce flooding and the outflow of wastewater from the combined sewer system during large storm events by providing additional storage capacity for the system via a below-ground storage facility (the vault). Plaintiff Citizens For a Safe and Sewage-Free McKinley Park (Citizens) appealed from the denial of its mandamus petition seeking to set aside the City’s certification of an environmental impact report (EIR) and approval of the project.

On appeal, Citizens contended the EIR violated CEQA by failing to adequately analyze various environmental impacts of the project and failing to analyze a reasonable range of project alternatives. Citizens added that recirculation of the EIR was required under CEQA due to the addition of significant new information following the public review period.

HOLDING: The Court of Appeal disagreed with each of the claims of error and affirmed.

KEY FACTS & ANALYSIS: Citizens contended the EIR violated CEQA by failing to adequately analyze various environmental impacts of the project.

First, Citizens contended the EIR was deficient because it contained virtually no analysis of how construction activities may damage or destroy dozens of trees at the project site. According to Citizens, the EIR was inadequate because it failed to: (1) consider how construction activities may adversely impact all trees at the project site, not just the trees to be removed; (2) evaluate the impacts to trees caused by construction vehicles entering and leaving the project site, including the impact from construction vehicles compacting soil above the roots of trees; and (3) analyze the impacts to trees caused by placing or storing construction equipment or material at the project site.

The draft EIR explained that approximately 129 trees were surveyed within the proposed project area, that those trees are generally located on the periphery of the work area and along access paths, and that the project was designed to avoid the removal and/or pruning of trees in accordance with Sacramento City Code 12.56 (Tree Ordinance), with the assistance of a report from an arborist. The draft EIR stated, “Figure 2.4-2 illustrates the trees surveyed and their identified driplines [or protection zones] to be avoided to the extent feasible.” Unlike the case cited by Citizens the project did not involve excavation of structural root zones. The Court of Appeal thus found that the analysis of trees was adequate.

Second, Citizens contended the City violated CEQA because it failed to analyze the impacts of the project on McKinley Park as an historic resource until the release of the final EIR, which deprived the public and responsible agencies of a meaningful opportunity to comment on this issue. Citizens further contended that, even if it were proper for the City to analyze the project’s impacts on an historic resource for the first time in the final EIR, substantial evidence did not support the final EIR’s conclusion that the project would be consistent with the Secretary of Interior’s Standards for Rehabilitation. The Court of Appeal disagreed on both points.

Initially, the Court of Appeal disagreed that the draft EIR was required to analyze the project’s impacts on McKinley Park as an historic resource. At the time the draft EIR was published, McKinley Park had not been listed on a federal, state, or local register of historic landmarks or places. Further, the record reflected that the public and responsible agencies were not deprived of a meaningful opportunity to comment on this issue, and substantial evidence supported the EIR’s conclusion that the project’s impacts on an historical resource would be less than significant.

Third, Citizens contended the EIR’s analysis of air quality impacts on sensitive receptors was deficient because it was based on fundamentally flawed assumptions, and failed to account for: (1) two-way hauling trips, with idling time on each end; (2) the use of a single access point to the project as opposed to two access points; and (3) the larger project area identified in the final EIR. The Court of Appeal disagreed.

The draft EIR explained that construction of the project would cause a temporary increase in traffic volumes on streets near the project site, resulting in an increase in carbon dioxide emissions during construction. The draft EIR further explained: “The proposed Project would generate approximately 4,722 total hauling trips throughout Project construction. Although hauling and construction worker vehicle trips would cause a temporary increase in traffic during Project construction, these additional trips would not result in a significant increase to congestion on local roadways since construction traffic would be intermittent and staggered in timing from residential and other local traffic in the area. Therefore, the proposed Project would not have the potential to expose sensitive receptors to substantial concentrations of localized [carbon dioxide].”

In response to comments about the air quality analysis in the draft EIR, the final EIR provided the an explanation regarding construction-related hauling trips. The Court found that Citizens failed to carry its burden showing the analysis was inadequate.

The Court of Appeal also rejected Citizens’ contention that the draft EIR’s analysis of air quality impacts was deficient due to the subsequent reduction from two to one project access point. The draft EIR identified two proposed alternative access routes stated that access routes would be

established during site preparation, and contemplated limiting access routes “when feasible” to mitigate impacts to trees. While the final EIR identified only one access route to the project site, Citizens had not carried its burden to demonstrate that the EIR’s air quality analysis was inadequate because it was based on the “false assumption” that construction traffic would be divided between the two proposed access points.

The Court of Appeal rejected Citizens’ contention that the draft EIR’s analysis of air quality impacts was deficient because the final EIR showed a larger project work area than analyzed in the draft EIR, with no updated analysis of the air quality impacts. Citizens did not cite any portion of the final EIR to support its vague contention that the final EIR showed a “far larger” project work area.

Fourth, the draft EIR described the regulatory and environmental setting for transportation and traffic, and explained the methodology used to determine whether the project’s impacts on traffic and transportation near the project site would be significant, including use of the CEQA Guidelines Appendix G checklist and the Level of Service (LOS) method. The Court of Appeal found no merit in Citizens’ contention that the EIR’s transportation and traffic impact analysis was deficient. The record disclosed substantial evidence supporting the EIR’s conclusion that the project’s impacts on traffic would be less than significant with mitigation. The draft EIR identified two proposed alternative access routes. Equally without merit was Citizens’ conclusory contention that the draft EIR was inadequate for failing to “evaluate the impacts that may be caused by residents of Park Way and 33rd Street being forced to use the intersection at 33rd Street and H Street for both ingress and egress to their homes.” The draft EIR stated, “Park Way and 33rd Street may experience temporary partial closures from installation of Project features within the roadway, parking restrictions, or construction site access; however, residential access would be maintained throughout construction for all road closures as required by [implementation of a traffic and pedestrian control plan].” Thus, the record reflected that the draft EIR considered the traffic impacts from temporary partial road closures in determining that the project would have less than a significant impact on traffic with mitigation.

Fifth, Citizens contended the EIR was deficient because it failed to adequately analyze noise and vibration impacts with respect to children at the nearby daycare. Citizens additionally contended the EIR was deficient because it failed to adequately analyze the noise and vibration impacts with respect to residences, including older or historic residences. The Court of Appeal disagreed. The record disclosed substantial evidence supporting the EIR’s conclusion that the project would have less than significant impacts regarding noise and vibration. Contrary to Citizens’ contention, the EIR considered and analyzed the project’s noise and vibration impacts on sensitive receptors near the project site, including impacts to children attending the daycare, as well as the vibration impacts on historic homes.

Sixth, Citizens contended the EIR was deficient because: (1) its conclusion that the project would cause no significant “liquefaction” impacts was not supported by substantial evidence; (2) its conclusions about landslide hazards were not supported by substantial evidence; and (3) the EIR did not include any mitigation measures to ensure that landslide risks were minimized. Although Citizens initially complained that the EIR was deficient because the draft EIR did not include a site-specific geotechnical report, it acknowledged that such a report was attached to the final EIR. Citizens failed to show how the EIR was deficient with the inclusion of this report. Citizens also

faulted the EIR for discussing soil conditions at a regional level rather than a site-specific level. However, the final EIR explained that site-specific information of the soils in the project area was gathered via soil borings, as discussed in the geotechnical report. The Court of Appeal was not persuaded by the remaining arguments raised by Citizens as to the adequacy of the EIR's analysis regarding geology and soils, which were conclusory in nature and did not show that the EIR was deficient.

Seventh, the Court of Appeal rejected Citizens' initial contention that the EIR was deficient because it failed to evaluate the risks associated with storing sewage material beneath McKinley Park, including analyzing the impacts from a leak or overflow after a large storm event. Citizens failed to carry its burden to show that the EIR's hazardous materials analysis was inadequate. The EIR addressed these concerns and described a temporary and well-maintained storage facility that, even if overwhelmed by the weather, would serve to reduce flooding and sewage overflows. Citizens failed to demonstrate that the EIR was deficient for failing to consider the impacts from a leak in the vault or the inlet and outlet pipelines.

Eighth, Citizens contended the EIR violated CEQA by failing to identify and consider a reasonable range of project alternatives. The Court of Appeal disagreed. The draft EIR analyzed three project alternatives and one no project alternative. The draft EIR discussed the ability of the three alternatives to meet the objectives of the project and the environmental impacts of the alternatives. In rejecting the three alternatives and concluding that the proposed project is the environmentally superior alternative, the draft EIR found that none of the alternatives would cause impacts less severe than the proposed project, each of the alternatives would cause environmental impacts more severe than the proposed project, and the alternatives would not or only partially achieve the proposed project objectives as compared to the proposed project. Equally without merit was Citizens' cursory contention that the EIR's alternatives analysis was deficient because it failed to account for the fact that McKinley Park was a unique site compared to the alternative locations due to its historic nature and listing in the National Register of Historic Places. The EIR considered the historic nature of McKinley Park and determined that the proposed project would not cause a substantial adverse change to the historical significance or integrity of the park, since the park would maintain its existing uses once construction is finished and the historical context would be maintained.

Finally, Citizens contended the City violated CEQA by failing to recirculate the EIR. According to Citizens, recirculation was required due to the addition of significant new information to the EIR following the public review period. The Court of Appeal disagreed, rejecting Citizens' initial argument that recirculation of the EIR was required because the final EIR expanded the project work area by approximately 159,000 square feet and failed to analyze the environmental impacts that might be caused by such an expansion. In support of its position, Citizens did not cite any portion of the draft EIR or final EIR showing an expansion of the project by 159,000 square feet, instead it relied on a letter. The City conceded that the drawings included in the final EIR showed a "modestly larger" construction staging area than the proposed staging area depicted in the draft EIR, but argued that Citizens failed to meet its burden to demonstrate that this amounted to significant new information requiring recirculation of the EIR. The Court of Appeal agreed. Citizens' argument failed to show that the expansion of the construction staging area qualified as

significant new information requiring an opportunity for further public comment and additional analysis by the City.

The Court of Appeal further rejected Citizens' contention that the EIR should have been recirculated because the final EIR identified a single access point to the project site whereas the draft EIR contemplated that the project would have two access points to the site. Citizens failed to show that the City's selection of one of the proposed access routes in the draft EIR constituted significant new information triggering the need to recirculate the EIR. The public was not deprived of a meaningful opportunity to comment on this issue. The draft EIR contemplated limiting access routes to the project site "when feasible" to minimize impacts to trees.

Finally, the Court of Appeal rejected Citizens' contention that recirculation of the EIR was required because the draft EIR contained virtually no analysis of the project's impacts on McKinley Park as an historical resource, and the final EIR included seven pages of new analysis on this issue.

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510pacificave v. Piana (Cal. Ct. App., Nov. 22, 2021, No. B304189) 2021 WL 5445999 [unreported].

BACKGROUND: An apartment lease agreement provided that the renter would be the apartment's sole occupant, and would pay an added \$200 "per occupant" if she allowed someone else to occupy the apartment. Rather than occupy the apartment herself, the renter sublet it to 1,090 Airbnb guests on a day-rate basis. The landlord sued for breach of contract and moved for summary adjudication of that sole cause of action. Finding no triable issue as to whether the renter breached the lease agreement, the trial court granted summary adjudication, and at a later hearing the court determined the undisputed damages were \$200 per Airbnb guest, amounting to \$218,000. The court entered judgment for that amount. The renter contended the \$200 charge per Airbnb guest constituted a rent "increase" that violated the Rent Stabilization Ordinance of the City of Los Angeles.

HOLDING: The Court of Appeal affirmed the judgment of the trial court, finding that the charge did not constitute a rent "increase."

KEY FACTS & ANALYSIS: The City of Los Angeles regulated various aspects of the landlord/tenant relationship, including rent "increases." (LAMC, § 151.01.) A rent increase was defined as "[a]n increase in rent or any reduction in housing services where there is not a corresponding reduction in the amount of rent received." (LAMC, § 151.02.)

The City's Rent Stabilization Ordinance provided that "[f]or a rental unit which has an additional tenant joining the occupants of the rental unit thereby resulting in an increase in the number of tenants existing at the inception of the tenancy ... [¶] ... The landlord may increase the maximum rent or maximum adjusted rent by an amount not to exceed 10% for each additional tenant that joins the occupants of the rental unit." (LAMC, § 151.06, subd. (G)(a).) "The rental unit shall not be eligible for a rent increase until the additional tenant has maintained residence in the rental unit for a minimum of thirty consecutive days." (LAMC, § 151.06, subd. (G)(b).)

The Rent Stabilization Ordinance did not regulate initial rents. (Civ. Code, § 1954.52, subd. (a) [“Notwithstanding any other provision of law, an owner of residential real property may establish the initial and all subsequent rental rates for a dwelling or a unit”]; see also *Bullard v. San Francisco Residential Rent Stabilization Bd.* (2003) 106 Cal.App.4th 488, 489 [landlords are permitted to “set the initial rent for vacant units”].)

The Court of Appeal opined that the \$200 surcharge per occupant was a contingent part of the initial rent for the apartment, not an “increase” for purposes of the Rent Stabilization Ordinance. It was set forth in the lease agreement and never changed. That the contingency was realized and the surcharge therefore invoked did not constitute a rent “increase” for purposes of the Rent Stabilization Ordinance.

For this, and other reasons related to the specific provisions of the lease at issue, the Court of Appeal affirmed the judgment of the trial court.

TAKE-AWAYS: Courts may construe a surcharge in a lease for occupants as part of initial rent, which landlord may impose outside of a City’s rent stabilization ordinance.

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AIDS Healthcare Foundation v. City of Los Angeles (Cal. Ct. App., Nov. 1, 2021, No. B313529) 2021 WL 5048628, review denied (Jan. 19, 2022) [unreported].

BACKGROUND: The City of Los Angeles (City) certified an environmental impact report (EIR) and adopted findings concerning a redevelopment project proposed by real party in interest Riley Realty LP (Riley). AIDS Healthcare Foundation (AHF) filed a petition for writ of mandate in the superior court challenging the City’s certification of the EIR and other project-related entitlements on the ground, among others, that the EIR failed to comply with the California Environmental Quality Act (CEQA). The court denied the petition and entered judgment for the City and Riley. AHF contended that the EIR was inadequate by failing to consider and analyze the possibility of scheduling construction of the Project and other nearby construction projects so as to mitigate the cumulative construction noise of the projects.

HOLDING: The Court of Appeal agreed with the City and Riley that AHF did not raise the cumulative construction noise argument during the administrative proceedings below and thus failed to exhaust its administrative remedies. The Court of Appeal therefore affirmed the judgment.

Key FACTS & ANALYSIS: Riley was the proponent of a project to redevelop approximately 1.16 acres (the Project). There was one single family residence, one duplex, a detached garage below a studio apartment, and three two-story apartment buildings on the site. As initially proposed, the Project would replace the buildings with two buildings. One of the new buildings would be 20 stories tall and include commercial, hotel, and residential uses. The second building would provide three floors of residential units. The Draft EIR (DEIR) for the Project concluded that construction noise impacts would be less than significant and that no mitigation measures were required. The DEIR included a list of past, present, and probable future projects producing related or cumulative impacts. According to the DEIR, if these nearby projects were constructed concurrently with construction of the Project, “significant and unavoidable cumulative construction noise impacts

could result.” The proposed noise mitigation measures included: the construction of 15-foot tall construction noise barriers between the Project site and adjacent properties; the use of “state-of-the-art noise minimization strategies when using mechanized construction equipment”; not operating heavy construction equipment within 15 feet of the nearby single family residence; and employing personnel and equipment to monitor ground vibrations. Even with the mitigation measures, the DEIR concluded, “construction noise impacts would remain significant and unavoidable.”

AHF submitted comments with respect to the DEIR’s analysis of, among other matters, the Project’s noise impacts. The comments included the following: (1) “[T]he analysis of existing ambient noise levels at locations of noise-sensitive receptors [was] incomplete”; (2) Baseline noise levels, or “significance thresholds,” used in the DEIR “d[id] not adequately capture noise impacts that [were] potentially significant”; (3) Specified locations of noise measuring equipment “[did] not allow adequate assessment of noise levels at residential uses adjacent to the Project site”; (4) the DEIR underestimate[d] the number of times per hour that the entrance to a parking structure would be used; (5) the analysis of impacts from the use of an emergency generator [was] flawed; and (6) the DEIR underestimate[d] the “composite noise level impacts” of the Project. Regarding the discussion of mitigation measures for “construction-related noise impacts—including cumulative impacts,” AHF asserted that the DEIR “d[id] not adequately discuss the feasibility of additional mitigation measures beyond those proposed, and [did] not provide information regarding the incremental benefits of increasing mitigation beyond that in the identified mitigation measures.”

Following the administrative process, AHF contended in its petition for writ of mandate that the City could reduce the cumulative noise by requiring staggering of the multiple projects. The Court of Appeal agreed with the trial court that AHF failed to exhaust its administrative remedies. AHF never asserted at any point in the CEQA process that the City should have considered staggered construction schedules as a mitigation measure for cumulative noise impacts or that the EIR was flawed for failing to address that possibility. In its comments to the DEIR, the closest AHF came to raising this issue is its statement that “although the DEIR identifies some construction-related noise impacts—including cumulative impacts—as significant and unavoidable, the DEIR does not adequately discuss the feasibility of additional mitigation measures beyond those proposed.”

AHF contended that the issue was preserved for judicial review because “the City itself” raised the issue when the City’s Deputy Advisory Agency stated that the City did not have “any control over the timing or extent of the construction of any of the related projects.” The Court of Appeal disagreed. Even if the DAA’s comment implied that mitigation of cumulative noise impacts by staggering construction schedules was beyond the City’s control, neither AHF nor any other person (including the City) ever alleged the failure to consider or analyze such a mitigation measure as a “ground[] for noncompliance with [CEQA].” (§ 21177, subd. (a); see *Coalition for Student Action v. City of Fullerton* (1984) 153 Cal.App.3d 1194, 1197 [evidence in the administrative record that would support an argument that proceedings violated CEQA does not preserve issue for judicial review if no one made the argument].)

AHF further argued that the exhaustion requirement should not apply because raising the possibility of staggering construction schedules during the administrative process would have been

futile. The Court of Appeal disagreed. Raising the argument at an earlier stage would have allowed evidence that the City could have staggered schedules to be presented during the administrative proceedings.

Lastly, AHF argued that the Court of Appeal should have reached the merits of its argument to allow the public to participate meaningfully in the decision. However, this position would have eviscerated the exhaustion of administrative remedies requirement.

Finding that AHF failed to exhaust its administrative remedies, the Court of Appeal affirmed.

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North Coast Rivers Alliance v. Department of Food and Agriculture (Cal. Ct. App., Oct. 15, 2021, No. C086957) 2021 WL 4809691, as modified on denial of reh'g (Nov. 15, 2021) [unreported].

BACKGROUND: The California Department of Food and Agriculture (Department) is tasked with preventing the introduction and spread of injurious plant pests and its pest prevention and management activities are covered by pest-specific California Environmental Quality Act (CEQA) documents. In 2014, when the Department implemented a Statewide Plant Pest Prevention and Management Program (Program), it certified an environmental impact report (EIR) that provided a consolidated set of management practices and mitigation measures.

Two groups of petitioners sought writs of mandate challenging the program EIR: (1) North Coast Rivers Alliance, Pesticide Free Zone, Inc., Health and Habitat, Inc., Californians for Alternatives to Toxics and Gayle McLaughlin (the NCRA petitioners), and (2) Environmental Working Group, City of Berkeley, Center for Food Safety, Pesticide Action Network North America, Beyond Pesticides, California Environmental Health Initiative, Environmental Action Committee of West Marin, Safe Alternatives for Our Forest Environments, Center for Biological Diversity, Center for Environmental Health, Californians for Pesticide Reform and Moms Advocating Sustainability (the EWG petitioners). Certain NCRA petitioners also sought writs of mandate challenging addenda to the program EIR. The petitions were asserted against the Department and its Secretary (the Department Appellants).

The trial court granted the writ petitions in part, ordering the Department to set aside its certification of the program EIR and approval of the Program and addenda. The trial court enjoined further activities under the Program until the Department certified an EIR correcting the CEQA violations identified in the trial court's ruling. The Department appealed.

HOLDING: The Court of Appeal concluded (1) the trial court correctly determined that the program EIR's tiering strategy and checklist violated CEQA; (2) Public Resources Code section 211081 required the Department to file a notice of determination when it approved or decided to carry out an activity under the Program and when the Department concluded no new environmental document was required under CEQA; (3) while the Court of Appeal rejected most of the NCRA and EWG petitioners' contentions regarding the program EIR's baseline, the Court of Appeal agreed the baseline was inaccurate because it significantly understated existing pesticide use; (4) BIO-CHEM-2 did not improperly defer formulating mitigation for impacts on special-status wildlife species, WQ-CUM-1 was not a mitigation measure, and the program EIR failed to provide

mitigation for potential significant impacts when there were discharges to impaired waterbodies; (5) the program EIR was adequate in discussing the organic-pesticide and no-pesticide alternatives to the Program; (6) with regard to the addenda to the program EIR, the Court of Appeal adopted its conclusions in (4) above; (7) the Department Appellants forfeited their claim that the trial court failed to make certain findings in its injunction order; (8) the program EIR failed to (a) provide mitigation measures for potential significant impacts on pollinators, (b) state facts supporting the conclusion that the Program's contribution to the cumulatively significant impact on impaired waterbodies would not be considerable, and (c) adequately analyze cumulative impacts, but the Court of Appeal rejected the other claims by the Department Appellants and EWG petitioners regarding the program EIR's discussion of potential significant environmental impacts; (9) the EWG petitioners failed to show that any mischaracterization of mitigation measures as Program features hindered the Department or the public's ability to understand the Program's significant environmental impacts and measures to mitigate those impacts; and (10) because the NCRA petitioners did not file an appeal or cross-appeal, their challenge to the judgment was forfeited.

The Court of Appeal disagreed with the trial court's conclusions that the program EIR failed to do the following: identify which of the Department's ongoing activities were included in the baseline, describe the amount of pesticides associated with ongoing Department activities, disclose figures for unreported pesticide use and adequately discuss the no-pesticide and organic-pesticide alternatives. The Court of Appeal also disagreed with the trial court's conclusions that the Department had a demonstrated ability to estimate unreported pesticide use based on sales data, that the Department erred in not considering impacts on non-special status pollinators, and that mitigation measure BIO-CHEM-2 improperly deferred the formulation of mitigation measures.

KEY FACTS & ANALYSIS: The Program included reasonably foreseeable pest prevention, management and regulatory activities to be carried out or overseen by the Department against specific injurious pests throughout the state and provides a framework of management practices and mitigation measures for those activities. After releasing a draft program EIR for public review and comment, the Department certified a final program EIR. It determined that the Program would have a significant effect on the environment and adopted a statement of overriding considerations.

The Department Appellants first challenged the trial court's conclusion that the program EIR's tiering strategy and checklist violated CEQA. The Court of Appeal found that the tiering strategy and checklist violated CEQA because they permitted the Department to carry out a proposed activity without determining whether the proposed activity would have more significant or different potential significant environmental effects than were covered in the program EIR and, thus, whether an additional environmental document must be prepared under CEQA. The checklist would only ask whether an activity would have a significant effect on the environment not contemplated in the EIR in certain situations. Other activities could proceed without that determination.

The Department Appellants next argued that, contrary to the trial court's conclusion, when a proposed activity was within the scope of the program EIR, it was part of the project previously noticed and analyzed and not a separate project for which a new notice of determination is required under section 21108. The court analyzing the section, concluded that when the Department approved or determined to carry out an activity as being within the scope of the Program and

concluded that no new environmental document would be required under CEQA because the significant environmental effects of the activity were adequately covered in the program EIR, the Department was still required to comply with section 21108, subdivision (a) and issue a notice of determination.

The Department Appellants also argued that the program EIR properly incorporated ongoing activities into its environmental baseline and the baseline did not need to include unreported pesticide use data. Typically, the baseline for environmental analysis is the existing conditions of the environment at time the environmental analysis is performed. The Court of Appeal agreed with the EWG petitioners that the program EIR's baseline significantly understated existing pesticide use. The program EIR disclosed that typically, at most only about one-third of the pesticide active ingredients sold and used in a given year was reported. Inasmuch as a significant portion of pesticide used was not included in the baseline conditions for the program EIR, the baseline was not an accurate description of the existing physical conditions and, consequently, did not provide a reliable assessment of the environmental consequences of the Program.

Fourth, the Department Appellants challenged the trial court's rulings regarding mitigation measures BIO-CHEM-2 and WQ-CUM-1. The program EIR identified chemical management activities that could result in potentially significant impacts on special-status species. Site-specific mitigation measures for impacts on special-status species could not be formulated at the time of project approval because Program activities could occur anywhere pest infestations occurred in the state. Mitigation measure BIO-CHEM-2 aimed to avoid or minimize substantial adverse effects on, or the taking of, special-status species. It provided that the Department would first determine whether an area to be treated may contain suitable habitat for special-status wildlife species. Under WQ-CUM-1, the Department was required to determine whether a treatment location or quarantine area contained or was near any impaired waterbody before conducting a treatment or implementing a quarantine, and was required to implement Program management practices during the Program activity when an impaired waterbody was present. The program EIR concluded without discussion that implementation of Program management practices would avoid or minimize discharges to impaired waterbodies. It did not describe feasible measures to mitigate potential cumulative significant impacts when discharges to impaired waterbodies occur, even though it recognized that any additional contribution of pesticides or toxic substances by Program activities to impaired waterbodies would be a considerable contribution to a cumulative significant impact. The Court of Appeal agreed with the trial court that this shortcoming rendered the mitigation measures insufficient insofar as they did not contemplate mitigation for when discharges to impaired waterbodies occurred. For the same reason, the Court of Appeal agreed with the trial court that the addenda to the EIR were insufficient to the extent they relied on the inadequate mitigation measures.

Fifth, the Department Appellants challenged the trial court's conclusion that the program EIR's analysis of the no pesticide and organic pesticide alternatives was inadequate for failure to discuss how those alternatives would impact ongoing activities. The Court of Appeal agreed with the Department Appellants, reversing the opinion of the trial court on this point. The alternatives adequately described the alternatives, and discussed what pests would and would not be controlled by them.

The Department Appellants and the EWG petitioners both challenged the trial court's rulings regarding the program EIR's discussion of the Program's potential significant environmental impacts.

The EWG petitioners contended the Department failed to analyze the scenarios identified in Table 6.3-4 of the program EIR in relation to significant impacts on pollinators. The Court of Appeal agreed with EWG that the program EIR failed to mitigate potential significant adverse impacts on bees specifically. Because the program EIR disclosed that Program activities could have substantial adverse impacts on bees, it was required to discuss mitigation measures for those impacts. The Court of Appeal rejected several other arguments of the EWG petitioners for failure to raise it until its reply brief.

The Department Appellants claimed substantial evidence supported the program EIR conclusion of no cumulative impacts on impaired surface waters. The Court of Appeal disagreed, finding that the EIR was insufficient in that it failed to identify facts supporting its conclusion that the Program's contribution to a cumulative impact would be less than considerable. Additionally, the EIR acknowledged a significant impact of chemicals on waterbodies, which was at odds with its conclusion that the Program would have no cumulative impact on waterbodies.

The Department Appellants also challenged the trial court's ruling that the discussion of cumulative impacts in the program EIR were deficient because it did not provide sufficient information about other pesticide programs. The Department Appellants agreed with the trial court's assessment.

The Court of Appeal agreed with the trial court that the EIR was not defective for assuming that spraying would generally not occur near wetlands or other sensitive natural communities, and explaining its mitigation measure to avoid runoff into wetlands.

The EWG petitioners failed to demonstrate why the program EIR was required to consider U.S. Geological Service guidance, the California Department of Pesticide Regulation's regulations on groundwater protection, groundwater protection areas, high groundwater tables, and currently contaminated groundwater supplies in order to evaluate the potential impact of Program activities on groundwater. Accordingly, the Court of Appeal rejected the EWG petitioners' claims that the EIR was inadequate in that regard. The Court of Appeal also rejected the EWG petitioners' claims that the EIR failed to analyze impact on sediment toxicity, and that the EIR failed to discuss the impacts of dichlorvos and carbaryl as Proposition 65 listed toxicants.

The EWG petitioners also failed to demonstrate that the EIR did not adequately assess health impacts on adults over the age of 40, children under 2, and other sensitive populations. The program EIR explained why children, fetuses and the elderly are at greater risk to exposure to pesticides and describes studies showing links between pesticide exposure and adverse conditions in children, fetuses and the elderly. And the program EIR stated that the Department evaluated potential human health risks of Program activities to those sensitive receptors. The program EIR considered human health impacts on children and adults over 40 years and was adequate.

Next, the Court of Appeal disagreed with the EWG petitioners that the EIR improperly concealed mitigation measures as program features. The EWG petitioners failed to show that any mischaracterization of mitigation measures as Program management practices hindered the Department or the public's ability to understand the Program's significant environmental impacts relating to pesticide drift and the analysis of measures to mitigate such impacts.

Finally, the Court of Appeal declined to hear the NCRA petitioners' arguments of error, because they did not file an appeal.

In summary, the Court of Appeal affirmed in part and reversed in part the judgment of the trial court regarding the inadequacies of the EIR.

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Elfin Forest Harmony Grove Town Council v. County of San Diego (Cal. Ct. App., Oct. 14, 2021, No. D077611) 2021 WL 4785748 [unreported].

BACKGROUND: In consolidated appeals, appellant and real party in interest RCS-Harmony Partners, LLC challenged an order granting the writ of mandate of respondents Elfin Forest Harmony Grove Town Council, Endangered Habitats League, and Cleveland National Forest Foundation, which challenged the County of San Diego's (County) approval of the Harmony Grove Village South project (the Project) and certification of a final Environmental Impact Report (EIR) for the Project under the California Environmental Quality Act (CEQA). The superior court ordered County to set aside its approval of the Project, finding the EIR relied on unsupported greenhouse gas mitigation measures and failed to address certain fire safety issues or relied on unsupported fire evacuation measures. It found County failed to proceed in the manner required by CEQA by not including certain forecasts or analyses relevant to air quality impacts and failed to show the Project was consistent with a San Diego Association of Governments (SANDAG) regional plan for growth and development. The court finally found the Project inconsistent with County's General Plan's requirement that developers provide an affordable housing component when requesting a General Plan amendment, and also conflicted with a policy of the Elfin Forest and Harmony Grove San Dieguito Community Plan (Community Plan) that Elfin Forest development be served only by septic systems for sewage management.

Appellant contended the court erred by its ruling. It contended: (1) the Project's greenhouse gas emission mitigation measures were supported by substantial evidence and also satisfied the performance standards set forth by this court in *Golden Door Properties, LLC v. County of San Diego* (2020) 50 Cal.App.5th 467 (*Golden Door*), making them materially different from the non-CEQA-compliant mitigation measure M-GHG-1 invalidated in *Golden Door*; (2) the EIR adequately addressed fire safety and evacuation; (3) the EIR properly evaluated the Project's impact on air quality and land use plans; (4) the Project's approval was consistent with County's General Plan policy regarding affordable housing; and (5) the trial court incorrectly applied a septic policy to the Project.

HOLDING: The Court of Appeal concluded the Project's greenhouse gas mitigation measures M-GHG-1 and M-GHG-2 suffered from many of the same flaws as M-GHG-1 in *Golden Door* in that they lacked objective performance criteria to ensure the effective and actual mitigation of

greenhouse gas emissions, and also improperly deferred mitigation. However, the Court of Appeal agreed with the appellant that the EIR adequately addressed fire safety and evacuation, as well as the Project's consistency with County's regional air quality and transportation/development plans. The Court of Appeal held the Project did not conflict with the Community Plan, but that County erred by finding it is consistent with its General Plan, which required developers to provide an affordable housing component when seeking a General Plan amendment. Accordingly, the Court of Appeal affirmed in part, reversed in part and remanded with directions.

Key FACTS & ANALYSIS:

Mitigation of Greenhouse Gas Emissions

The final EIR provided that the Project's construction activities and operation at full buildout would generate greenhouse gas emissions that may have a significant impact on the environment. However, it concluded that with mitigation, the impacts would be less than significant. Specifically, it stated that after analyzing feasible on-site measures to avoid greenhouse gas emissions, the Project applicant "ha[d] committed to reducing Project [greenhouse gas] emissions to 'net zero' through the purchase of additional off-site carbon credits.

The EIR concluded: "Through this offset of all Project GHG emission (i.e., to net neutrality), through [M-GHG-1 and M-GHG-2], the Proposed Project would have less than significant GHG impacts. The mitigated Project would not generate GHG emissions that may have a significant impact on the environment because the mitigated Project would have no net increase in GHG emission, as compared to the existing environmental setting Because the mitigated Project would have no net increase in the GHG emissions level, the mitigated Project would not make a cumulatively considerable contribution to global GHG emissions."

The Court found that the mitigation measures were deficient for the same reason as in *Golden Door*. The Project's measures had no objective criteria for making findings as to the sufficient number of credits, including no manner in confirming whether offsets from foreign country credits were real, permanent, verifiable, and enforceable. An improper deferral issue existed by the fact that the County's Planning Director was allowed to decide whether to approve offset credits on grounds a non-Board-approved registry was "reputable" to the County's Planning Director's "satisfaction." The Court of Appeal observed that under CEQA, mitigating conditions had to be enforceable through some legally binding instrument so as to result in permanent reductions, and not "mere expressions of hope."

Impacts Related to Fire Safety

The final EIR acknowledged that the Project was within an area statutorily designated as a "Very High Fire Hazard Severity Zone." It also lay within a "Wildland Urban Interface," which was an area where development is proximate to open space or lands with native vegetation and habitat prone to brush fires. Thus, the EIR stated, improper design and maintenance may facilitate the movement of fire between structures and vegetation.

The Court of Appeal found that the EIR adequately addressed the wild-fire related impacts. The EIR contained a CEQA-compliant discussion of the potential wildland fire risks or exacerbation caused by the Project and the fire risks in the Project's vicinity, and that substantial evidence supported the conclusion that the Project measures would reduce them to a level of insignificance. The County's fire plan was incorporated into the EIR as an appendix and thus was presented in a manner calculated to adequately inform the public of its conclusions.

Likewise, the EIR's discussion of evacuation routes satisfied CEQA. The EIR's conclusion that the Project fire safety measures reduced fire hazards to a level of insignificance was supported by substantial evidence, namely the fire-related expert studies on those measures. The measures were not not so "clearly inadequate and unsupported" as to be entitled to no judicial deference.

EIR's Analysis of Consistency with Air Quality and Land Use Planning Documents

The EIR concluded that the Project's inconsistency with the current Regional Air Quality Strategy (RAQS) caused a significant cumulative impact. The EIR nevertheless concluded that while the Project was not compliant with the RAQS and had a significant cumulative impact in that respect, it was in compliance with federal and state ambient air quality standards and would not result in significant air quality impacts with respect to the Project's construction and operational-related emissions of ozone precursors or criteria air pollutants, making it unlikely that the increased density would interfere with goals for improving air quality in the San Diego air basin. The Court of Appeal found that the EIR adequately analyzed the RAQS. The Project's inconsistency with the RAQS planning document was its addition of dwelling units beyond the plan's projections. This inconsistency would be resolved when the San Diego Association of Governments (SANDAG) updated its growth projections and provided them to the Air Pollution Control District, which would then prepare and update the RAQS and its modeling as it was required to do.

The EIR also concluded the project was consistent with the San Diego Forward regional plan regarding transportation. The EIR discussed the Project's consistency with San Diego Forward both with respect to greenhouse gas emissions, which that plan seeks to reduce and also with regard to land use impacts. The Court of Appeal found that the County's determination that the project complied with the San Diego Forward plan was supported by substantial evidence.

Consistency with General and Community Plans

The County found that the Project complied with the County's General Plan despite the fact that it did not include affordable housing which was required. The Court of Appeal found that the County erred in concluding that the Project complied with the General Plan, despite the County's argument that it could not legally impose an affordable housing condition without an ordinance.

The Community Plan for one area (Elfin Forest) also required sewer systems consistent with the area's rural septic system. The Project included annexation into a sewer district, in direct conflict with that Community Plan. However, the Community Plan for another area (Harmony Grove) did not contain the same requirement. In reviewing the Project documents, the Court of Appeal concluded that the project was within Harmony Grove, and therefore not subject to the Community Plan for Elfin Forest.

* * *

Genesee Friends v. County of Plumas (Cal. Ct. App., Oct. 12, 2021, No. C091033) 2021 WL 4739082 [unreported].

BACKGROUND: Plaintiff Genesee Friends and others (collectively, plaintiffs) brought a mandamus action against defendant County of Plumas, challenging the county's determination that the use of a helicopter and heliport for personal and agricultural purposes is permissible on land zoned agricultural preserve, as such use is functionally equivalent to uses already permitted under local land use law. Plaintiffs claimed that the county's determination violated various zoning and planning laws, and that the county erred in concluding its determination was a ministerial action exempt from the requirements of CEQA. The trial court granted summary judgment against plaintiffs, finding that they failed to exhaust their administrative remedies.

HOLDING: The Court of Appeal affirmed the judgment of the trial court, finding that the plaintiffs failed to exhaust their administrative remedies.

KEY FACTS & ANALYSIS: Real party in interest Genesee Valley Ranch, LLC (GVR) was a private 1,476 acre working cattle ranch with several residences and accessory buildings. It was located in the Genesee Valley area of Plumas County and was zoned agricultural preserve.

At some point, GVR decided that it wanted to use a portion of its property for private-use helicopter operations, including constructing a heliport and a storage building/hanger for a helicopter. On August 16, 2016, GVR filed an application with the county seeking a determination that the use of a heliport and helicopter on its property for personal and agricultural purposes was permissible on the basis that such use was a functionally equivalent use to existing uses permitted on land zoned agricultural preserve under local land use law.

On August 29, 2016, several members of Genesee Friends, an unincorporated nonprofit association, filed a complaint with the county claiming that GVR needed a special permit to construct a heliport on its property, and that GVR's use of a heliport on land zoned agricultural preserve was not permitted under zoning and planning laws. Plaintiffs submitted comments opposing the heliport. Counsel for plaintiffs appeared at the county planning director's hearing on GVR's application.

On June 30, 2017, the planning director concluded that GVR had a right to use a helicopter and heliport for agricultural and personal use. The planning director also concluded that the functionally equivalent use determination was exempt from CEQA. The planning director's decision specifically stated that, pursuant to Plumas County Code section 9-2.1001, it could be appealed to the Plumas County Board of Supervisors (board) within 10 days by filing an appeal in writing with the clerk of the board, in the manner specified in the Plumas County Code.

On July 10, 2017, plaintiffs filed an administrative appeal of the planning director's decision. The appeal was a two-page letter written on counsel's letterhead. It identified the challenged determination made by the planning director and the legal grounds for appeal, including that the decision violated CEQA as well as zoning and planning laws.

On July 12, 2017, GVR’s counsel submitted a letter to the planning director, asserting that plaintiffs’ administrative appeal was invalid for several reasons, including that plaintiffs failed to use the required appeal form. It was not disputed that plaintiffs’ appeal did not comply with Plumas County Code Section 9-2.1002, which provided that, “An appeal shall only be filed on the official form provided by the Clerk of the Board ... together with such additional information as may be necessary.”

The County’s Board of Supervisors (Board) dismissed the administrative appeal as procedurally defective, as it had not been filed on the official form required by the Plumas County Code. The Board declined to address the merits of the appeal as requested by plaintiffs’ counsel after counsel admitted that he did not ask the clerk of the Board for the form, even though he had read the code section stating that an appeal must be filed on the official form provided by the clerk.

On August 8, 2017, the county filed a Notice of Exemption (NOE), finding that the “project” was exempt from CEQA because the planning director’s functionally equivalent use determination was an interpretation of an existing code section, which is a ministerial action.

The petition for writ of mandate followed. Neither the original petition, nor the first amended petition contained an argument that the Board wrongfully denied the appeal. This argument was included in the plaintiffs’ second amended petition, which the trial court found to be barred by the applicable 90-day statute of limitations under Government Code section 65009. The trial court granted GVR and the county’s motion for summary judgment because the plaintiffs had failed to exhaust administrative remedies by failing to appeal to the Board.

Because the county, by ordinance, provided for an administrative appeal of the planning director’s decision to the board, the question was whether the plaintiffs had demonstrated that they exhausted all the administrative remedies available to them once the planning director issued what plaintiffs considered to be a wrongful decision.

It was not disputed that plaintiffs’ administrative appeal to the Board was dismissed as procedurally defective because they failed to use the official form required by county ordinance. The record did not disclose that plaintiffs’ sought reconsideration of the Board’s dismissal or otherwise challenged the dismissal at the administrative level following the August 1 Board meeting. Instead, the mandamus action was filed approximately six weeks later. Neither the original petition nor the first amended petition alleged that the Board’s dismissal of the administrative appeal was erroneous. Nearly five months after the action was commenced and after the trial court ruled that plaintiffs had failed to allege facts demonstrating that they had exhausted their administrative remedies, plaintiffs amended their petition to add a cause of action challenging the Board’s dismissal of their administrative appeal. The cause of action was subsequently dismissed because it was filed beyond the applicable 90-day statute of limitations. In short, because the record reflected that plaintiffs did not comply with the county’s administrative appeal procedures and the board did not render a decision on the merits of their appeal, plaintiffs did not exhaust their administrative remedies. Accordingly, the Court of Appeal affirmed the judgment of the trial court.

* * *

Rock v. Rollinghills Property Owners Assn. (Cal. Ct. App., Sept. 20, 2021, No. A160163) 2021 WL 4260607, reh'g denied (Oct. 13, 2021), review denied (Dec. 15, 2021) [unreported].

BACKGROUND: In 2002, Barbara and James Rock (Rocks) bought roughly 150 acres of timberland in Point Arena near the Mendocino County coast (Rock property), intending to eventually build a retirement home. They had been informed the property was landlocked, but they hoped to later negotiate an access easement from neighboring landowners. As it turned out, they lost their gamble. Fifteen years later, after repeated approaches to the county; the Rollinghills Property Owners Association (RPOA), the property owners' association for the adjacent Rollinghills subdivision; the subdivision's homeowners and other neighboring landowners proved fruitless, the Rocks sued the RPOA, its individual homeowners, and the original subdivider who owned a property abutting the subdivision to the south (collectively, defendants).

The complaint alleged the Rocks had a right to use the subdivision's private roads to access their parcel pursuant to theories of express easement, easement by estoppel, easement by necessity or implication, prescriptive easement, and equitable easement. Defendants cross-complained to quiet title and for a judicial declaration that the Rocks had no such right. After a four-day bench trial the trial court found the Rocks failed to establish an easement under any theory and entered judgment for defendants as to the entire action.

HOLDING: The Court of Appeal agreed that the trial court's findings and judgment were supported by substantial evidence and relevant law, and therefore affirmed.

KEY FACTS & ANALYSIS: There are three relevant properties: the Rock property, the Rollinghills subdivision, and the "Hay property" to its south, across which the subdivision's property owners have a private easement to access the nearest public road.

The Rock property was an undeveloped 146-acre parcel zoned for timber production, which their predecessor in interest accessed by a logging road across an adjacent parcel to the property's southeast. To the Rock property's south, the Rollinghills subdivision comprised approximately 530 acres subdivided into 25 roughly 20-acre lots. A segment of the subdivision's northern boundary abuts the southern boundary of the Rock property, while portions of its southern boundary abutted land owned by William Hay (Hay property), who developed the subdivision in the early 1970's. Among these three properties, only the Hay property had direct access to a public road. In 1974 Hay's partnership, H Bar H, subdivided the land now known as the Rollinghills subdivision. On the western side of the subdivision it intersected Pine Reef Road, which exited the subdivision to the south, crossed the Hay property and finally intersected with Eureka Hill Road (also called Riverside Drive), a public road. Pine Reef Road was the subdivision's sole connection to public roadways. The county approved and recorded the final subdivision map for the Rollinghills development in 1974. The map identified all of the roads within the subdivision as private roads.

In 2001 the Rocks purchased the Rock property. Before going through with the purchase, the Rocks received a preliminary title report that expressly excluded from coverage "[t]he lack of a legal right of access to and from a public street or highway." The Rocks acknowledged that they "READ, UNDERSTOOD & ACCEPTED" this report. The Rocks were unsuccessful with negotiating an easement through the Rollinghills subdivision to access the public road.

Nevertheless, in 2011 the Rocks applied to the county for a permit to construct a road to their property. The RPOA protested, and the Rocks withdrew the application after the county informed them they “likely do not have a deeded easement for access” because their property was not part of the subdivision.

In 2017 the Rocks sued defendants on theories of express easement, easement by estoppel, easement by necessity or implication, prescriptive easement, and equitable easement. Defendants cross-complained to quiet title and for a judicial declaration that the Rocks had no such right. The trial court held for defendants on both the complaint and cross-complaint. The Court of Appeal upheld the judgment of the trial court.

There was no express easement because the subdivision map did not indicate an intent to grant an easement for the benefit of the Rock property. The map made no mention of such an easement even though the map expressly referenced other easements affecting the subdivision, including public utility easements and an easement across the Hay property for the subdivision’s homeowners. There was likewise no extrinsic evidence supporting the contention that the private road at issue was intended to provide public road access for the rock Property.

Alternatively, the Rocks contended the trial court erred in interpreting the subdivision map because the county’s subdivision laws required that Hay provide access to their property. Title 17 of the Mendocino County Code addressed the division of land. Section 17-53, subdivision (C) (section 17-53(C)) provided that “[a]ll streets shall, insofar as practicable be in alignment with existing adjacent streets by continuation of the centerlines thereof, or by adjustments by curves, and shall be in general conformity with plans made for the most advantageous development of the area in which the division of land lies. Where a division of land adjoins acreage, provision shall be made for adequate street access thereto.” Relying on that section the Rocks argued their property was “acreage” that adjoined the Rollinghills subdivision (a “division of land). Thus, section 17-53(C) required Hay to grant them legal access through the subdivision to the nearest public street. The trial court disagreed with the Rocks’ construction of section 17-53(C), reasoning that their interpretation would lead to absurd results and finding it unsupported by the evidence. The court further concluded that construing section 17-53(C) to require the grant of an easement to a private adjoining landowner “would violate the Constitution as an unlawful taking without just compensation. The Court of Appeal agreed. Assuming that section 17-53(C) was susceptible to the Rocks’ ascribed meaning, the trial court properly rejected their construction because it would raise a serious question about the provision’s constitutionality under the Takings Clause.

Next, the Rocks argued the network of private roads shown on the Rollinghills subdivision map “[b]y definition” must provide access across the subdivision to their parcel, because Mendocino County Code section 17-54 prohibited the approval of private roads within subdivisions unless they “will not be a substantial detriment to the adjoining properties” This argument, too, was unpersuasive to the Court of Appeal. There was no indication in the record that the Rock parcel historically had either a legal right to traverse the Rollinghills land or a pattern of doing so.

There was likewise no estoppel argument that defendants were estopped from denying the Rocks an easement across the subdivision because Hay accepted the benefits of the subdivision, a requirement of which included providing street access to and from the acreage that was the Rock property. However, in *Rock*, the county *agreed* that H Bar H was not required to build the road

and that its purpose was to provide the subdivision with access to a public road in the north if the Rock property were developed in the future. As an appellate court, the Court of Appeal declined to reweigh that evidence.

Similarly, the Rocks did not obtain a prescriptive easement. The trial court found the RPOA prevented the creation of a prescriptive easement by posting Civil Code section 1008-compliant signage from 2002 onward.

Finally, the Court of Appeal concluded that the Rocks were not entitled to an equitable easement. Plaintiffs did not purchase their property with a good faith belief that an access easement existed. The purchase price was at a reduced rate due to a lack of access. The purchase agreement and policy of title insurance clearly stated there was no access. Plaintiffs purchased the property in spite of knowing they did not have access with the hope that they would eventually gain access through negotiations with the adjacent property owners. Accordingly, there was no reason to provide the Rocks with an equitable easement.

The Court of Appeal declined to award sanctions against the Rocks, not finding that their arguments were made in bad faith.

* * *

Environmental Council of Sacramento v. City of Elk Grove (Cal. Ct. App., Aug. 30, 2021, No. C089384) 2021 WL 3854906 [unreported].

BACKGROUND: The City of Elk Grove (City) proposed modifying an environmental impact report (EIR) it had prepared for the development of 1,200 acres of largely agricultural lands. In the initial EIR, the City concluded that the proposed development would destroy foraging habitat for the Swainson's hawk, a species listed as threatened under California's Endangered Species Act. To mitigate the impact, the City required the developer to acquire, before any site disturbance, replacement foraging habitat that the California Department of Fish and Wildlife found suitable. But years later, the developer asked the City to modify the EIR to add an alternative mitigation option that would allow it to acquire replacement foraging habitat at a ranch known as the Van Vleck Ranch. The City agreed to the request and, in an addendum, it found the proposed change would not trigger the need to prepare a subsequent or supplemental EIR. Appellants Environmental Council of Sacramento, Sierra Club, and Friend of Swainson's Hawk (collectively Environmental Council) afterward challenged that decision, alleging the City's decision was not supported by substantial evidence. But the trial court disagreed.

HOLDING: The Court of Appeal affirmed. At bottom, Environmental Council's arguments showed that different experts disagreed about the mitigation value of the Van Vleck Ranch site. One appeared to find the site inadequate. Another found differently. But a disagreement among experts was not reason, in itself, to conclude the decision was not supported by substantial evidence. The Court of Appeal thus rejected Environmental Council's challenge to the City's decision and affirmed the trial court's judgment in the City's favor.

KEY FACTS & ANALYSIS: For many projects, the preparation of an EIR "is the end of the environmental review process. But like all things in life, project plans are subject to change. When

such changes occur, [Public Resources Code] section 21166 provides that ‘no subsequent or supplemental environmental impact report shall be required’ unless at least one or more of the following occurs: (1) ‘[s]ubstantial changes are proposed in the project which will require major revisions of the environmental impact report,’ (2) there are ‘[s]ubstantial changes’ to the project’s circumstances that will require major revisions to the EIR, or (3) new information becomes available.” (*Friends of College of San Mateo Gardens v. San Mateo County Community College Dist.* (2016) 1 Cal.5th 937, 945 (Friends); see also CEQA Guidelines, §§ 15162, subd. (a) [describing when a subsequent or supplemental EIR is required], 15163 [describing the difference between a subsequent and a supplemental EIR].)

Environmental Council contended the City’s approval of the addendum to the EIR was not supported by substantial evidence. It reasoned that (1) allowing for mitigation more than 10 miles from the project site was inadequate and (2) because the record showed that the Van Vleck Ranch did not support the same density of Swainson’s hawk nests as in the project area, substantial evidence did not support a finding that the project would be mitigated. It argued these changes would have a significant impact on the environment and therefore would require a supplemental EIR.

On the first argument, Environmental Council noted that the City’s own website previously said mitigation lands would “ideal[ly]” be located within 10 miles of a project site. The Van Vleck Ranch was not within 10 miles. This contention did not merit reversal. A mitigation measure was not insufficient merely because it was not “ideal.” The City was only required to adopt mitigation measures that would reduce potential impacts to a less than significant level — or, if that were not possible, to adopt a statement of overriding considerations. (Pub. Resources Code, § 21081; see also *Save Panoche Valley v. San Benito County* (2013) 217 Cal.App.4th 503, 528.) Both the old mitigation measure and the new one satisfied this standard.

Second, although the Department of Fish and Wildlife estimated that the Van Vleck Ranch would be an inferior foraging habitat, the developer’s consulting biologist, and expert witness acknowledged that the Van Vleck Ranch would be a suitable foraging habitat, and described it as “a good tradeoff.” Because the Court of Appeal found that Environmental Council had only indicated a disagreement among expert witnesses, and that alone was not enough to show a lack of substantial evidence to support the City’s determination that no supplemental EIR was required, the Court of Appeal affirmed the judgment of the trial court.

TAKE-AWAYS: Evidence that experts disagree on a particular determination is not sufficient to demonstrate that an agency lacks substantial evidence under CEQA.

* * *

“I Am” School, Inc. v. City of Mount Shasta (Cal. Ct. App., Aug. 23, 2021, No. C091575) 2021 WL 3721409, reh’g denied (Sept. 13, 2021), review denied (Nov. 10, 2021) [unreported].

BACKGROUND: Health and Safety Code section 11362.768, subdivision (b) states: “No medicinal cannabis cooperative, collective, dispensary, operator, establishment, or provider who possesses, cultivates, or distributes medicinal cannabis pursuant to this article shall be located within a 600-foot radius of a school.” This case addresses whether the 600 feet is measured from the parcel upon

which a school is located or from additional parcels owned by the school upon which no school building currently exists. The appellant, “I Am” School, Inc, (Appellant) appealed from the trial court’s entry of judgment against them in their declaratory relief action. The appellant contended it had vested rights in all of the lots it acquired, the court erred in failing to find the 600-foot radius applied to all of the lots, and the ruling infringed on their First Amendment right to practice and teach their religion. It further contended that the trial court erred in failing to address the remainder of its complaint petitioning for a writ of mandate and administrative mandamus and other relief.

HOLDING: The Court of Appeal held that the trial court correctly determined that the 600-foot limit was measured from the lot upon which the school exists at the time, meaning the lot upon which the school was located; undeveloped lots upon which there was no school were not counted, even if owned by the school. The Court of Appeal found that it did not have jurisdiction to address the remaining arguments, and accordingly affirmed.

Key FACTS & ANALYSIS: Appellant was a private, faith-based school located in Shasta City, Siskiyou County. Appellant owned one parcel which contained its school, and several other parcels which were subject to a conditional use permit (CUP) and which could accommodate classroom use. The City approved development of a cannabis dispensary more than 600 feet from the school parcel, but less than 600 feet from one of the other parcels owned by the school.

Appellant sought a declaration that: stated the City’s amendment to the Shasta Municipal Code addressing cannabis businesses did not comply with the California Environmental Quality Act (CEQA), ordered the City to rescind the law due to insufficient and deficient public notice, began CEQA review of the ordinance in question, vacated the ordinance’s exemption from CEQA review, and stayed permitting future and current cannabis industry use within certain zones until CEQA review was complete. Appellant further sought an order requiring the City to measure the buffer zone for cannabis businesses from the perimeter property line of all lots identified in its CUP, notwithstanding the lack of any infrastructure on the property. Appellant also sought unspecified attorney fees, general damages, punitive damages, and costs.

In December 18, 2019, Appellant also filed a “Notice of Motion and for the Issuance of an Order” (the motion or motion), which sought an order declaring: the 600-foot measurement be made from the perimeter of all property owned by appellant, a 600-foot buffer zone be ordered for all schools, the City had not properly permitted in certain zones to include the cannabis industry, the school property be considered what was included in the CUP, the City be enjoined from granting the proposed cannabis license within 600 feet of school property, and summary judgment be entered. The City opposed the motion on the grounds it was procedurally defective, summary judgment was premature, there was insufficient evidence to support granting a preliminary injunction, and the requested relief was not properly obtained through a motion.

On January 9, 2020, Appellant filed a request for a CEQA hearing. That same day, at a hearing on the motion, both attorneys acknowledged that the motion’s essence was a determination of the minimum buffer zone under Business and Professions Code section 26054 and Health and Safety Code section 11362.768, subdivision (c), and how it should be measured, and that “resolution of this issue could resolve the litigation matter.” The parties agreed that prompt resolution of this issue would be in all their best interests.

The motion was heard on February 13, 2020. The trial court denied the motion, finding appellant did not have vested rights in the undeveloped parcels at issue.

The Court of Appeal first found that it did not have jurisdiction to address the claims not subject to the trial court's judgement. (Code Civ. Proc., § 904.1, subd. (a)(1).) The Court of Appeal found that the parties effectively narrowed the scope of the dispute to the 600-foot limit declaratory action, and thus limited its review to that claim. .

The Court of Appeal then analyzed the relevant statutes. Business and Professions Code section 26054 establishes the 600-foot limit for cannabis businesses and defers how that limit is to be determined to Health and Safety Code section 11362.768. Under section 11362.768, the 600-foot limit is measured from the property line of the school, and school is defined as the place "providing instruction in kindergarten or any of grades 1 to 12, inclusive," which the Court of Appeal found clearly referred to the place where the children are taught rather than property that is owned by an educational institution but where children are not educated.

The fact that Appellant had a CUP allowing educational facilities on a lot was of no consequence because Appellant had not developed that lot and therefore had no vested right in it. The Court of Appeal therefore affirmed the judgment of the trial court.

* * *

Notes on the Summaries:

“BACKGROUND” and “HOLDING” for cases are from the WestLaw Synopses.

“KEY FACTS & ANALYSIS” and “TAKE-AWAYS” for cases are from the text of cases and, occasionally, from published on-line analyses.

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The Mitigation Fee Act's Five-Year Findings Requirement: Beware Costly Pitfalls

Friday, May 6, 2022

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**THE MITIGATION FEE ACT'S FIVE-YEAR FINDINGS REQUIREMENT:
BEWARE COSTLY PITFALLS**

presented at

**LEAGUE OF CALIFORNIA CITIES
2022 City Attorneys Spring Conference**

Friday, May 6, 2022, 9:00-10:15 a.m. General Session
Westin Carlsbad, Carlsbad, California

RICK W. JARVIS, Managing Partner, Jarvis, Fay & Gibson, LLP (Panelist)

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OVERVIEW

The Mitigation Fee Act (specifically Government Code section 66001, subdivision (d)) requires local agencies to adopt “five-year findings” accounting for development impact fee proceeds held unexpended for more than five years. It further provides that agencies must refund the moneys held if they fail to make the required findings. The statute is vaguely written, and recent court decisions have interpreted it in a draconian manner, suggesting that a local agency must automatically refund its development fee proceeds if the court determines the findings to be defective, without any chance for the agency to cure the defect. As a result, there appears to be an increase in lawsuits seeking such refunds.

Every city that has development fee proceeds collected and unexpended for more than five years faces the risk of such litigation, including arguments that it is too late for the city to cure any defects in its most-recent five-year findings and that it must automatically refund all of the retained funds. City attorneys and staff should scrutinize their most recently adopted five-year findings and, even more importantly, make sure to carefully review and “bullet-proof” the next five-year findings when those become due. In addition, the League of California Cities should seriously consider pursuing legislative reform to clarify existing requirements (perhaps working from recently-adopted legislation imposing new requirements for nexus studies, including a requirement to update them every eight years). In the meantime, municipal litigation counsel should strive to carefully brief these issues in currently pending appeals, to better educate the appellate courts and to hopefully succeed in obtaining rulings that are workable for public agencies and consistent with the Act’s purpose of offsetting the impacts of new development.

THE MITIGATION FEE ACT'S FIVE-YEAR FINDINGS REQUIREMENT:
BEWARE COSTLY PITFALLS

League of California Cities 2022 City Attorneys Spring Conference
Page 2

The following analysis outlines the existing legal requirements, summarizes recent court decisions, and identifies potential areas for legislative reform.

ANALYSIS:

I. DEVELOPMENT FEES IMPOSED BY CITIES

A. Authority To Impose Development Fees

- Cities have the inherent police power to impose development impact fees on development projects. (*Associated Home Builders etc., Inc. v. City of Walnut Creek* (1971) 4 Cal.3d 633, 638; *Shappell Industries, Inc. v. Governing Board* (1991) 1 Cal.App.4th 218, 234.)
- Cities “commonly impose[]” such fees “in order to lessen the adverse impact of increased population generated by the development.” (*Russ Bldg. Partnership v. City and County of San Francisco* (1987) 199 Cal.App.3d 1496, 1504.)
- Such fees are “only fair” because the “developer has created a new, and cumulatively overwhelming, burden on local government facilities, and therefore ... should offset the additional responsibilities required of the public agency by the dedication of land, construction of improvements, or payment of fees, all needed to provide improvements and services required by the new development” (*Trent Meredith, Inc. v. City of Oxnard* (1981) 114 Cal.App.3d 317, 325.)

B. Limitations For Imposing Development Fees

- Federal Takings Jurisprudence – The U.S. Supreme Court has interpreted the Takings Clause to impose certain limitations on the ability of public agencies to impose exactions on development projects, so that they do not use their leverage over development approvals to require developers to give up property rights having nothing to do with their development impacts.
 - Nexus - *Nollan v. California Coastal Commission* (1987) 483 U.S. 825
 - Rough Proportionality - *Dolan v. City of Tigard* (1994) 512 U.S. 374
 - Applies to Monetary Exactions - *Koontz v. St. Johns River Water Management Dist.* (2013) 570 U.S. 595

THE MITIGATION FEE ACT'S FIVE-YEAR FINDINGS REQUIREMENT:
BEWARE COSTLY PITFALLS

League of California Cities 2022 City Attorneys Spring Conference
Page 3

- California Constitution
 - Legislatively imposed development mitigation fees “*must bear a reasonable relationship, in both intended use and amount, to the deleterious public impact of the development.*” (*San Remo Hotel v. City and County of San Francisco* (2002) 27 Cal.4th 643, 671.)
- The Mitigation Fee Act (aka “AB 1600”) – Government Code §§ 66000 *et seq.* (“MFA”) – Discussed below.

II. MITIGATION FEE ACT REQUIREMENTS

A. MFA Requirements For Legislative Adoption

- The MFA essentially requires nexus findings for all legislatively-adopted development fees (Govt. Code § 66001, subd. (a)). The findings must:
 - Identify the purpose of the fee
 - Identify the use to which the fee is to be put
 - Determine how there is a reasonable relationship between the fee’s use and the type of development project on which the fee is imposed
 - Determine how there is a reasonable relationship between the need for the public facilities to be funded by the fee and the type of development projects on which the fee is imposed
- Nexus studies (Govt. Code § 66016.5 [effective 1/1/22]) Originally, the term “nexus” or “nexus study” never actually appeared in the Mitigation Fee Act. However, the Legislature has now adopted new legal requirements for such nexus studies. The new nexus requirements:
 - Require identification of the existing level of service, the proposed new level of service, and an explanation why the new level of service is appropriate (where applicable)
 - Generally require fees on housing developments to be proportional to square footage unless the city makes findings in support of a different metric
 - Require adoption at public hearing with 30 days’ notice
 - Must be updated at least every 8 years, starting 1/1/22

B. MFA Requirements for Fee Imposition on Individual Development Projects

- If the development impact fees are imposed on a particular project based on a legislatively-adopted fee schedule, the requirements in Government Code

THE MITIGATION FEE ACT'S FIVE-YEAR FINDINGS REQUIREMENT:
BEWARE COSTLY PITFALLS

League of California Cities 2022 City Attorneys Spring Conference
Page 4

section 66001, subdivision (b), apply, and not the requirements of subdivision (a):

- *See Garrick Development Co. v. Hayward Unified School Dist.* (1992) 3 Cal.App.4th 320, 336 [“Subdivisions (a) and (b) describe different stages of a fee imposition process. Subdivision (a)--which speaks of use and need in relation to a ‘type’ of development project and of agency action ‘establishing, increasing, or imposing’ fees--applies to an initial, quasi-legislative adoption of development fees. Subdivision (b)--which speaks of ‘imposing’ fees and of a reasonable relationship between the ‘amount’ of a fee and the ‘cost of the public facility or portion of [it] attributable to the development on which the fee is imposed’--applies to adjudicatory, case-by-case actions.”)]
- *See AMCAL Chico LLC v. Chico Unified School Dist.* (2020) 57 Cal.App.5th 122, 127 [“For a general fee applied to all new residential development, a site-specific showing is not required”]. *See also Tanimura & Antle Fresh Foods, Inc. v. Salinas Union High School Dist.* (2019) 34 Cal.App.5th 775, 786; *Cresta Bella Cresta Bella, LP v. Poway Unified School Dist.* (2013) 218 Cal.App.4th 438, 447.
- If the development impact fees are imposed based on an administratively imposed (ad hoc) assessment:
 - “In any action imposing a fee as a condition of approval of a development project by a local agency, the local agency shall determine how there is a reasonable relationship between 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.” (§ 66001(b).)
 - “At the time the local agency imposes a fee for public improvements on a specific development project, it shall identify the public improvement that the fee will be used to finance.” (§ 66006(f).)
- Developers have 90 days to protest and 180 days to bring an as-applied challenge.
 - Caveat: The 90-day exhaustion requirement and 180-day statute apply *ASSUMING* city has given developer written notice of protest

THE MITIGATION FEE ACT'S FIVE-YEAR FINDINGS REQUIREMENT:
BEWARE COSTLY PITFALLS

League of California Cities 2022 City Attorneys Spring Conference
Page 5

rights under § 66020(d)(1)! Failure to give such notice of protest rights could toll the statute of limitations for bringing legal action challenging the fee (subject to potential laches defenses).

- § 66020 provides the exclusive method for making an “as applied” challenge to a development fee. (*Merkoh Associates, LLC v. Los Angeles Unified School Dist.* (2016) 245 Cal.App.4th 1031.)

C. MFA Requirements for Post-Collection Use and Accounting of Fee Revenues

- Development fee proceeds must be deposited in separate account or fund and be expended “solely for the purpose for which the fee was collected.” (§ 66006 (c).)
- Cities must adopt annual reports within 180 days of the close of each fiscal year (§ 66006 (b).):
 - Describing of the type of fee, its amount, and beginning and ending balance
 - Specifying the amounts collected during the year and interest earned
 - Listing each public improvement for which fees were expended, including the percentage of the project costs funded by the fees
 - Providing an approximate date by which construction of the improvements will commence, if sufficient funds have been collected
- Fee refund remedies (§ 66001(e), (f))
 - Once sufficient funds have been collected to complete financing of public improvements, cities have 180 days to identify an approximate date when construction will be commenced.
 - If a city does not identify an approximate construction commencement date, then it must refund the fees to the current property owners on a prorated basis, including accrued interest.
 - “By means consistent with the intent of this section, a local agency may refund the unexpended revenues by direct payment, by providing a temporary suspension of fees, or by any other reasonable means.”

THE MITIGATION FEE ACT'S FIVE-YEAR FINDINGS REQUIREMENT:
BEWARE COSTLY PITFALLS

League of California Cities 2022 City Attorneys Spring Conference
Page 6

- If administrative costs of refunding fees exceed the amount to be refunded, the agency may hold a public hearing to determine how to allocate the revenues “for some other purpose for which fees are collected ... and which serves the project on which the fee was originally imposed.”

D. MFA’s Five-Year Findings Requirement

- Statutory five-year findings requirement (§ 66001(d)(1))
 - For the fifth fiscal year following the first deposit into the account or fund, and every five years thereafter, the local agency shall make specified findings with respect to that portion of the account or fund remaining unexpended, whether committed or uncommitted. The findings must:
 - A. Identify the purpose to which the fee is to be put.
 - B. Demonstrate a reasonable relationship between the fee and the purpose for which it is charged.
 - C. Identify all sources and amounts of funding anticipated to complete financing in incomplete improvements ...
 - D. Designate the approximate dates on which the funding referred to in subparagraph (C) is expected to be deposited into the appropriate account or fund.
 - Five-year findings “shall be made in connection with [the annual reporting under § 66006(b)].”
[§§66006(b) requires the report to be filed within 180 days of the end of the fiscal year]
- Refund remedies for failure to make five-year findings (§ 66001(d)(1))
 - “If the findings are not made as required by this subdivision, the local agency shall refund the moneys in the account or fund as provided in subdivision (e).”
 - In *Walker v. City of San Clemente* (2015) 239 Cal.App.4th 1350:

THE MITIGATION FEE ACT'S FIVE-YEAR FINDINGS REQUIREMENT:
BEWARE COSTLY PITFALLS

League of California Cities 2022 City Attorneys Spring Conference
Page 7

- The city was ordered city to refund over \$10 million in development fees that had been collected over two decades to fund beach parking.
 - The city never developed any plan to use the funds.
 - The city had multiple studies conducted that concluded that there was no need for additional beach parking, but the city continued collecting the fee.
 - The court found that the “Five-Year Report” the city adopted failed to make the specified findings and “dodges the question.”
 - The court rejected challenges to prior expenditures to purchase a vacant lot and for administrative overhead costs – the city need only refund “unexpended” funds.
 - “The five-year findings requirement imposed a duty on the City to *reexamine* the need for the unexpended Beach Parking Impact Fees The City may not rely on findings it made 20 years earlier to justify the original establishment of the Beach Parking Impact Fee, or the findings it made 13 years earlier to justify reducing the amount of the fee. *Instead, the Act required the City to make new findings demonstrating a continuing need for beach parking improvements caused by the new development in the noncoastal zone.*”
 - The court held that the city was required to make the refunds without any opportunity to cure the defects.
- In *County of El Dorado v. Superior Court* (2019) 42 Cal.App.5th 620, 625-627:
- The court held that challenges to five-year findings seeking refunds are subject to a one-year statute of limitations, because the refunds are a “penalty or forfeiture” subject to Code of Civil Procedure section 340(a).
 - But the court also confusingly held that a claim for refund of development impact fee payments could be pursued after the running of the one-year statute of limitations based on the “continuous accrual doctrine.” (*County of El Dorado v. Superior Court, supra*, 42 Cal.App.5th at pp. 620, 627-628 [“If [plaintiff’s claim is] not made within one year of the deadline for findings, the plaintiff has only a limited remedy for the subsequent payments made within one year before filing a refund action, not the entire corpus existing at the time of the deadline. The County’s liability for failure to

THE MITIGATION FEE ACT'S FIVE-YEAR FINDINGS REQUIREMENT:
BEWARE COSTLY PITFALLS

League of California Cities 2022 City Attorneys Spring Conference
Page 8

comply with its statutory duty is accordingly limited.”)]
This holding is troubling insofar as it seems to confuse the need to adopt findings for funds held more than five years with the ongoing collection of new development fees, which shouldn't be subject to any such findings requirements unless and until held for more than five years.

- Current issues and questions regarding Five-Year Findings (which could warrant statutory clarification from the Legislature):
 - Must cities make the five-year findings for all amounts in the fund, or only for amounts held for over five years as of the close of the fiscal year? The “plain language” of Section 65001(d) could be interpreted either way.
 - Are five-year findings required for any accounts that had some balance five years prior, even though the funds from five years ago have been fully expended, if a balance still exists in the fund five years later due to the collection of subsequently-paid fees?
 - If a refund is required, is a city required to refund all amounts held in the fund, or only amounts held for more than five years? What about amounts recently collected after the close of the fifth fiscal year?
 - Must cities conduct new nexus studies or other analysis in support of the five-year findings? (Presumably not since new Section 66016.5 only requires updated studies every eight years. However, note the language in *Walker v. City of San Clemente* that “the Act required the City to make new findings demonstrating a continuing need for beach parking improvements caused by the new development in the noncoastal zone.”)
 - The five-year findings are due within 180 days after the close of the fiscal year (typically, by December 27). If a city is late in making the findings, must it refund all the funds for which the findings were required?
 - If a court later determines that a city's five-year findings are legally inadequate, should the city be given the opportunity to cure any such inadequacy before being required to refund the funds?

THE MITIGATION FEE ACT'S FIVE-YEAR FINDINGS REQUIREMENT:
BEWARE COSTLY PITFALLS

League of California Cities 2022 City Attorneys Spring Conference
Page 9

- What is the statute of limitations for challenging the adequacy of a city's five-year findings? While the court in *County of El Dorado* held that the statute of limitations is only one year, that holding is premised on a questionable finding that the refund requirement is analogous to a forfeiture or penalty. It is not clear whether other appellate courts will agree.

- Possible legislative reforms

Legislative reforms that could help cities accountably manage their development fee programs and avoid litigation and refund risks include:

- Clarifying the procedures for challenging five-year findings, including providing an opportunity to cure any procedural defects and setting forth a statute of limitations.
 - Removing any suggestion that the refund requirement is a “penalty or forfeiture”
 - Perhaps adding an administrative procedure that requires litigants to raise objections with the local agency before they are able to sue in court
- Clarifying accounting requirements for improvements included in capital improvement programs.
- Giving agencies more flexibility on how to address shifting infrastructure needs.
- Reconciling the requirement for “five-year findings” with the newly-adopted statutory requirement to update nexus studies every eight years, as set forth in Government Code section 66016.5 (effective 1/1/22)



General Municipal Litigation Update

Friday, May 6, 2022

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GENERAL MUNICIPAL
LITIGATION UPDATE
FOR
LEAGUE OF CALIFORNIA CITIES
CITY ATTORNEYS CONFERENCE
SPRING 2022

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TABLE OF CONTENTS

	Page(s)
I. Public Finance	3
A. <i>Lejins v. City of Long Beach</i> (2021) 72 Cal.App.5th 303.....	3
B. <i>Plata v. City of San Jose</i> (2022) 74 Cal.App.5th 736.....	5
II. Government Claims Act.....	7
A. <i>Andrews v. Metropolitan Transit System</i> (2022) 74 Cal.App.5th 597.....	7
III. Elections	8
A. <i>Jobs & Housing Coalition et al. v. City of Oakland</i> (2021) 73 Cal.App.5th 505.....	8
B. <i>County of San Bernardino v. West Valley Water District</i> (2022) 74 Cal.App.5th 642.....	10
IV. Open Government	12
A. <i>Getz v. Superior Court</i> (2021) 72 Cal.App.5th 637, review denied Mar. 16, 2022.	12
B. <i>Riskin v. Downtown Los Angeles Property Owners Association</i> (2022) — Cal.Rptr.3d — , 2022 WL 805377	14
V. Miscellaneous	15
A. <i>Hill RHF Housing Partners, L.P. v. City of Los Angeles, et al.</i> (2021) 12 Cal.5th 458	15
B. <i>City of Oxnard v. County of Ventura et al.</i> (2021) 71 Cal.App.5th 1010.....	17
C. <i>Crenshaw Subway Coalition v. City of Los Angeles</i> (2022) — Cal.App.5th — , 2022 WL 620093	18
D. <i>Houston Community College System v. Wilson</i> (2022) 595 U.S. —, 2022 WL 867307	21

I. PUBLIC FINANCE

A. *Lejins v. City of Long Beach* (2021) 72 Cal.App.5th 303, review denied March 23, 2022

Holding: Voter approval of a general fund transfer from water and sewer utilities was not sufficient to protect it from Proposition 218 challenge.

Facts/Background: Long Beach Water Department is a department of the City, governed by its City charter, providing water and sewer services to residents and businesses throughout Long Beach and to some areas outside the City. Monies collected from customers for water services are accounted for and initially maintained in the City’s Water Revenue fund; likewise for revenues from sewer services in the City’s Sewer Revenue fund. The City has historically transferred revenues from its utilities to the City’s general fund to support general City services, such as fire, police, library, and parks. The City attempted to protect its general fund transfer post-Proposition 218 by obtaining voter approval of it as a tax. City voters approved the measure. Customers outside the City, of course, did not participate in that election.

Plaintiffs filed a writ action challenging the measure (Measure M) which authorizes use of the proceeds of rates the Long Beach Water Department charges its customers for service to fund the general fund transfer. The City imposed the surcharge on its water and sewer customers by embedding it in the service rates of the Water Department. The surcharge was intended to cover transfers of funds from the Water Department to the City’s general fund, to be used for unrestricted general revenue purposes — revenues from the Water and Sewer funds that the Board determined unnecessary to meet other obligations of the Water Department, not to exceed 12% of Department annual gross revenues. The surcharge was developed in 2016 to account for a reduction in general fund revenues after Lejins sued the City over a pipeline permit fee collected from the Water Department. The Board raised rates for potable and recycled water by over 7% to account for the Measure M transfer, which plaintiffs characterized as a “surcharge.”

Characterizing Measure M as a voter-approved general tax to support the City’s general fund, the City argued it was properly approved by a majority of the City’s voters under article XIII C, section 2(b) for the use of a property-related service (sewer and water). Plaintiffs argued the surcharge must meet the constitutional requirements in article XIII D for a fee or charge imposed as an incident of property ownership — a theory, which if

taken to its logical extent, would threaten all utility taxes even though ballot arguments on Proposition 218 assured voters they could continue to approve such taxes.

The trial court concluded the surcharge violates article XIII D, section 6 because it is a general tax imposed as an incident of property ownership, and not a charge based on actual water usage. It also found it to violate article XIII D, section 3's closed list of allowable impositions on property and property ownership because it is a charge as an incident of property ownership that does not fall under any of the enumerated exceptions. The trial court concluded compliance with article XIII C did not excuse compliance with independent constitutional requirements in article XIII D.

Analysis: Affirmed. The Court focused on the key issue of whether the Measure M surcharge is imposed upon a parcel or person as an incident of property ownership. The City argued the surcharge is akin to a valid utility user's tax or excise tax levied on the use of utility services; it is not imposed as an incident of property ownership since one may own real property without obtaining water or sewer service. Looking to precedent in *Apartment Association of Los Angeles County Inc. v. City of Los Angeles*, *Richmond v. Shasta Community Services District*, and *Bighorn-Desert View Water Agency v. Verjil*, the Court rejected this argument, finding charges for utility services such as water and sewer are property-related fees. Quoting *Richmond*, the Court concluded: "A fee for ongoing water service through an existing connection is imposed 'as an incident of property ownership; because it requires nothing more than normal ownership and use of property.'" Based on this finding, the Court next concluded that the surcharge must comply with article XIII D, section 6's requirements regardless of voter approval.

The case purports to distinguish the contrary ruling of *Wyatt v. City of Sacramento* (2021) 60 Cal.App.5th 373, which affirmed Sacramento's voter-approved measure to protect its general fund transfer from its water, sewer, and trash utilities. The Supreme Court has denied review in both *Wyatt* and *Lejins*, so it is necessary to reconcile the two. It is notable that Sacramento characterized its tax as on the utility itself and, therefore, a lawful use of rate proceeds just as are sales taxes the utilities incur in purchasing materials for system maintenance. Ballot materials, too, informed Sacramento voters the measure was a tax, unlike Long Beach.

B. *Plata v. City of San Jose (2022) 74 Cal.App.5th 736, review filed Mar. 14, 2022*

Holding: Late penalty charges are not subject to Proposition 218 since they do not burden landowners as “landowners,” but rather as delinquent bill payors. These charges are not fees imposed on a property owner, in his or her capacity as a property owner, to pay for the costs of providing a service to a parcel of property, as contemplated by article XIII D, section 6. Claimants may not pursue litigation on a new theory of liability based on an entirely different state of facts from that included in their government claim, particularly where they have not litigated the case based on that theory.

Facts/Background: The City of San Jose owns and operates San Jose Municipal Water System (“Muni Water”). The water department’s annual budget is reflected in a source and use of funds statement, which is part of the City’s annual operating budget. The Platas, customers of Muni Water and suing on behalf of a class of water customers, filed suit claiming the water department violated Proposition 218 by collecting money from customers and transferring it to the City’s general fund, urging the City used Muni Water revenues for general purposes rather than operational costs associated with water service. The Platas argued this practice depleted the funds, causing Muni Water to charge higher rates for service. The lawsuit focused on five categories of transfers: (1) late payment penalty charges imposed by Muni Water; (2) transfers to service City debt incurred in financing City Hall and other City structures; (3) “enterprise in lieu” transfers encompassing fees the City would otherwise charge a private utility to provide a similar service; (4) “rate of return” transfers the City made from Muni Water to compensate the City for investing in the Muni Water system; and (5) transfers to the City to cover overhead. Just weeks before trial, the Platas included in a pretrial statement that they also intended to challenge the underlying tiered rates under article XIII D, section 6 (citing *San Juan Taxpayers Assn., Inc. v. City of San Juan Capistrano* (2015) 235 Cal.App.4th 1493) — an issue not in their pleading. The City argued decertification of the class, which no longer had community of interest on this new theory because tiered rates necessarily divide the class into those who pay upper-tier rates and those who do not.

The trial court found the late fees charged by Muni Water were neither a fee nor charge under Proposition 218, and any claims pre-November 2012 were time barred under Government Code section 911.2. The court also found the City was on notice of challenge to the rate structure, and the tiered rate structure did not comply with

Proposition 218. It did not, however, award any relief to ratepayers, instead granting the City's motion to decertify the class.

Analysis: Affirmed in part and reversed in part. The Court affirmed for the City on the transfers to the City's general fund. First, the late penalty charges need not comply with Proposition 218. The Court analyzed prior decisions in *Apartment Association of Los Angeles County Inc. v. City of Los Angeles*, *Richmond v. Shasta Community Services District*, and *Bighorn-Desert View Water Agency v. Verjil* on the limitations of Proposition 218 and whether a fee or charge is imposed by an agency as an incident of property ownership. A fee or charge must comply with article XIII D "if it is imposed on a property owner, in his or her capacity as a property owner, to pay for the costs of providing a service to a parcel of property." The Court determined that late penalty charges do not burden landowners as landowners, but rather as delinquent bill payers. "An owner will not incur a late penalty charge merely through ownership and normal use of property ... but through an additional act — or in this case, omission: failing to pay his or her bill by the due date." Because Muni Water cannot identify in advance which customers will become delinquent payers, it cannot calculate a per-parcel charge and notify those property owners of a public hearing, as article XIII D, section 6 requires. These charges have nothing to do with water service, rates, nor a customer's water usage.

The Court declined to consider the merit of the legality of the tiered rates, instead finding the Platas failed to meet the claim presentation requirement by omitting this issue from their claim and pleading. The Plata's government claim could be distilled to "You're using the money for the wrong purposes and making up for it by inflating our rates," not "Your rate system tiers are illegal." The Platas consistently framed the issues in the lawsuit as a challenge to use of water funds, not their collection or rates. This is an important victory and those defending rates should take care to compare what was claimed pre-litigation, what was pleaded, and what appears in a trial brief to attempt to preclude surprise issues at trial. This case provides good authority for that effort.

On the statute of limitations issue, the Court agreed that the Plata's challenges to the rate of return and enterprise in lieu transfers were time barred under Government Code § 911.2, subd. (a) since the City ceased these transfers three years before their first government claim.

II. GOVERNMENT CLAIMS ACT

A. *Andrews v. Metropolitan Transit System (2022) 74 Cal.App.5th 597*

Holding: Metropolitan Transit System’s (“MTS”) notice rejecting passenger’s government claim was insufficient to trigger 6-month statute of limitations period and instead provided her with two years to file suit. MTS’s rejection notice omitted language advising the claimant she may wish to consult an attorney on the matter. This omission was material and including the remainder of language as required in Government Code § 913, subdivision (b) did not meet the requirements for substantial compliance.

Facts/Background: Treasure Andrews sued the MTS when she was injured on an MTS bus from the driver’s “negligent acceleration,” which caused her to fall. She submitted a claim for monetary damages to MTS, listing her attorney as the contact for further notices from MTS. MTS rejected her claim on November 17, 2017. The notice included some of the language required under section 913 — specifically, notifying claimant she had 6 months from the date of mailing of the notice to file a court action under section 945.6. However, it omitted the following language from section 913: “You may seek the advice of an attorney of your choice in connection with this matter. If you desire to consult an attorney, you should do so immediately.”

Andrews then filed suit on July 3, 2018 — almost 8 months after MTS mailed its notice of rejection. MTS moved and was granted summary judgment in the trial court, which found MTS complied by providing a warning in the rejection notice substantially the same as that provided in section 913, and then mailing it to Andrews’ counsel.

Analysis: The rejection notice’s omission of the second half of the section 913 warning failed to comply with the statute, and was insufficient to trigger the 6-month statute of limitations in section 945.6, subdivision (a)(1).

The Government Claims Act requires written notice to the claimant or a representative, given in a “precise manner.” Section 913, subdivision (a) describes the mandatory requirements for delivery of the notice (see § 915.4) and provides language that “may” be used for the text of the notice. Section 913, subdivision (b) then sets forth a warning that “shall” be included if a claim is wholly or partially rejected. Applying principles of statutory construction, the Court determined section 913’s use of the word “shall” means the warning language is mandatory whenever a claim is rejected. According to the Court,

a showing of compliance is significant since it will determine the applicable statute of limitations under section 945.6 for claimant’s subsequent lawsuit — 6 months after the date of notice with compliance, or 2 years from accrual absent compliance. And based on the plain language of section 913, its purposes is twofold: “to inform the claimant of the applicable statute of limitations *and* the desirability of promptly consulting an attorney.”

MTS argued substantial compliance since section 913 only requires the rejection notice “shall include a warning in substantially the following form.” The Court disagreed. Noting from prior court decisions that substantial compliance with a statute is dependent on the meaning and purpose of the statute, the Court noted that one objection of section 913 is to ensure claimants are advised they should consider consulting an attorney and do so promptly. MTS’s rejection notice did not comply with this objective since it failed to include that language. The doctrine “excuses literal noncompliance only when there has been ‘actual compliance in respect to the substance essential to every reasonable objective of the statute.’” MTS’s notice did not. While this case follows prior precedent, it is an important reminder to precisely follow the language of Government Code section 913 when issuing claim rejections.

III. ELECTIONS

A. *Jobs & Housing Coalition et al. v. City of Oakland* (2021) 73 Cal.App.5th 505

Holding: Ballot materials for a citizen initiative special parcel tax that stated a two-thirds voter requirement, even though Council later enacted the measure finding only majority vote was required, were not ineffective and void. Misstatements of law by City officials cannot affect the right of initiative proponents to have their proposal considered under the voter-approval standard required by the California Constitution.

Facts/Background: A group of Oakland citizens placed a proposed special parcel tax on the November 2018 ballot (Measure AA) to fund programs for early childhood education and college readiness. The official ballot materials prepared by the City Attorney’s Office stated the measure was for a “special parcel tax” and, in light of the law at that time, that a two-thirds vote was needed to pass. Measure AA received 62.47 percent of the vote. The City Council determined that only a majority vote was actually needed given the Supreme Court’s reasoning in *California Cannabis Coalition v. City of Upland* (2017) 3

Cal.5th 924, declaring the measure enacted (though acknowledging by resolution uncertainty in the law whether two-thirds or majority vote was required).

A coalition of stakeholders brought a post-election, reverse-validation action against the City, seeking invalidation of Measure AA as an illegal special tax because it had not received the two-thirds vote required by Propositions 13 and 218. Plaintiffs also alleged enactment by majority vote, when the ballot materials stated a two-thirds voter requirement, constituted a post hoc bait-and-switch that created a patent and fundamental unfairness amounting to a due process violation.

The trial court ruled in favor of the coalition on its motion for judgment on the pleadings, finding Measure AA failed because it needed two-third vote, and enactment of the measure on majority vote amounted to a “fraud on the voters.”

Analysis: In an unpublished portion of the decision, the First Appellate District, Division 1 joined decisions of Division Four (*City and County of San Francisco v. All Persons Interested in the Matter of Proposition G* (2021) 66 Cal.App.5th 1058; *City and County of San Francisco v. All Persons Interested in Matter of Proposition C* (2020) 51 Cal.App.5th 703); Division Five (*Howard Jarvis Taxpayers Association v. City and County of San Francisco* (2021) 60 Cal.App.5th 227); and the Fifth Appellate District (*City of Fresno v. Fresno Building Healthy Communities* (2020) 59 Cal.App.5th 220) that a citizen initiative imposing a special parcel tax is enacted when it receives a majority vote. Relying, too, on the holding in *California Cannabis Coalition v. City of Upland* (2017) 3 Cal.5th 924, the court distinguished Proposition 218’s treatment of government- and citizen-sponsored initiatives.

In the published portion of the decision, the Court held that Measure AA cannot be invalidated based on the ballot materials’ voting-threshold statements because: (1) the statements did not concern the measure’s substantive features, (2) were not alleged to be intentionally misleading, and (3) cannot override the law governing the applicable voting threshold.

The Court first found the measure could not be invalidated in a postelection challenge based on inaccuracy of the materials. Any Elections Code challenge to ballot materials must be brought pre-election — it was not; Plaintiffs’ only remedy was to bring a due process challenge showing the materials so misleading or inaccurate that the election must be invalidated. Applying the multifactor test from *Horwath v. East Palo Alto* (1989)

212 Cal.App.3d 766, the Court explained this must illustrate the ballot materials prevented voters from making informed choices (essentially, that the result would have been different without the misinformation). The voting threshold was an ancillary matter, and the ballot materials were otherwise informative, explaining the proposed tax's substance and intended allocations. Moreover, the statements were made at a time of legal uncertainty concerning the applicable vote threshold for citizen-initiated tax measures, rendering Oakland's officials' statement of a two-thirds requirement not fundamentally unfair.

Second, the Court found Plaintiffs could not succeed on their challenge to Council's post-election conduct. Finding the ballot materials' incorrect voting statement "lamentable," it did not constitute fraud. The Court distinguished facts in *Hass v. City Council of City of Palm Springs* (1956) 139 Cal.App.2d 1956, where the ordinance for redistricting itself required three-fourths voter approval and thus established the applicable law for that measure, in contrast to Measure AA which was silent on the voting threshold, only included in ballot materials. "A voting threshold identified in ballot materials cannot supplant the law governing the applicable voting threshold" Nor was there any evidence of fraudulent intent in light of the evolving legal landscape surrounding citizens' initiatives for special parcel taxes.

Despite the five recent cases on this issue, the San Diego Superior court recently ruled against that City, concluding the ordinance placing an initiative on the ballot was sufficient to increase the voter approval standard from 50% plus 1 to two-thirds. The case is on appeal as *Alliance San Diego v. City of San Diego*. No case number is yet available for the appeal filed March 23, 2022.

B. County of San Bernardino v. West Valley Water District (2022) 74 Cal.App.5th 642

Holding: Local water district is required to hold its elections on the statewide general election date starting in November 2022. Though California Voter Participation Rights Act (VPRA) required a change to either the statewide primary or general election date, the VPRA did not eradicate all existing voting laws and does not conflict with Elections Code sections 1303 or 10404, which require the District set its election date on the statewide general election date.

Facts/Background: The District sought by resolution to change its election date from the existing date of November in odd-numbered years, to the statewide primary election date in even-numbered years commencing in June 2022. The County (whose Registrar of Voters serves as the District’s elections official under the Uniform District Election law) filed for writ of mandate, declaratory and emergency relief for an order obligating the District to change its election date to the statewide general election date, arguing District’s requested election date change would result in an illegal election. The County alleged the Registrar of Voters determined the average voter turnout for the District’s elections in November of odd-numbered years (for November 2019, 10.79%) was at least 25 percent less than the turnout for the last four statewide general elections (averaging 61.54% turnout), and thus within the VPRA mandate to set elections on the statewide election date. Harmonizing the VPRA and sections 1303 and 10404, the County urged the District could not choose a date other than the statewide general election date in this instance in order to comply with the VPRA’s intent to maximize voter turnout.

On demurrer, the District alleged the language of VPRA allowed the date to be moved to any “statewide election date” — there was no mandatory change to the statewide general election date and that section 10404 did not apply since the VPRA was enacted later. The District also asserted the County lacked standing under the VPRA, only granting standing to registered voters. After the trial court ruled for the County on demurrer, the parties agreed to a stipulated judgment. The trial court found the resolution invalid because when harmonized, sections 1303, 10404, and 14052 require the District to hold its elections on the date of the statewide general election in even-numbered years to fulfill the VPRA’s intent.

Analysis: The VPRA requires political subdivisions in the state to consolidate local elections with statewide on-cycle elections if the local jurisdiction’s turnout falls at least 25% below the locality’s average voter turnout in the previous four statewide general elections. Based on the VPRA’s plain language, the District could hold its election on the statewide primary or general election date, if it had a significant decrease in voter turnout on its nonconcurrent date. But, the VPRA could not be read in isolation. Section 1303 provided only one exception to the holding of an election on an odd-numbered year: the statewide general election date. No language in the VPRA supports that it was intended to replace section 1303, subdivision (b), and the two can be read in harmony. Once the District was required to change its election date under the VPRA for low voter turnout, it could only adopt a resolution that set the election date on the statewide general election date under section 1303, subdivision (b). The District waived its arguments on standing

by not seeking a ruling on that point in the stipulated judgment.

IV. OPEN GOVERNMENT

A. *Getz v. Superior Court* (2021) 72 Cal.App.5th 637, review denied Mar. 16, 2022.

Holding: Records in a public agency’s custody are assumed to be public records; any claim to the contrary must be supported by substantial evidence. Moreover, the burden to assert and establish exemption from disclosure is on the agency, which would be well advised to segregate privileged documents from others. “An agency cannot resist disclosure based on the burden stemming from actions needed to assuage an abstract fear of improvident disclosure, a fear that could be avoided by simply setting privileged documents apart.” The Court rejected the County’s claim that reviewing 42,582 emails for privilege was unduly burdensome.

Facts/Background: Getz sought public records under the Public Records Act from El Dorado County concerning its contacts with a homeowner’s association, local real estate developer, and law firm. After receiving about 4,500 responsive documents that he was unsatisfied with, Getz broadened the search, seeking all records between the County and four email domains over a 6-year period. This resulted in about 42,582 additional potentially responsive records. The County asked Getz to provide more specific search terms to reduce the County’s burden in reviewing the newly responsive records for privilege, but he refused. The County thus provided an index of the records (but not the actual documents) and asked Getz to identify which were relevant. He refused, asking for all documents. When the County failed to provide them, Getz filed a writ of mandate seeking their production.

The County argued the request was overbroad and unduly burdensome. A search based on these broad parameters would likely result in documents not likely to relate to the conduct of official business, and might fall into exemptions from disclosure including the attorney-client privilege. The County estimated a review time of 40 to 50 business days to review for relevance and applicable exemptions. Attorney-client review was particularly important to the County since the law firm that was the subject of the request was also a firm that had worked closely with the County on a matter of common interest.

The trial court agreed with the County, finding its efforts extended well beyond what is

reasonable to comply with a PRA request.

Analysis: The Court of Appeal reversed. Records requests always impose some burden on government agencies, but an agency is obligated to comply so long as the records can be located with reasonable effort. Because the County had already located and indexed the 42,582 emails without objection, the County had demonstrated the records could be located with reasonable effort and the volume of materials was not unmanageable.

The Court found the County's assertion speculative that records may fall outside County official business, particularly since all the domains were work-related accounts and communications with these types of businesses and the County would "naturally deal with work-related matters, e.g., the developer's business with the County in which the developer builds and manages developments." The Court also rejected the County's argument of burden to review for exemptions or privilege, finding only emails with the law firm or specifically referencing County legal matters needed to be reviewed for attorney-client privilege.

The dissenting opinion asserted the relevant inquiry was how burdensome it would have been for the County to make a determination on exemptions. The Court disagreed, stating: "Since the volume of email correspondence in the modern era will always be an order of magnitude greater than [those records] formerly sought in a request under the Act, the argument that the County must review every email furnishes a ready-made 'overly burdensome' response justifying a public agency's refusal to respond to a request under the Act for emails." The Court recommended a Legislature fix so that the burden imposed when email records are requested in volume may be considered; existing statutes, however, "do not make such a burden a basis for refusing disclosure." The Court suggested until then that agencies identify and segregate potentially exempt records when they are created to reduce burden later on a PRA request. This case provides an important reminder to segregate privileged documents from others, utilize search criteria when dealing with large document productions in response to a PRA request, and maintain thorough information (substantial evidence) on the public agency's efforts to search through its documents to find responsive documents. An unsupported claim of undue burden for voluminous document review will not do.

The Court agreed the County need not provide records relating to Getz's alleged involvement in filing a false police report under Government Code section 6254(f). An effort to achieve a legislative response to this ruling seems likely.

B. Riskin v. Downtown Los Angeles Property Owners Association (2022)
— Cal.Rptr.3d — , 2022 WL 805377

Holding: If appropriate to a particular case, the trial court must determine whether a litigant who obtains partial relief under the CPRA is a prevailing party so as to justify an award of fees by analyzing whether the documents obtained were “so minimal or insignificant” to justify a finding the litigant did not prevail.

Facts/Background: Riskin, a self-described “open records activist” and frequent litigant against Los Angeles’ business improvement districts, submitted PRA requests to the Downtown Los Angeles Property Owners Association to produce: (1) emails between the Association and the South Park BID and/or Downtown Neighborhood Counsel, as well as the Board Chairman’s emails; (2) emails between the Association and Urban Place Consulting; and (3) a Board Member’s emails relating to the Association. The Association produced documents in all three categories, claiming exemptions and deliberative process privilege as to the remainder.

Riskin disagreed, petitioning for a writ to compel release of documents he claimed were wrongly withheld under the deliberative process privilege and due to an inadequate search. The trial court granted the petition in part. After reviewing some documents in camera on the basis of deliberative process privilege, the court denied the request as to category 1 and 3, and ordered the Association undertake an adequate and reasonable search for responsive documents under category 2. The trial court also ordered disclosure of non-privileged portions of one document reviewed in camera.

Following judgment, Riskin sought attorney fees of \$123,119 pursuant to Government Code section 6259, subdivision (a). The Association argued Riskin was not the prevailing party, because the one document he obtained was minimal and insignificant and the trial court has discretion to deny attorney fees. The trial court awarded fees of \$71,075.75. Rejecting the Association’s argument that *Los Angeles Times v. Alameda Corridor Transportation Authority* (2001) 88 Cal.4th 1381 authorized the court to deny fees where a PRA plaintiff wins only minimal and insignificant relief, the trial court held that section 6259, subdivision (d) made a fee award mandatory.

Analysis: The Court of Appeal found the trial court erred in concluding it had no discretion to deny Riskin attorney fees. Under the CPRA, the court “shall award court

costs and reasonable attorney’s fees to the requester should the requester prevail in litigation filed pursuant to this section.” Gov. Code, § 6259, subd. (d). Though the statute does not define the term, based on precedent, a party “prevails” when an action results in defendant releasing a copy of a previously withheld document — e.g., if the lawsuit motivated defendant to produce the document, under a catalyst theory.

It mattered not whether the minimal or insignificant standard was dicta in *Los Angeles Times* — the Court found it appropriate under the CPRA and adopted it. Thus, it is for a court to decide whether the documents that plaintiff obtains from the defendant, as a result of a lawsuit, are so minimal or insignificant as to justify a finding that the plaintiff did not prevail. The Court analogized this to other contexts where a court, despite a mandatory fee provision, has discretion to deny fees where the result is so minimal or insignificant to justify finding it did not prevail, e.g., based on the Public Contract Code or partial success on an anti-SLAPP motion. The matter was remanded to the trial court for it to apply the proper standard and to permit the trial court to exercise its discretion as to whether Riskin is a prevailing party.

Given the volume of Public Records Act litigation and the number of lawyers who file such cases in an apparent search for fees, this is an important ruling and should be cited whenever fees are sought in a PRA case that generated only marginal relief or the facts suggest litigation did not catalyze the outcome.

V. MISCELLANEOUS

A. *Hill RHF Housing Partners, L.P. v. City of Los Angeles, et al.* (2021) 12 Cal.5th 458

Holding: Proposition 218’s majority-protest proceeding required for new or increased assessments need not be exhausted before litigation. Property owners are not required to present specific objections to BIDs at public hearings for objections to later be heard on the merits in court.

Facts/Background: A non-profit senior housing provider challenged business improvement district (BID) assessments established in downtown Los Angeles and San Pedro. Each City followed the procedures for BIDs as established in Proposition 218, the Proposition Omnibus Implements Act (Gov. Code, § 53750 et seq.), and the Property and Business Improvement District Law of 1994 (Streets & Highways Code, § 36600 et seq.),

including holding public hearings to consider all objections or protests to the proposed assessments. Assessed property owners overwhelmingly approved renewal of the assessments.

Petitioners voted against renewal of the BID assessments by marking “no” on the ballot, but did not participate in the public hearings or state specific objections to the BID assessments either orally or in writing. They did not identify problems with the assessments or attempt to otherwise exhaust remedies. The City argued the challenger was required to identify at the City’s public hearings the issues or specific objections it would later litigate. The trial court ruled for the City on the merits, finding no issue with failure to exhaust. The Court of Appeal, however focused solely on the exhaustion question, applying the issue exhaustion doctrine, and finding petitioners’ failure to present their specific objections to the BIDs at the appropriate public hearings meant they had not exhausted their extrajudicial remedies, which prevented the court from considering the merits of their claims.

Analysis: Reversed. The California Supreme Court found that the opportunity to comment on a proposed BID at a public hearing does not involve the sort of “clearly defined machinery for the submission, evaluation and resolution of complaints by aggrieved parties” that has allowed the Court to infer an exhaustion requirement in other contexts. The Court thus would not imply an issue exhaustion requirement in these circumstances. It reasoned that the remedy — a noticed opportunity to participate in a public comment session concerning a proposed legislative act under consideration by local officials — did not provide a fulsome “machinery” to resolve disputes. Though the Council had to “consider” objections, “a requirement that objections be *considered*, by itself, places no legal obligation upon an agency to actually *respond* to whatever comments it might receive.” The public comment session was not obviously geared toward resolution of challengers’ objections.

The Court also found no compelling policy arguments for imposing an issue exhaustion rule in this context: exhaustion would not promote development of a record for judicial review (Proposition 218 and the PBID Law already require a detailed management district plan and engineer’s report), nor need for prompt resolution of issues (served by the PBID Law’s 30-day deadline for challenging an assessment). Finally, the Court observed that not requiring exhaustion comports with Proposition 218, with the goal of facilitating challenges to assessments.

The Court’s ruling is narrow. It does not preclude an exhaustion defense in legislative contexts like ratemaking, and does not read Proposition 218 to forbid an exhaustion requirement adopted through legislation or by local ordinance.

B. City of Oxnard v. County of Ventura et al. (2021) 71 Cal.App.5th 1010, review denied March 9, 2022

Holding: As California Supreme Court precedent in *Valley Medical Transport, Inc. v. Apple Valley Fire Protection Dist.* (1998) 17 Cal.4th 747 established, when a city delegates the administration of ambulance services to the surrounding county, which then assumes control, the city may not later attempt to resume administration of those services. The trial court properly applied this holding when it denied Oxnard’s motion for preliminary injunction to prohibit Ventura and Ventura County Emergency Medical Services Agency (VCEMSA) from contracting for ambulance services within City limits.

Facts/Background: The City, County, and other municipalities entered into a joint powers agreement (JPA) in 1971 regarding ambulance services. The JPA provided the County would administer and pay for a countywide ambulance system, and County alone would contract with ambulance service providers for the other JPA signatories. The County established seven exclusive operating areas (EOAs) in which private companies provide ambulance services; the City is in EOA 6, where Gold Coast Ambulance (GCA) is the service provider. In 1980, pursuant to the Emergency Medical Services Act (Health & Safety Code, § 1797.200 et seq.) (the “EMS Act”), the County designated VCEMSA as the exclusive local EMS agency to administer services countywide.

In the 2010s, the City grew dissatisfied with GCA’s services (e.g., contending residents in low- and moderate-income areas were twice as likely to experience delayed responses; GCA spent significant time outside EOA 6). City notified County in December 2020 it intended to withdraw from the JPA to begin administering its own ambulance services on July 1, 2021. City requested the County not extend its contract with GCA. The County did so anyway.

City moved for an injunction to prevent the County from providing ambulance services in the City after June 30, 2021, claiming it retained authority under the EMA Act to provide these services because it was indirectly contracting for the services under the JPA. The trial court disagreed, finding the City lacks authority to contract for its own ambulance

services under the EMS Act. City argued that the trial court erred in concluding the City had no authority to contract for ambulance services, and that the City would suffer no irreparable harm absent an injunction.

Analysis: Affirmed. The EMS Act aims to achieve integration and coordination among government agencies and EMS providers. The Legislature contemplated cities would eventually be integrated into local EMS agencies. While the provision provides a transitional time for cities providing EMS services in 1980 to continue to do so, the intent is for them to cede to local EMS agencies after the grandfathering of existing EMS operations. And it only allows for continuance of existing services — “If a city did not provide or exercise administrative control over a specific type of EMS operations (such as ambulance services) on June 1, 1980, it cannot later seek to provide or administratively control that service. ... This is true even if the city retains some sort of ‘concurrent jurisdiction with the county’ over a service.”

City could not unilaterally resume administration of EMS services which were already contracted under the JPA to the County, and which the County held as of June 1, 1980 under the EMS Act. It did not matter that the City remained a signatory to the JPA. To read section 1797.201 to permit cities that *indirectly* contracted for ambulance services in 1980 to later resume *direct* contracting for those services would render the law’s exemption language meaningless. The Court also reasoned that assuming provision of ambulance services is a police power, the City’s exercise of police powers is subject to constitutional constraints. The EMS Act is a general law, and the City may only make and enforce laws that are not in conflict with general laws.

**C. Crenshaw Subway Coalition v. City of Los Angeles (2022) —
Cal.App.5th — , 2022 WL 620093**

Holding: A disparate impact claim based on a gentrification theory is not cognizable under the Fair Housing Act (FHA) or the Fair Employment and Housing Act (FEHA). Neither FHA nor FEHA afford relief if it causes race to be used and considered in a pervasive and explicit manner in deciding whether to justify governmental or private actions because this would inject racial considerations into the decision. The court held that recognizing Plaintiffs’ gentrification theory would improperly obligate the City to use race in making local planning decisions.

Facts/Background: Three private entities sought to develop what is now the Baldwin Hills Crenshaw Plaza near the Leimert Park neighborhood in Los Angeles. The redevelopment project planned to turn the current retail mall into a mixed-use facility — retail, restaurant, and office space, a hotel, and residential units (condos and apartments, of which 10 percent would be affordable housing). Leimert Park, part of the Crenshaw Corridor, has served as the political, cultural, and commercial heart of the Black community in Los Angeles since the 1960s — 65 percent of Leimert Park’s residents are Black and 25 percent Latinx.

Crenshaw Subway Coalition — a nonprofit organization of residents, property owners, and merchants in South Los Angeles — sued the City of Los Angeles, its City Council, and the developer to enjoin the project, alleging violations of the FHA, FEHA and CEQA. The Coalition alleged the project violated the FHA and FEHA due to the gentrification it would cause. Specifically, it would result in an influx of new, more affluent residents, leading to increased rents and property values, which would push out existing, lower-income residents in the surrounding neighborhoods who are already rent-burdened. The displacement will fall predominantly on lower-income Black and Latinx residents. The Coalition sought an injunction halting the project until measures were taken to ensure protected minorities would not be displaced (at one point in the litigation, it was suggested the developer could set aside all of the new residential units for low-income residents).

The trial court granted City and developer’s motion for judgment on the pleadings, relying on the Supreme Court’s 2020 decision in *AIDS Healthcare Foundation v. Los Angeles* (2020) 50 Cal.App.5th 672, 264 Cal.Rptr.3d 128 (subsequently ordered depublished), which rejected a gentrification-based lawsuit under the FHA. The CEQA claim, too, was dismissed as untimely.

Analysis: Affirmed. First, the Court noted that the Supreme Court’s depublishing of *AIDS Healthcare* was not authority — it could not infer disapproval of the reasoning or holding from the fact of depublishing, and its sole task was to review the trial court’s ruling, not its rationale. Second, the Court clarified that to the extent the Coalition’s theory implicates how to balance social benefits of revitalizing blighted neighborhoods against the resulting social costs of gentrification, it was a question for elected officials, not the Court.

Third, the Court found the FHA and FEHA claims were not legally cognizable based on

the U.S. Supreme Court’s decision in *Texas Department of Housing & Community Affairs v. Inclusive Communities Project, Inc.* (2015) 576 U.S. 519. An FHA disparate impact claim requires a showing the challenged policy or practice has a disproportionately adverse impact on minorities (or other protected group) and is otherwise unjustified by a legitimate rationale. However, the FHA “is not a panacea against all wrongs,” and was instead designed to end segregation by eradicating discriminatory practices within the housing sector that exclude minorities. In other words, it was not intended to displace valid government policies, and thus part of the analysis for an FHA disparate impact claim is whether judicially created safeguards or cautionary standards bring it outside the scope of FHA. The Court discussed three such standards: FHA **may not** be used to (1) inject race into land use decisions; (2) discourage the construction of affordable housing or displace valid governmental policies; or (3) perpetuate segregation.

The Court found the Coalition’s claim ran afoul of each of these safeguards. It injected racial considerations into the City’s decision-making since those displaced are minorities. FHA’s protected categories do not include socioeconomic status, and only includes race discrimination that has “a significantly disparate impact on nonwhites.” If gentrification were a valid theory under FHA, “city officials would be required to avoid gentrification-based displacement for a potential development in a majority minority community, but not for one in a mostly white community.” The Court also noted Plaintiffs’ gentrification theory aimed to keep the Black and Latinx community together in Leimert Park, and thus to perpetuate the segregation of these minority groups.

The Coalition argued the MJOP ruling must also be reversed since it could make a prima facie case of disparate impact discrimination, and this was enough to survive the pleading stage. The Court disagreed, noting this three-step burden-shifting rubric is merely an evidentiary standard to shift the burden of production to identify meritorious claims. But the burden of proof remains with the FHA plaintiff at all times, and Plaintiff must show its claim is cognizable. It cannot. Moreover, allowing the Coalition’s claim to proceed while knowing it will be dismissed on summary judgment would undermine *Inclusive Communities*’s pronouncement that prompt resolution of these cases is important.

Because FEHA provides substantially equal (or broader) protections to FHA, the analysis was the same, specifically the same safeguards read into FHA must be read into FEHA — “namely, the concern that such claims not be used to coopt FEHA into a tool for injecting race into city planning decisions, for discouraging affordable housing, or for perpetuating racial segregation in housing patterns.”

**D. *Houston Community College System v. Wilson* (2022) 595 U.S. ___,
2022 WL 867307**

Holding: A community college board of trustee member has no First Amendment retaliation claim arising from the Board of Trustee’s censure arising from his repeated litigation against the District. The First Amendment historically permits free speech on both sides and for every faction on every side. Censure is nothing new, and there is no evidence suggesting a verbal censure has ever been widely considered offensive to the First Amendment. Plaintiff cannot make out a First Amendment retaliation claim since the Board’s censure does not qualify as a materially adverse action capable of deterring Wilson from exercising his own right to speak.

Facts/Background: In 2013, David Wilson was elected to the Board of Trustees of the Houston Community College System, a public entity. He often disagreed with the Board about the best interests of HCC, and brought multiple lawsuits challenging its actions. By 2016, the Board reprimanded Wilson publicly. Then in 2018, the Board adopted a public resolution “censuring” Wilson and stating his conduct “was not consistent with the best interests of the College” and was “reprehensible.” The Board also adopted penalties, which included making Wilson ineligible for Board officer positions in 2018. Wilson amended one of his lawsuits to add a § 1983 claim asserting the Board’s censure amounted to retaliation for his exercise of free speech rights (in the form of litigation) and itself violated the First Amendment. The HCC removed the case to federal court. While the district court found Wilson lacked standing, the Fifth Circuit reversed and found Wilson had a viable First Amendment claim.

Analysis: The Supreme Court reviewed only whether Wilson had an actionable First Amendment claim for retaliation arising from the Board’s censure, answering “no.” To determine whether the Board’s censure was impermissible retaliation, the Court noted “elected bodies in this country have long exercised the power to censure their members,” and noting “no one before us has cited any evidence suggesting that a purely verbal censure analogous to Mr. Wilson’s has ever been widely considered offensive to the First Amendment.” Congress censures Members for objectionable speech directed at fellow Members, media comments, and public remarks disclosing confidential information; censure is common, too, at state and local levels. Thus, historically, the First Amendment permits free speech on both sides and for every faction on any side.

Moreover, for a First Amendment retaliation claim, there must be an adverse action by government in response to the speech that would not have been taken absent the retaliatory motive. The Court noted the ease of identifying such specific adverse actions — arrest, prosecution, dismissal from employment. On the other end of the spectrum, a mere frown from a supervisor is not actionable. In distinguishing material from immaterial adverse actions, the Court noted: (1) Wilson is an elected official, and thus expected to shoulder a degree of criticism about his public service, but continue with his free speech nonetheless; and (2) the only “adverse action” is itself speech from Wilson’s colleagues that concerns the conduct of public office. The Court concluded there was no adverse action since the censure at issue was itself a form of speech by elected representatives. Too, the censure did not prevent Wilson from doing his job, nor deny him a privilege of office. The facts showed that Wilson did not cower and remain quiet after the censure — he spoke his mind and pursued his lawsuit.

The Court left open whether under different circumstances, censure that materially impairs First Amendment freedoms is actionable, also noting the case’s limited scope and inapplicability to questions concerning legislative censures accompanied by punishments, those aimed at private individuals, or those involving censure by one legislative body of a member of another body. The ruling is narrow but helpful especially given that censures are not uncommon in the life of local government.



(MCLE Specialty Credit for Ethics)

Update on Counsel & Council Publication - A Focus on Ethics

Friday, May 6, 2022

Valerie Armento, Chair, Ad Hoc Counsel and Council Committee, Interim City Attorney/General Counsel, East Palo Alto/Santa Clara County Habitat Agency
Glen Googins, City Attorney, Chula Vista
Inder Khalsa, City Attorney, Davis, Mill Valley, Richards, Watson & Gershon

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Find the paper for the session **Update on Counsel & Council Publication – A Focus on Ethics** at the following link:

<https://www.calcities.org/resource/counsel-and-council-a-guide-to-building-a-productive-city-attorney-city-council-relationship>



(MCLE Specialty Credit for Ethics)

Rules of Professional Conduct for City Attorneys

Friday, May 6, 2022

Heather Linn Rosing, Shareholder and CEO, Klinedinst

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**Rules of Professional Conduct for
City Attorneys**

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[Friday, May 6, 2022, 10:30 a.m. – 12:30 p.m. general session]

I. OVERVIEW AND THE EVOLUTION OF THE CALIFORNIA RULES OF PROFESSIONAL CONDUCT

Creating and maintaining confidence in lawyers and the profession of law has always been a mainstay in our system of justice. California lawyers service clients from around the globe in a very wide variety of matters. How lawyers are perceived is not only a function of the results they achieve, but how the profession adheres to and embraces the ethical standards. The public unquestionably expects lawyers, with their specialized training and education and status in society, combined with the oath of office, to adhere to the highest of standards.

The California State Bar Act of 1927 created the State Bar of California as an integrated bar; since that time the State Bar has been de-unified, with the traditional professional association functions taken up by the California Lawyers Association. As part of that package of reforms almost a century ago, the first California Rules of Professional Conduct were written and adopted in 1928. The more modern form of the Rules of Professional Conduct were adopted in 1987, with California rejecting the ABA Model Rules of Professional Conduct.

As the profession evolved, and it became clear that the rules were outdated, the First Rules Revision Commission was established, and an extensive package of revisions was proposed to the State Bar Board of Trustees in 2010. In 2014, the Supreme Court of California asked the State Bar Board of Trustees to institute a Second Rules Revision Commission to start the revision process over, with a deadline to complete the project of March 2017.

In the charter that was given to the Commission, the Supreme Court indicated that the Commission's work should promote confidence in the legal profession and the administration of justice, and ensure adequate protection to the public. It was additionally requested that this new Commission consider the historical purpose of the Rules of Professional Conduct in California, and ensure that the proposed rules set forth a clear and enforceable articulation of disciplinary standards, as opposed to purely aspirational objectives. The Supreme Court further mandated that the Commission's work facilitate compliance with and enforcement of the Rules by eliminating ambiguities and uncertainties.

The Second Rules Revision Commission engaged in extensive process to propose new rules and submitted a new package of rules to the Supreme Court by the deadline. They were substantially adopted and put into effect on November 1, 2018. Importantly, the Rules of Professional Conduct are designed to be entirely consistent with, and must be read in conjunction with, the legislation governing the profession of law, which is known as the State Bar Act, found in Business & Professions Code section 6000 et seq.

The purpose of the Rules is to regulate the conduct of lawyers through discipline. The Rules do not create independent civil causes of action. Though governmental lawyers such as those with the Office of the City Attorney face unique challenges in a highly specialized environment, such governmental lawyers are equally bound by the Rules of Professional Conduct, and subject to discipline accordingly.

Most importantly, understanding and living by the rules of ethics, as well as maintaining a high level of civility and morality, inures confidence in our noble profession and helps us maintain our democracy, with confidence that all persons and entities that seek remedy through our legal system will have equal access to justice.

II. FIVE CORE ETHICS AREAS FOR CITY ATTORNEYS

A. Who is the client in the Office of the City Attorney?

This is not a question that is unique to a City Attorney. To the contrary, this is a question that all licensed practitioners across the country grapple with on a daily basis.

The primary Rule of Professional Conduct in California that addresses the issue is Rule 1.13, Organization as Client. In section (a), it provides that “[a] lawyer employed or retained by an organization shall conform his or her representation to the concept that the client is the organization itself, acting through its duly authorized directors, officers, employees, members, shareholders, or other constituents overseeing the particular engagement.” In other words, while the client is the

entity itself, the direction in the course of the relationship must come from a duly authorized person.

In subsection (f), the Rule goes on to explain as follows: “In dealing with an organization’s constituents, a lawyer representing the organization shall explain the identity of the lawyer’s client whenever the lawyer knows or reasonably should know that the organization’s interests are adverse to those of the constituent(s) with whom the lawyer is dealing.” In other words, if the lawyer for the entity is speaking to a constituent who may be adverse to the client, the lawyer should clearly explain who that lawyer represents. In that manner, there can be no confusion.

The Rule also imposes certain duties to proceed as is reasonably necessary in the best lawful interests of the organization (subsection (b) and (d)) and to refer matters to higher authorities within the organization (subsection (b)), as well as to consider whether resignation or withdrawal would be appropriate under certain circumstances under Rule 1.16 (subsection (d)).

Importantly, as described in Comment [1], the Rule applies to all forms of private, public, governmental organizations. Comment [6] specifically addresses governmental organizations, and explains as follows:

[6] It is beyond the scope of this rule to define precisely the identity of the client and the lawyer’s obligations when representing a governmental agency. Although in some circumstances the client may be a specific agency, it may also be a branch of government or the government as a whole. In a matter involving the conduct of government officials, a government lawyer may have authority under applicable law to question such conduct more extensively than that of a lawyer for a private organization in similar circumstances. Duties of lawyers employed by the government or lawyers in military service may be defined by statutes and regulations. In addition, a governmental organization may establish internal organizational rules and procedures that identify an official, agency, organization, or other person to serve as the designated recipient of whistle-blower reports from the organization’s lawyers, consistent with Business and Professions Code section 6068,

subdivision (e) and rule 1.6. This rule is not intended to limit that authority.

In the case of any attorney who works within the Office of the City Attorney, the primary client is, unequivocally, the city. The job should be viewed through this lens, particularly in situations where the interests of certain constituents, community members, employees, or elected officials could conflict with the interest of the city.

The case of *Ward v. Superior Court* (May 24, 1997) 70 Cal.App.3d 23, provides guidance on the issue. In this matter, the real party in interest, Watson, was the incumbent assessor for the County of Los Angeles. He represented that the County Counsel had been the legal representative of his office and advised his office on questions of law and taxability. He also represented that County Counsel had counseled him upon personal matters and in civil actions in which he was individually named as a defendant. Watson listed several cases in which County Counsel had provided such representation. He sought to disqualify County Counsel from providing representation adverse to him in a matter brought by him individually and as a taxpayer, claiming that County Counsel's clients violated his constitutional rights by unlawful surveillance, unlawful attempts to obtain tax records, and the publishing of libelous statements concerning him.

In response to the motion for disqualification, County Counsel stated that Watson had only been represented as a public officer, and he had not been provided representation in personal matters unrelated to his duties and responsibilities as a public officer. County Counsel also denied receiving confidential communications from Watson which related to the subject matter of the lawsuit.

The appellate court vacated the trial court's order granting the motion for disqualification. In doing so, the appellate court began the analysis by stating that County Counsel only has one client, "namely, the County of Los Angeles." The court further found that County Counsel is obligated to represent County officers in civil actions, but only as to matters wherein such officers acted in the representative capacity within the scope of their official duties. The court examined the case of *In Meehan v. Hopps*, 144 Cal.App.2d 284, wherein the Court of Appeal held that "the mere fact that attorneys...served as corporate counsel to [a corporation] on various matters did not establish

an attorney-client relationship between ... a former director, chairman of the executive committee, chairman of the board of directors and principal shareholder of the corporation, and the former corporate counsel..." Accordingly, in the *Ward* matter, the appellate court found that no attorney-client relationship existed between County Counsel and Watson.

Additionally, the Court of Appeal found that Watson's declaration in support of his motion to disqualify the County Counsel set forth no facts showing the nature of alleged confidential communications between him and County Counsel. In so finding, the court commented as follows: "Any communication between Watson and the county counsel, pursuant to the discharge of their respective duties, concerning the operation of the assessor's office could not be considered a secret confidential communication so as to bar the county, acting through the board of supervisors, from obtaining that information. The assessor is an agent of the county... As such, the assessor has a duty of full disclosure to his principal, the county. Communications by the assessor with respect to the operations of his office made to the county counsel are not subject to a claim of privilege as between the assessor and members of the board of supervisors, who are charged by law with the duty of supervising the conduct of the assessor's office."

Another illustrative case is *People ex rel Deukmejian v. Brown* (March 12, 1981) 29 Cal.3d 150. In that matter, at the urging of the Atty. Gen., the Governor adopted a measure that was described as a well-accepted, existing method of resolving labor/management disputes. Shortly thereafter, several groups filed a petition for writ of mandate, contending the legislation was unconstitutional. The Atty. Gen. thereafter met with the State Personnel Board to discuss options with regard to the lawsuit.

The Court of Appeal found that the Atty. Gen. was, by law, the designated attorney for both the Governor and the State Personnel Board. However, the Atty. Gen., in the same timeframe, initiated a proceeding by filing an independent petition for writ of mandate against the Governor and state agencies, asking for relief comparable to that requested by the groups seeking to have the legislation declared unconstitutional.

The appellate court framed the question, and stated the holding, as follows: “The issue then becomes whether the Attorney General may represent clients one day, give them legal advice with regard to pending litigation, withdraw, and then sue the same clients the next day on a purported cause of action arising out of the identical controversy. We can find no constitutional, statutory, or ethical authority for such conduct by the Attorney General.”

In making these determinations, the Court of Appeal analyzed a number of cases, and grappled with the contention of the Atty. Gen. that he is not bound by the rules that control the conduct of other attorneys in the state, because he is a protector of the public interest. While acknowledging the role of the Atty. Gen. as a guardian of the public interest, the court found nothing to justify the relaxation of the rules governing the assumption of a position adverse to clients or former clients, particularly in litigation that arose during the course of the attorney-client relationship. Accordingly, the Court of Appeal found that the Atty. Gen. was enjoined from proceeding in a matter, and the petition should be dismissed.

In dissent, one justice found that the majority opinion “may well serve to deprive the office of the Attorney General of its traditional authority to initiate judicial proceedings which challenge the constitutional basis for procedures which are undertaken or threatened to be undertaken by public officials, including the Governor, when the Attorney General reasonably and in good faith believes such procedures to be defective.”

These application of these nuanced and fact specific cases, and others like them, are complicated by the fact that there is law typically requiring city attorneys to advise specific officials. See, Government Code section 41801.

In one matter, which has been partially distinguished by other cases, the appellate court found that a city councilmember facing criminal charges could not evade prosecution by arguing “entrapment by estoppel,” claiming she acted in reliance upon the direction of the City Attorney. *People v. Chacon* (February 8, 2017) 40 Cal. 4th 558. The defendant argued she was entitled to assert the defense because the City Attorney was a government lawyer authorized to advise the city council members on legal matters.

The trial court denied a motion to exclude evidence of the City Attorney’s advice, and ruled that the city councilmember defendant could present evidence of entrapment by estoppel. The prosecution determined that it could not proceed, and, after an order of dismissal was entered, appealed.

The Court of Appeal reversed the order of dismissal, finding that the City Attorney has neither enforcement nor regulatory authority over criminal conflict of interest statutes. The appellate court found that while the City Attorney as a lawyer may interpret statutes, the City Attorney is not authorized to criminally of force or administer the law. Therefore, the City Attorney is not similarly situated to those public officials whose actions have been found to bind the state. Accordingly, the defense of entrapment by estoppel was not available under that particular record.

While the city is the client, there are instances in which the City Attorney has more than one client. In these instances, the joint representation should be recognized, as well as the consequences. For example, if the joint clients become adverse at some point in time, the city may not represent either in litigation. Outside counsel may need to be retained.

Practical note: The question of *who is the client*, and how to navigate the relationship in light of the identification with client, is the primary and threshold question for every lawyer at the outset of representation. It is difficult, if not impossible, for a lawyer to conduct him or herself without knowing who the clients are in that particular matter, and, therefore, knowing what considerations in both the confidentiality and conflict of interest arenas may apply to the scenario.

In particular, with regard to confidentiality, the attorneys in the Office of the City Attorney should, in the course of communicating with city employees, be very diligent about advising and reminding that the client is the city itself, and there is no confidentiality as to communications with a particular city employee.

B. What is the proper methodology for communication with the city client?

Proper and thoughtful lines of communication are critical for the maintenance and success of any attorney-client relationship. Rules of Professional Conduct Rule 1.14, Communication with Clients, requires a lawyer to reasonably consult with the client about the means by which to accomplish the client’s objectives (subsection (a)(2)), and keep the client reasonably informed about significant developments (subsection (a)(3)). The lawyer is also obligated to explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation (subsection (b)). A lawyer is not required, however, to communicate insignificant or irrelevant information (Comment [1]).

The standard is reinforced by Business and Professions Code section 6068(m), which indicates that it is a duty of an attorney “[t]o respond promptly to reasonable status inquiries of clients and to keep clients reasonably informed of significant developments in matters with regard to which the attorney has agreed to provide legal services.”

As discussed above, Rule of Professional Conduct Rule 1.13 imposes certain duties upon any attorney to “report up the chain” as a protective measure for the entity. Specifically, this duty may exist if the lawyer knows or reasonably should know that a constituent is acting, intends to act, or refuses to act in a manner that is “(i) a violation of a legal obligation to the organization or a violation of law reasonably imputable to the organization, and (ii) likely to result in substantial injury to the organization.” In so conducting his or herself, the attorney must be cognizant of the duty of confidentiality as set forth below, and not disclose information outside of the entity itself.

In considering the obligations of communication, the City Attorney must also keep in mind that ultimately he or she takes direction from a majority of the City Council members, on issues

subject to City Council approval. Therefore, the lines of communication must conform to this ultimate decision-making authority. With regard to interactions with a mayor or city manager, the City Attorney must intimately understand the parameters of that person's authority, versus the authority of the City Council, and communicate accordingly.

Practical note: While city attorneys are not subject to malpractice lawsuits in the same way that nongovernmental attorneys are, it is commonly claimed in both malpractice matters and State Bar disciplinary matters that the attorney has failed to communicate with the client, leaving the client feeling abandoned, or in a position where the client does not have adequate information to make informed decisions regarding his or her legal affairs. It is very easy for a lawyer to get caught up in his or her day-to-day work, neglecting regular and clear client communications not only about the status of the matter in hand, but the pros and cons of different courses of action and recommendations regarding the same. While verbal communications are a critical part of any attorney-client relationship, creating and transmitting writings that nonlawyer clients can easily understand has become a necessity in today's environment. All lawyers are encouraged to speak with their client representatives regarding preferred courses of communication and to consciously decide on the best methodologies for keeping that particular client informed.

C. What is the application of the duty of confidentiality?

California has one of the strongest duties of confidentiality in the country, as set forth in Business and Professions Code section 6068(e). This is described as the duty "to maintain inviolate the confidence, and at every peril to himself or herself to preserve the secrets, of his or her client."

The duty of confidentiality is distinct from the attorney-client privilege, and, in most instances, is broader, as it transcends communications between the attorney and the client. Evidence Code section 952 describes a confidential communication between a lawyer to client as "information transmitted between a client and his or her lawyer in the course of that relationship and in confidence by a means which, so far as the client is aware, discloses the information to no third persons other than those who are present to further the interest of the client in the consultation or those to whom disclosure is reasonably necessary for the transmission of the information or the

accomplishment of the purpose for which the lawyer is consulted, and includes a legal opinion formed and the advice given by the lawyer in the course of that relationship.”

The holder of the privilege is not the lawyer, but the client, pursuant to Evidence Code section 953. The lawyer is in fact obligated to claim the privilege under Evidence Code section 955. There are several exceptions to the privilege, including the crime fraud exception under Evidence Code section 956.

The application of the duty of confidentiality is also discussed in Rules of Professional Conduct Rule 1.6, Confidential Information of the Client. Pursuant to that Rule, “[a] lawyer shall not reveal information protected from disclosure by Business and Professions Code section 6068, subdivision (e)(1) unless the client gives informed consent, or the disclosure is permitted by paragraph (b) of this rule.” Under subsection (b), “[a] lawyer may, but is not required to, reveal information protected by Business and Professions Code section 6068, subdivision (e)(1) to the extent that the lawyer reasonably believes the disclosure is necessary to prevent a criminal act that the lawyer reasonably believes is likely to result in death of, or substantial bodily harm to, an individual, as provided in paragraph (c).”

When advice is given to an official or constituent within the city in the individual’s capacity with the city, there is generally no separate attorney-client privilege or duty of confidentiality inuring to the benefit of that individual. As discussed above, prior to communications with any officials or constituents, the lawyer with the Office of the City Attorney should advise of the fact that such communications are not privileged from the city itself. In other words, the individual should have no expectation of confidentiality in that regard.

Roberts v. City of Palmdale (June 24, 1993) 5 Cal.4th 3 is illustrative on this point. In this case, the California Supreme Court considered a number of questions pertaining to the application of the attorney-client privilege in the context of a relationship between the City Attorney and city council.

In confirming the applicability of the attorney-client privilege between the City Attorney and the city council, the Supreme Court stated that “a city council needs freedom to confer with its lawyers confidentially in order to obtain adequate advice, just as does a private citizen who seeks legal counsel, even though the scope of confidential meetings is limited by this state's public meeting requirements.” Neither the Public Records Act nor the Brown Act abrogate the privilege as to written legal advice transmitted from the City Attorney to members of the local governing body.

In considering the duty of confidentiality, all City Attorneys should also keep in mind California State Bar Formal Opinion 2010-179, which confirms that an attorney can violate his or her duty of confidentiality and competence failing to ensure that the technology used in the course of the provision of legal representations is sufficient to ensure that the information is not subject to invasion. Specifically, before using a particular technology, the Office of the City Attorney must take appropriate steps to evaluate “1) the level of security attendant to the use of that technology, including whether reasonable precautions may be taken when using the technology to increase the level of security; 2) the legal ramifications to a third party who intercepts, accesses or exceeds authorized use of the electronic information; 3) the degree of sensitivity of the information; 4) the possible impact on the client of an inadvertent disclosure of privileged or confidential information or work product; 5) the urgency of the situation; and 6) the client’s instructions and circumstances, such as access by others to the client’s devices and communications.”

Confidentiality has gained new attention in light of remote working environments as well. For decades, lawyers have practiced law from their office, appeared personally in the courts; and attended key events such as client meetings, mediations, depositions, transactional closings, and more in person. The pandemic changed that, giving lawyers the flexibility to provide legal services remotely from another state or even potentially another country. This has been widely viewed as a positive development, for example, allowing lawyers to spend more time with their families and achieve a higher level of work life balance.

Until recently, there were few ethics opinions addressing the situation. In response to the pandemic, on March 10, 2021, the American Bar Association issued Formal Opinion 498,

indicating that the ABA Model Rules permit virtual practice, while reminding lawyers that they must particularly consider ethical duties regarding competence, diligence, communication, and supervision. The opinion recognizes that “a lawyer’s virtual practice often occurs when a lawyer at home or on-the-go is working from a location outside the office, but a lawyer’s practice may be entirely virtual because there is no requirement in the Model Rules that a lawyer have a brick-and-mortar office.”

The State Bar of California published Interim Ethics Opinion 20-0004, addressing a California lawyer’s ethical duties when working remotely in response to the COVID 19 pandemic or another disaster situation. The Interim Opinion draws conclusions similar to those found in ABA Formal Opinion 498. It states, in conclusion, “Lawyers may ethically practice remotely under the California Rules of Professional Conduct and the State Bar Act, provided they continue to comply with these rules, including the duties of confidentiality, competence, communication, and supervision. Lawyers must implement reasonable measures to ensure compliance that are tailored to the relevant circumstances and remote working environment.”

These opinions stressed the importance of confidentiality in remote working arrangements, and, in particular, ensuring that the lawyer has reasonable measures through the IT infrastructure to safeguard the client information, and ensuring that the law firm or agency has reasonable remote policies and practices in place, including the attendant training of relevant employees.

Practical note: The duty of confidentiality can also be violated through inadvertence. This can include holding a confidential conversation on a mobile phone in an area where others can overhear the conversation; engaging casual chatter at a cocktail party; leaving confidential documents unsecure in public areas; and an inappropriate level of sharing of confidential information with family members or intimate acquaintances. A constant state of heightened awareness is necessary in order to ensure the protection of client information.

D. What are the managerial and supervisory responsibilities within the Office of the City Attorney?

With the promulgation of the new Rules of Professional Conduct on November 1, 2018 came newly articulated standards regarding the responsibilities of managerial and supervisory lawyers.

Rule 5.1 provides that “[a] lawyer who individually or together with other lawyers possesses managerial authority in a law firm, shall make reasonable efforts to ensure that the firm has in effect measures giving reasonable assurance that all lawyers in the firm comply with these rules and the State Bar Act.” Moreover, “[a] lawyer having direct supervisory authority over another lawyer, whether or not a member or employee of the same law firm, shall make reasonable efforts to ensure that the other lawyer complies with these rules and the State Bar Act.” Under the terminology section of the Rules of Professional Conduct, firm or law firm includes a governmental organization. Rule 5.1 concludes with section (c), which indicates that a lawyer can be responsible for another lawyer’s violation of the Rules of Professional Conduct in the State Bar Act, under certain circumstances. In other words, a lawyer can be disciplined for the conduct of an attorney that he or she manages or supervises.

It was widely anticipated that the new Rule 5.1 would have an effect on how law organizations are managed and how more junior attorneys are trained and supervised. Practical tips emerged as a result, including the following best practices:

- Establishment of internal policies and procedures
 - to detect and resolve conflicts of interest
 - to identify dates by which actions must be taken in pending matters,
 - to account for client funds and property
 - to ensure that experienced lawyers are properly supervised
 - to take remedial action in the event that misconduct is detected
- Establishment of a point of contact for lawyers to consult regarding ethics-related matters
- Development of systems for nonlawyers to make reports regarding problematic lawyer conduct
- Creation and implementation of reasonable guidelines relating to the assignment of cases and distribution of workload for all lawyers, but particularly lawyers in a public sector legal agency or other legal department

Rule 5.3, Responsibilities regarding Nonlawyer Assistants, also went into effect on November 1, 2018, and provides that “[w]ith respect to a nonlawyer, . . . a lawyer who individually or together with other lawyers possesses managerial authority in a law firm, shall make reasonable efforts to ensure that the firm has in effect measures giving reasonable assurance that the nonlawyer’s conduct is compatible with the professional obligations of the lawyer.” The same general premise is in effect for lawyers having direct supervisory authority over nonlawyers. As with Rule 5.1, a lawyer responsible for the managing or supervising a nonlawyer shall be responsible for the conduct of that person under certain circumstances.

Nonlawyers covered by this rule can include secretaries, investigators, law school interns, and paraprofessionals, whether employed or serving as independent contractors. This could also include outsourced legal services.

In the Matter of Sullivan (Review Dept. 1997) 3 Cal. State Bar Ct. Rptr. 608, is an illustrative tale regarding supervision of nonlawyers. In that matter, the lawyer respondent, who had no record of discipline, maintained a practice emphasizing personal injury matters. During the relevant time period, he had 4 law offices and employed 7 attorneys and 15 nonlawyer staff members. He maintained a volume of approximately 1600 cases.

Sullivan represented a client named Yang in an arbitration hearing, and, after Sullivan failed to appear at several hearings, the action was dismissed. After the departure of a secretary, Sullivan found notices of the various dates and proceedings in the matter in her desk drawer. It was uncontested that Sullivan was unaware of these notices. Nevertheless, the hearing judge concluded that “[h]ad there been in place an effective system for periodic attorney review, the problem would have been discovered much earlier; and the client, better served.”

Based on this violation, as well as others, it was recommended he be suspended from the practice of law for a period of one year, with the execution of the order of suspension stayed.

Practical tips have emerged in light matters such as *Sullivan* and Rule 5.3, including the following:

- Thoughtful training of all new employees, and especially those who may not have had prior legal training
- Carefully formulated employee manual with signatures
- Regular controls and review for all matters in the office
- Clear lines of communication within the office
- Proactive steps to address breakdowns in communication
- Reports up the chain of command in the law organization

These rules regarding supervision do not differentiate between small offices, large offices, and in-house legal departments at corporations or governmental organizations. They apply uniformly to all organizations.

E. What is the interplay between civility and ethics in the context of representation provided by the Office of the City Attorney?

For decades, Bar Associations have promulgated ethics codes that talk about the ideal conduct of lawyers. These codes ask that all lawyers aspire to act with the highest levels of civility, integrity, and professionalism.

In recent years, given what some perceive to be a decline of civility in the profession, the focus has shifted from aspirational codes to decisive measures to combat incivility, particularly in the context of litigation. The rationale is that incivility frustrates the ability of judges to control the courtroom and allow the smooth progress of the cases. It sometimes manifests itself in the context of bias against attorneys or parties of a certain gender, race, or other protected characteristic. Inappropriate animosity among counsel can cause the fees charged to the clients to double or even triple. The consequences to the system of justice and the perception of the profession of law are enormous.

The State Bar of California, the California Lawyers Association, and the California Judges Association came together to start a statewide Civility Task Force, which issued a report on September 9, 2021. The report is entitled “Beyond the Oath: Recommendations for Improving Civility.” It presents four concrete proposals. The first is ask the State Bar Board of Trustees to mandate one hour of civility MCLE training. The second is to ask the Chief Justice, as head of the Judicial Council and the Center for Judicial Education and Research Advisory Committee, provide specific training to judges on promoting civility inside and outside courtrooms.

The third proposal is to ask the State Bar Board of Trustees to recommend revisions to the Rules of Professional Conduct to state that repeated incivility constitutes professional misconduct under certain circumstances. The final proposal asks that the Supreme Court amend the Rules of Court to require all attorneys to swear and affirm that they will conduct themselves at all times of dignity, courtesy, and integrity.

The appellate courts across the state have also issued a variety of opinions that discuss the consequence of incivility on a matter being adjudicated in our state court system. In *LaSalle v. Vogel* (2019) 36 Cal.App.5th 127, the appellate court specifically found that, in the fact pattern presented to it, “dignity, courtesy, and integrity were conspicuously lacking.” The appellate court set aside a default judgment that was taken without appropriate courtesies to the other side. In *Karton v. Ari Design & Constr.* (2021) 61 Cal.App.5th 734, in the course of a considering a motion for attorney’s fees, the trial court noted incivility in the attorney’s briefing. The appellate court found that “excellent lawyers deserve higher fees, and excellent lawyers are civil.... Incivility can rankle relations and thereby increase the friction, extent, and cost of litigation. Calling opposing counsel a liar, for instance, can invite destructive reciprocity and generate needless controversies.” Both the trial court and the appellate court found that the findings of incivility were a sound base (among other bases) for reducing the requested attorney fee from about \$300,000 to \$90,000.

Practical note: Given the enhanced scrutiny given to actions of the Office of the City Attorney in any given municipality, adherence to civility standards is doubly important. The

conduct of the attorneys for the city reflect upon the city itself, and ultimately influence public perception and support of the office.



LEAGUE OF
CALIFORNIA
CITIES

Speakers' Biographies



Valerie Armento

After graduating Phi Beta Kappa, summa cum laude, from Dartmouth College in its first coeducational class, Valerie obtained both Juris Doctor and Master of Regional Planning degrees from Cornell University. She spent her entire full-time career in municipal law in legal departments for several cities in the San Francisco Bay Area: Fremont, Hayward, South San Francisco and Sunnyvale, eventually retiring as the City Attorney for the City of Sunnyvale. In 2000-2003, she served as a City Attorney Department Officer. Since retiring from Sunnyvale, Valerie has continued to work as an interim city attorney (Napa and Santa Clara, as well as at least half a dozen times for the City of East Palo Alto) and on special projects for different local government entities. Since 2014, Valerie has been the part-time general counsel for the Santa Clara Valley Habitat Agency, a joint powers authority that focuses on the preservation and restoration of endangered species and their habitat in southern Santa Clara County.



Celia Brewer

A City Attorneys Department Past President and president of the City Attorneys Association of San Diego County twice. Celia is retiring following a 29-year career in public service, the last nine and a half at the City of Carlsbad. During her tenure as Carlsbad City Attorney, Brewer was a key member of the team that negotiated a historic agreement with NRG Energy and SDG&E to remove the aging power plant from Carlsbad's coast. Today, the above ground demolition is nearly complete. The site will eventually be redeveloped, and provisions in the agreement call for significant collaboration with the community on its future use. In Carlsbad, Brewer also led a team that developed a creative solution combining a lawsuit settlement, an interested developer and several environmental groups. This agreement resulted in completion of the long-awaited Poinsettia Lane connection and the repurposing of an abandoned reservoir site into Buena Vista Reservoir Park, which opened late last year – both paid for by a developer. Brewer began her public service career in Solana Beach, first as deputy city attorney and eventually as city attorney, where she helped resolve issues related to moving the railroad tracks below street level, a project that improved safety and helped revitalize this small coastal city. In addition to working directly for public agencies, Brewer has worked in private practice representing municipalities, special districts and nonprofit organizations. In 2007, Brewer joined the San Diego County Water Authority as Assistant General Counsel. In this role she developed model conservation ordinances that today serve as the foundation for water district conservation programs throughout San Diego County. She also worked on resolving disputes related to the construction of the All American and Coachella canal lining projects. Brewer's penchant for successfully negotiating complex land use and environmental agreements led her in 2010 to the San Diego Unified Port District. As Assistant Port Attorney and Interim Port Attorney, she helped resolve community concerns about the North Embarcadero Visionary Plan, ultimately securing Coastal Commission approval for the 30-year plan to transform what has been called San Diego's "front porch." Her time at the port also involved the demolition of an old power plant. In this case, Brewer helped develop a strategy that expedited the above ground demotion of the South Bay Power Plant, something community members wanted for years. Just a month after Brewer left the port for Carlsbad, more than 1,000 people gathered in the early morning hours to watch the plant's implosion. Active in her profession, Brewer has served as the president of the California League of Cities City Attorneys Department, and she has been president of the City Attorneys Association of San Diego County twice. Brewer earned her Juris Doctorate degree from the University of San Diego School of Law and a bachelor's degree in urban studies and planning from UCSD. In 2018 UCSD featured Brewer in its on-campus banner program highlighting alumni who have made a difference in the world. In addition to her work as a public lawyer, Brewer is the proud mother of three children, the youngest of whom is graduating from college this spring.



Jeb Brown

Jeb is a graduate of Cal State University, San Bernardino with a Bachelor of Science Degree in Political Science. He obtained his Juris Doctor from the McGeorge School of Law, University of the Pacific. He is licensed to practice law before all of the Courts of the State of California as well as the United States District Court, Central District of California, Southern District of California, 9th Circuit Court of Appeals, and the United States Supreme Court. In 1992, Jeb began his career with the law firm of Fidler and Bell, (now Orrock, Popka, Fortino Tucker and Dolen) in Riverside, where he represented numerous public agencies. In 1995 he joined the Riverside City Attorney's Office as a litigation deputy and handled civil litigation, employment advice, supervision and direction of outside counsel and risk management. He worked closely with the Riverside Police Department, providing them with various legal services. In May, 2001, he left the City of Riverside to work at the municipal law firm of Burke, Williams & Sorensen, representing several public entities, including the Cities of Hemet, Santa Clarita and Compton. In August, 2002, he returned to the Riverside City Attorney's Office as Supervising Deputy City Attorney for the Litigation Services Section. Jeb was the Legal Advisor to Public Safety (Police and Fire), provided advice on employment issues and represented the City and its employees in both state and federal court. In 2014, Jeb left the City of Riverside to become Chief Assistant County Counsel for Riverside County where he supervised 30 attorneys. He represented public safety departments including the Probation Department, Department of Social Services, Fire Department and Sheriff's Department. Jeb also handled high value litigation for multiple County departments. In 2022, Jeb joined the firm of Liebert Cassidy Whitmore where he continues to represent public entities with a focus on public safety matters. Jeb is a Past President and board member of the Leo A. Deegan Inn of Court and the Inland Empire Federal Bar Association. He was an adjunct professor at University of La Verne College of Law from 2008 until 2018 teaching Civil Rights, First Amendment, Federal Courts and Conflict of Laws. Jeb was Lawyer Representative to the Ninth Circuit and currently serves the Federal Court as an Attorney Settlement Officer. He is a graduate of Leadership Riverside (2005), a year-long leadership class sponsored by the Chamber of Commerce. Jeb served on the Leadership Riverside Board from 2007 until 2019, chairing the class of 2014. Jeb recently attended Mediating the Litigated Case at the Strauss Institute at Pepperdine Law School, receiving a certificate. Jeb holds the prestigious International Municipal Lawyers Association Fellow designation (Since 1999, 120 lawyers in the United States and Canada have received this designation). Jeb also holds an ADA Employment Certificate from the ADA Coordinator Training Certificate Program. Jeb has been a speaker for the League of California Cities, International Municipal Lawyers Association, California County Counsels Association, Americans for Effective Law Enforcement, Institute for the Prevention of In-Custody Deaths, Federal Bar Association, California State Association of Counties, University of Laverne Law School Civil Rights Symposium, American Jail Association, Riverside County Bar Association and the Los Angeles County Bar Association.



Timothy T. Coates

Tim Coates is a partner at the appellate firm of Greines, Martin, Stein & Richland LLP in Los Angeles, and over the past 38 years he has briefed and argued more than 350 matters in the state and federal appellate courts, including successfully arguing five cases in the United States Supreme Court, and obtaining a per curiam reversal in a sixth case. Tim's Supreme Court victories have addressed absolute and qualified immunity (*Van de Kamp v. Goldstein*, 555 U.S. 335 (2009), *Messerschmidt v. Millender*, 565 U.S. 535 (2012), *Stanton v. Sims*, 571 U.S. 3 (2013)), Monell liability (*Los Angeles County v. Humphries*, 562 U.S. 29 (2010)) and warrantless arrests (*County of Riverside v. McLaughlin*, 500 U.S. 44 (1991)). He has been named a Southern California Super Lawyer in the area of appellate practice (2007-current), and has also been named in *The Best Lawyers In America (Appellate Law)* (2014-current). The *Los Angeles Daily Journal* has repeatedly recognized Tim as one of the Top 100 Attorneys in California, he has received a California Lawyer Attorney of the Year award for his United States Supreme Court work, and Reuters News Service named him one of the "Top Petitioners" in the United States Supreme Court. Tim lectures widely on issues related to appellate practice, as well as section 1983 and government tort liability, and is currently co-chair of the International Municipal Lawyers Association (IMLA) Litigation, Insurance and Risk Management section, as well as IMLA co-chair for California.



Michael Colantuono

Michael has specialized in municipal law since 1989. He is certified by the California State Bar as a Specialist in Appellate Law and is also First Vice President of the California Academy of Appellate Lawyers, an association of a bit more than 100 of the most distinguished appellate lawyers in California. He is an Elected Member of the American Law Institute, the leading independent organization in the United States producing scholarly work to clarify, modernize, and otherwise improve the law. He has argued 14 cases in the California Supreme Court and appeared in all six of the California District Courts of Appeal, as well as trial courts around the State. He serves on the California Judicial Council's Appellate Advisory Committee. Michael has expertise in a broad range of areas of concern to local governments in California, including constitutional law, land use regulation, open meetings, elections, municipal litigation, conflicts of interest, public utilities, LAFCO issues, inverse condemnation, cannabis regulation, and a wide range of public finance issues involving taxes, assessments, fees and charges. Michael is perhaps California's leading expert on the law of local government revenues, briefing 18 cases on that subject in the California Supreme Court since 2004. The Daily Journal named him a California Lawyer of the Year in inverse condemnation law for his win in *City of Oroville v. Superior Court* (2019) 7 Cal.5th 1091, government's first win in that court in this subject area in decades. California Chief Justice Ronald M. George presented him with the 2010 Public Lawyer of the Year Award on behalf of the California State Bar. Two successive Speakers of the California Assembly appointed him to the Board of Trustees of the California Bar, the state agency which regulates the practice of law in California. His fellow Trustees elected him Treasurer and President of the Bar and the California Supreme Court appointed him as Chair of its Board of Trustees.



Derek Cole

A founding partner of Cole Huber LLP, Derek specializes in municipal law. He presently serves as the City Attorney for Oakley and Sutter Creek. Previously, he served as Interim City Attorney for Antioch (2015-2016 and 2017-2019), City Attorney for Angels Camp (2012-2017), and County Counsel for Trinity County (2008-2013). In addition to his advisory practice, Derek handles a diverse caseload of litigation matters before state and federal courts.

Although Derek is familiar with all aspects of municipal government, he has particular expertise in land use and environmental law. He has extensive experience handling matters involving CEQA, NEPA, local planning and zoning requirements, development agreements, the Subdivision Map Act, the Surface Mining and Reclamation Act, Williamson Act, CERCLA, and air and water quality laws. Derek was selected to the Northern California "Super Lawyers" list from 2015 to 2021; was included as a "Top Lawyer" in Sacramento Magazine from 2015 to 2020; and, was a recipient of the "Best of the Bar" award by the Sacramento Business Journal in 2014, 2016, and 2018.



Eric Danly

Eric Danly has served as the Petaluma City Attorney since December 5, 2005, and since July 1, 2013 in an in-house capacity. Eric reports directly to the City Council and oversees the City Attorney's Office consisting of, in addition to the City Attorney, two assistant city attorneys and a legal assistant. Prior to joining Petaluma in-house Eric was a partner in the Meyers Nave law firm and managing partner of its Santa Rosa office. Eric also served as Cloverdale City Attorney, General Counsel to the Monterey County Housing Authority Development Corporation, Clearlake City Attorney and Assistant City Attorney for Pinole. Eric has delivered numerous presentations on open meetings and records law, and ethical and other laws applicable to public agency officials. He served on the League of California Cities committee that authored the organization's first published guide to the California Public Records Act, entitled "The People's Business – A Guide to the California Public Records Act." He was appointed to serve on the City Attorney's Department's standing committee on the Public Records Act when the committee was formed in September, 2009 and served on the committee through April, 2016. Along with his colleagues on the Public Records Act Committee, Eric helped author updates to The People's Business: A Guide to the Public Records Act, which were published 2010, 2011, 2014, and the Second Edition to The People's Business, which was published in 2017. While serving on the Public Records Act Committee Eric and his colleagues provided annual updates on the Public Records Act for the Municipal Law Handbook, in addition to providing support to Cal Cities lobbyists on Public Records Act issues and recommendations to the Legal Advocacy Committee on requests for amicus support in public records cases. Currently Eric serves as the First Vice President of the City Attorneys' Department of Cal Cities. His First Vice President duties include serving as liaison to the FPPC Committee and the Public Records Act Committee. Eric has also previously served as Chair of the Attorney Development and Succession Committee, and on the Legal Advocacy, Municipal Law Handbook, and Nominating Committees within the City Attorneys Department of Cal Cities. Eric received a BA in Interdisciplinary English from Stanford University in 1990, and his JD from University of California, Hastings College of the Law with a public law concentration in 1998. He has been practicing law representing public agencies since 1999.



Dave Fleishman

Dave Fleishman has practiced extensively in the area of public law and in the area of labor and employment law for both public and private employers. His practice has focused on the representation of public agencies in an advisory role as city attorney or general counsel, as well as in public entity defense litigation, including writs and appeals, civil rights, Fair Labor Standards Act, wrongful termination, employment investigations, public contracting, tort claims and code enforcement. He has also represented private employers throughout California in wrongful termination, wage and hour, and other employment matters. He currently serves as City Attorney for the City of Pismo Beach and the City of Solvang. He formerly served as City Attorney for the cities of Guadalupe and Pacific Grove, and assistant city attorney for the cities of Atascadero and Morro Bay. He was formerly Assistant General Counsel for the Cambria Community Services District and the Los Osos Community Services District. He also previously served as General Counsel for the San Simeon Community Services District. He has represented over 40 cities and special districts in California and Nevada in various labor and employment matters.



Glen Googins

Glen Googins is currently serving his final term (until December 2022) as Chula Vista's first ever elected City Attorney. He was first elected in June 2010 and was re-elected in 2014 and again in 2018. As City Attorney, Mr. Googins is committed to provide the City with high quality, unbiased legal advice, support the efficient delivery of City services, fairly interpret and apply City laws, protect taxpayer resources, improve the flow of information between the City and its citizens, and ensure the City itself complies with the law. Mr. Googins received his undergraduate degree from Dartmouth College in 1985 and his law degree from Berkeley Law School (Boalt Hall) in 1988. His early law practice focused on real estate, business and tax matters. In 1992 Mr. Googins left private practice to pursue public service, and in 1993 he took a job with the City of Chula Vista as a Deputy City Attorney. Over the next 11 years Mr. Googins served as the primary lawyer for the City's redevelopment and affordable housing agencies. He was also lead counsel on many of the City's major real estate, business and franchise transactions. Notable projects during this time period include the development of the Coors (now North Island Credit Union) Amphitheater and long-term Franchise Agreements with the City's cable television, solid waste disposal and energy providers. During this time Mr. Googins rose to the position of Senior Assistant City Attorney, second in command at the City Attorney's office. He left the City in 2004, and during the next six years ran his own legal practice based in downtown Chula Vista. As City Attorney for California's 14th most populous City, Googins' major projects include the City's acquisition and operation of the 155-acre former U.S. Olympic Training Center, the City's transition to Fire Department provided ALS First Responder and Ambulance Transport Services, and a public/private partnership for the imminent development of a 1,600 room Gaylord Resort Hotel and Convention Center on the Chula Vista Bayfront. Mr. Googins is active in the community, especially through his membership and participation with the Chula Vista Rotary Club and the Chula Vista Charitable Foundation. He has also served on the boards of many local non-profits, including Wakeland Housing and Development Corporation, Third Avenue Village Association, and the Friends of Chula Vista Parks and Recreation. Mr. Googins is a member of the California, San Diego County and South Bay Bar Associations. He also served as President of the City Attorneys Association of San Diego County. Though originally from Connecticut, Googins has called the San Diego area his home for 33 years, the last 29 as a resident of Chula Vista. He currently resides in the Chula Vista community of Eastlake with his wife Maria Elena. They are on the cusp of "empty nesting" with the last of their 4 children now off to college, but they enjoy frequent invasions by their three grandchildren for sleepovers.



Pamela Graham

Pamela Graham is Senior Counsel and a member of Colantuono, Highsmith & Whatley's litigation practice group. She also leads its public safety defense group. Pamela's practice covers a wide range of public law litigation, including municipal finance and public revenues, labor and employment law, land use and CEQA, cannabis regulation and enforcement, and police liability defense work. Pamela has broad litigation experience in both state and federal courts, handling all phases of litigation from case assessment through appeal. She has served on Cal Cities' Editorial Board for the Municipal Law Handbook for the past three years, and also serves on the Los Angeles Bar Association's Editorial Board for its L.A. Lawyer publication. Throughout her 20-year legal career, Pamela has advocated pro bono for children's rights, working on countless adoption and education rights matters.



Glen Hansen

Mr. Hansen has been with Abbott & Kindermann, Inc. since 2007, providing legal counsel and litigation representation to cities and counties in the areas of takings law, land use, real estate law, California Environmental Quality Act, the Subdivision Map Act, the Mitigation Fee Act, among others. Mr. Hansen is a former Chair of the Real Property Section of the Sacramento County Bar Association, and former member of the Board of Directors for the Sacramento County Bar Association. He is a Dispute Resolution Conference pro-tem judge for the El Dorado County Superior Court for real estate cases. He is a graduate of Biola University in La Mirada, California, and the University of the Pacific, McGeorge School of Law, in Sacramento, California.



Jonathan Holtzman

Jonathan V. Holtzman is a founding partner of Renne Public Law Group® (RPLG). Prior to entering private practice, Jon served as San Francisco's Chief Deputy City Attorney and as Director of Labor and Policy for Mayor Willie L. Brown, Jr. Jon is a veteran of innumerable negotiations with police unions over wages, hours and departmental policies, including numerous police reform initiatives. He recently served as Special Counsel to the Fresno Commission on Police Reform, which produced 73 discrete recommendations that were adopted nearly unanimously by the 40-member commission. He also helped the City of Berkeley craft and negotiate the City's November 2020 ballot measure, Measure II, which passed with over 80 percent of the vote. The Charter Amendment established an independent Director of Police Accountability (DPA) and a Police Accountability Board (PAB) to replace the existing Police Review Commission. Jon is co-author of Rutter Group's California Practice Guide: Public Sector Employment Litigation Guide, the leading treatise on public sector employment issues. He is a graduate of Stanford Law School and clerked for Justice Otto Kaus of the California Supreme Court.



Bill Ihrke

Bill Ihrke is a Partner at the law firm of Rutan & Tucker LLP and currently serves as the City Attorney for the Cities of La Quinta and Cerritos. He served as the Assistant City Attorney for the Cities of Yorba Linda and Duarte, and continues to serve as general and special counsel to the successor agencies to former redevelopment agencies of several cities. Bill's practice emphasis includes general state and municipal law advice, land use and entitlement, environmental review and compliance, developing and financing affordable and market rate housing and mixed-use projects, and matters relating to economic development, infrastructure investment, post-redevelopment resources, and public-private partnerships.



Andrew Jared

Andrew has dedicated his practice to representing cities and government agencies since 2006. He presently serves as the City Attorney for the City of South Pasadena. He previously has served as City Attorney and Assistant City Attorney for the City of Chico (6 years), and Assistant City Attorney for the City of Pomona (13 years). He leads the firm's CEQA and land use planning practices. His general counsel practice covers the full range of public law issues, including land use, elections, contracts, procurement, public works, and solid waste franchises. He earned his Juris Doctor at Pepperdine University School of Law, and a Masters of Science in Environmental Management from the University of London. He attended UCLA as an undergraduate, earning a BA in Geography.



Rick Jarvis

Rick Jarvis is one of California's leading land use and public law litigators. With three decades of experience, Rick has litigated hundreds of cases in California and federal courts, primarily defending cities and other public agencies against claims brought under CEQA, the Planning and Zoning Law, the Mitigation Fee Act, the Subdivision Map Act, and other land use and municipal laws, as well as regulatory takings and landowner civil rights claims. Rick also advises his clients on land use issues during the planning and public hearing process, reviewing and "bullet-proofing" CEQA documentation and working with city attorneys and planning staff in order to minimize litigation risks in the first place. Rick is active with the League of California Cities, including preparation of several amicus briefs and presenting the Land Use and CEQA Litigation Update at some of its conferences. Rick has extensive experience handling writs (at both the trial and appellate levels) and appeals, and is a Certified Specialist in Appellate Law by the State Bar of California Board of Legal Specialization. Given his expertise in both appellate and public agency law, the Judicial Council of California often retains Rick to represent various superior courts in appellate writ matters. Rick received his law degree from U.C. Berkeley School of Law in 1991 and then served for one year as a law clerk to former Federal Magistrate Judge Wayne D. Brazil in the Northern District of California. For nearly every year since 2006, Rick has been selected by Law & Politics for inclusion in its annual list of "Super Lawyers" in Northern California, which seeks to list the top 5% of lawyers in Northern California through a process of independent evaluation and peer review.



Inder Khalsa

Inder counsels local government agencies on all aspects of municipal governance, including the interpretation, application of, and compliance with the Brown Act, Public Records Act, Political Reform Act, and other conflict of interest and ethics laws. Inder serves as City Attorney to the City of Davis, the City of Mill Valley, and the Assistant City Attorney to the City of Fairfield. Inder is the General Counsel to the Valley Clean Energy Alliance, San Francisco Local Agency Formation Commission and the East Bay Community Energy Authority. Inder has represented a number of other public entities as Special Counsel.



Claire Lai

Claire S. Lai is Of Counsel in Meyers Nave's Municipal and Special District Law Practice Group. She currently serves as Assistant City Attorney for the City of South San Francisco, City of Walnut Creek, and Town of Los Altos Hills, as well as the General Counsel for Graton Community Services District and the Oro Loma Sanitary District. She also serves as Assistant General Counsel for the SSF Conference Center Authority and Santa Cruz Regional Transportation Commission. Additionally, Claire serves as supporting counsel for the Tri-Valley Transportation Council.



Eli Makus

Eli Makus is an employment attorney whose practice focuses on conducting impartial workplace investigations. Eli is the Managing Partner of Van Dermyden Makus Law Corporation. With over twenty-five attorneys across California, Van Dermyden Makus is devoted to promoting fair workplaces and safe campuses through industry-leading neutral fact-finding services. Drawing upon his extensive employment law background, Eli conducts complex and sensitive investigations involving a variety of workplace complaints for public and private employers throughout California. Eli regularly trains internal and external investigators on how to conduct impartial workplace investigations. Eli is the President for the Association of Workplace Investigators (AWI) Board of Directors and regularly serves as Faculty for AWI's ANSI-accredited Training Institute.



Jenica Maldonado

Ms. Maldonado is a seasoned attorney with ample experience advising cities, counties, and special districts regarding labor and employment law matters, general government, ethics, and election matters. Throughout her career, Ms. Maldonado has advised and defended public agencies in politically sensitive, high-stakes matters. Those experiences have afforded her the legal and political acumen necessary to support public agencies on complex and novel matters as outside counsel. Ms. Maldonado practices in the firm's Labor and Employment and Government Groups. Ms. Maldonado advises the firm's clients on a wide range of labor and employment issues, including evaluating meet-and-confer requirements under the Meyers-Miliias-Brown Act, drafting employment policies and procedures, responding to administrative complaints, drafting separation agreements, negotiating pre-litigation resolutions, and navigating a wide variety of employment-related disputes. She also conducts workplace investigations and frequently advises clients on municipal law matters, including staffing public meetings, drafting resolutions and ordinances, providing legal advice and training regarding California's ethics laws, the Brown Act, and the Public Records Act, and drafting legal opinions. Prior to joining the Renne Public Law Group, Ms. Maldonado served as a Deputy City Attorney in the San Francisco City Attorney's Office on the Ethics and Elections and Labor Teams and worked in private practice defending private and public employers in labor and employment litigation matters.



Ephraim Margolin

Ephraim (“Eppi”) is an associate with Colantuono, Highsmith & Whatley's municipal advisory practice group and resident in the firm's Pasadena office. Eppi advises municipal agency clients on public law issues, including the Public Records Act, land use, conflicts of interest, elections, public works and public contracting. While in law school, Eppi worked for several federal and local agencies including the Oakland City Attorney's Office, the Enforcement Division of the Securities and Exchange Commission, and completed an externship at the 9th Circuit Court of Appeals. He also served as the Publishing Editor of the Berkeley Journal of Entertainment & Sports Law. Eppi graduated from Berkeley Law with a Juris Doctor, receiving an American Jurisprudence Award and a Prosser Prize for academic excellence, and graduated magna cum laude from University of California, Los Angeles, with a Bachelor's degree in Philosophy.



Yuval Miller

Yuval Miller maintains a nationwide practice as an arbitrator and mediator of labor and employment disputes, including public- and private-sector permanent panels throughout the Western United States. An esteemed speaker and moderator on labor issues, he also trains other neutrals, publishes on dispute resolution, and speaks frequently on public-safety reform modalities and their consequences. Among other affiliations, he is on the Faculty of the Labor Arbitration Institute (LAI), a PERC Law Enforcement Arbitrator, and Editor in Chief of the treatise Aitchison et al., *INTEREST ARBITRATION* (3d ed., LRIS Books, forthcoming 2022). Prior to becoming a full-time neutral, Arbitrator Miller earned his JD at Yale Law School, served as a Fulbright Scholar, taught courses at the Budapest University of Public Administration, and received his BA with Highest Distinction from the University of California, Berkeley. After clerking for the Honorable Dolores K. Sloviter of the United States Court of Appeals for the Third Circuit, he represented management (Munger, Tolles & Olson LLP) and unions (McCracken, Stemerma & Holsberry, LLP) for over a decade.



Jennifer Mizrahi

Jennifer A. Mizrahi Ms. Mizrahi currently serves as the City Attorney for the City of Desert Hot Springs, practicing in municipal law for nearly her entire career. Ms. Mizrahi joined Stream Kim in 2019, after working for Quintanilla & Associates and Green, de Bortnowsky & Quintanilla (GdQ) for nearly 15 years combined. During the course of representing public entities for nearly 20 years, Ms. Mizrahi has acquired extensive experience in many facets of municipal law such as, but not limited to, land use planning, environmental analysis, annexation proceedings, development agreement negotiations, public works construction contract preparation, prevailing wage compliance, eminent domain actions, and sales and property tax measures. Ms. Mizrahi is also one of the legal leaders in the cannabis field. Ms. Mizrahi has represented the City of Desert Hot Springs from stem to stern in the cannabis arena – from working with elected officials to solidify their ideas to allow cannabis activity in their city, to creating a highly regulated and developer-friendly space where the cannabis industry can flourish. To that end, Ms. Mizrahi has been and currently a key player, drafting ordinances and regulations, to development agreements and procedures. Ms. Mizrahi also has had the distinct pleasure of working with key players at the State level in aiding to draft State cannabis regulations, often being asked to speak at conferences. Further, Ms. Mizrahi has been instrumental in working with several public agencies, including CalFire and water districts, to effectively develop a comprehensive inter-agency regulatory structure within the County of Riverside. Most importantly, Ms. Mizrahi oversees the implementation of the City Council's zero-tolerance stance on non-compliant cannabis activity, from conducting permit revocation procedures to general code enforcement. Recently, in September 2021, Ms. Mizrahi co-authored "Seed to Sale: A Guide to Regulating Cannabis in California Cities" published by League of California Cities. Ms. Mizrahi was admitted to the State Bar of California in January 2003. Ms. Mizrahi received her Juris Doctor from Southwestern University School of Law, and her Bachelor of Arts degree in Latin American Studies/Economics from the University of California, Santa Cruz, where she graduated with honors. Ms. Mizrahi also attended the University of Madrid, Complutense, where she studied international political economy. Ms. Mizrahi is currently a member of the State Bar of California, the California League of Cities Attorney Succession and Development Committee, the League of Cities Cannabis Regulation Committee, and the Southwestern Alumni Association. Ms. Mizrahi is admitted to practice before all courts of the State of California, the United States District Court, District 7, and the Ninth Circuit Court of Appeals and she is fluent in speaking, reading, and writing in Spanish.



Alex Mog

Alex Mog is Of Counsel with the Municipal and Special District Law Practice Group. He serves as Deputy City Attorney for the City of Union City, Senior Assistant City Attorney for the City of San Leandro, Assistant City Attorney for the City of Pinole, the General Counsel of Bodega Bay Public Utility District, and advises numerous other municipalities and special districts.



Joseph Montes

Joseph Montes is a partner with Burke, Williams & Sorensen and is the City Attorney for Alhambra, San Marino and Santa Clarita.



Rebecca Moon

Rebecca Moon is a graduate of U.C. Davis and U.C. Hastings College of Law. After beginning her career at an insurance defense litigation firm, she joined the Sunnyvale City Attorney's office in 2001 and has, by this time, covered almost every aspect of municipal law. During the past several years, she has focused on planning and land use and is the legal advisor to the Planning Commission.



Neil Okazaki

Neil is an Assistant City Attorney for the City Attorney's Office in Riverside. He currently manages the Public Safety Division, a motivated team of talented professionals who provide legal services for the Riverside Police Department, Riverside Fire Department, and Riverside Code Enforcement. His career has included the following: • Completing 18 jury trials • Completing 12 binding arbitrations and 14 non-binding arbitrations • Handling 2 state administrative hearings • Serving as Police Department Legal Advisor • Serving as Fire Department Legal Advisor • Serving as Human Resources Department Legal Advisor • Serving as Legal Advisor to the ADA Coordinator • Overseeing Quality of Life Initiatives for the City Attorney's Office • Setting up the City's Gun Violence Restraining Order program • Speaking at 3 League of California Cities conferences • Serving as an Attorney Settlement Officer for the United States District Court for the Central District of California



Joseph Petta

Joseph “Seph” Petta is a Partner at Shute, Mihaly & Weinberger, LLP, where he advises municipalities, other public agencies, and community groups in environmental, land use, and public law matters. Mr. Petta’s practice focuses on the California Environmental Quality Act, general plan and zoning law, public lands law, and ordinance and conservation easement drafting and enforcement. His work also includes representing clients in proceedings before state public utility commissions.



Scott Porter

Mr. currently serves as Assistant City Attorney to the City of Whittier, and as Deputy City Attorney for Fullerton and has served as City Attorney in two other cities. Mr. Porter has been with the law firm of Jones Mayer since 2015. His primary practice areas are municipal law, land use, housing, and telecommunications. An acknowledged expert in land use and housing laws, Mr. Porter has advised dozens of cities on the implementation of new state housing laws affecting accessory dwelling units, and now urban lot splits under Senate Bill 9. Mr. Porter has provided dozens of trainings on land use, telecommunications and CEQA, including lecturing at California State University Northridge on state ethics laws and the planning process. Mr. Porter has published various articles in the California Real Estate reporter and previously presented well-acclaimed papers to the League of California Cities and other attorney organizations.



Christina "Tina" Ro-Connolly

Christina (Tina) Ro-Connolly is a Partner at Oppenheimer Investigations Group LLP. Her practice is exclusively on neutral work: investigations and trainings. She previously worked as an attorney advocating for employers. But she grew weary of the constant battles and noticed, when reviewing these matters, that there were often missed opportunities early on for mediation and communication. She recognized the value of letting all parties be heard earlier in the process, addressing matters and seeking resolution before issues escalated. And, after overseeing many workplace investigations, she was intrigued by the role of a neutral investigator. That interest, coupled with a stroke of perfect timing, brought her to OIG. Tina has more than a decade of labor and employment law experience. Her investigations include allegations of discrimination and harassment, allegations of abusive conduct, sexual misconduct, retaliation and workplace misconduct. She has handled investigations against high-level executives and elected officials. She has worked in both the public and private sectors. Tina conducts Title IX investigations and is a Title IX hearing officer. She also leads sexual harassment prevention trainings and workplace investigation trainings. Tina spent 11 years at the Contra Costa County Counsel's Office, advising departments on labor and employment matters. This included representing departments in civil service hearings, arbitrations and before the Public Employment Relations Board. Tina is a member of the Executive Committee of the Labor and Employment Section of the California Lawyers Association, a graduate of the AWI's Training Institute for workplace investigators and a frequent trainer and presenter on employment law matters.



Heather Rosing

Heather L. Rosing is a Shareholder with Klinedinst PC, with five offices across the West. Ms. Rosing chairs the firm's Professional Liability and Ethics Department and serves as the CEO and President. Ms. Rosing litigates and tries complex malpractice and fraud cases, advises in the areas of ethics and risk management, and serves as an expert witness. In her decades of defending lawyers and other professionals, Ms. Rosing has numerous notable victories in legal malpractice cases in state court, federal court, and arbitration. She also defends judicial officers before the Commission on Judicial Performance. Well known for her advocacy and contributions to the profession, Ms. Rosing was one of 18 lawyers honored as "Lawyer of the Decade" by the Daily Journal in January 2021. In September 2021, the San Diego legal community came together at the annual Red Boudreau Trial Lawyers Dinner to recognize Ms. Rosing with the Daniel T. Broderick III Award, which honors the highest standards of civility, dedication, and professionalism in the practice of law.

Ms. Rosing is a certified specialist in legal malpractice and a former member of the ABA Standing Committee on Lawyers Professional Liability. She served as an appointed advisor to the Rules Revision Commission of the State Bar of California, which recommended wholesale revisions to the Rules of Professional Conduct (adopted in large part by the California Supreme Court in 2018), and as an appointed member of the Mandatory Insurance Working Group of the State Bar. She frequently speaks on a pro bono basis on malpractice, ethics, and risk management issues across California and the country. Ms. Rosing was also appointed to serve as the co-vice chair of the Civility Task Force, which is a joint effort among the California Lawyers Association (CLA), the State Bar, and the California Judges Association (CJA). In addition, Ms. Rosing is a member of the CJA's Judicial Fairness Coalition, which focuses on education about the judicial branch and the importance of judicial independence. She is also an appointed member of the ABA Standing Committee on Specialization, which accredits specialty certification programs for lawyers in particular fields of law offered by private organizations. In 2020, when the COVID 19 pandemic disrupted the judicial system, Ms. Rosing was part of the Steering Committee of RESOLVE Law San Diego, which offered free mediations and discovery referee services to civil litigants across the county.

In 2018 and 2019, Ms. Rosing served as the inaugural President of the CLA, the largest statewide voluntary Bar Association in the country. During her tenure, she launched the organization, focusing on its 16 Sections, the California Young Lawyers Association, governmental affairs, bar relations, and initiatives in the areas of diversity, access to justice, and civics education. Under her leadership, CLA took over the Annual Meeting, which has brought together judges, lawyers, and organizations from across the State for several days of meetings for over 80 years. Ms. Rosing is now the President of the philanthropic sister organization of CLA, the California Lawyers Foundation (CLF). CLF focuses on supporting organizations, causes, and projects related to the core CLA initiatives.

Previously, she served for four years on the State Bar of California's Board of Trustees as Vice-President, Treasurer, and Chairperson of the Regulations, Admissions, and Discipline Oversight

Committee. A strong advocate for judicial and legal diversity, Ms. Rosing served as President of ChangeLawyers (formerly the California Bar Foundation), which awards pipeline grants, scholarships, and fellowships across the State. Ms. Rosing has also served in leadership roles of many other organizations, including as President of the San Diego County Bar Association in 2008. During her presidency, she launched a Diversity Fellowship Program, spearheaded a civility initiative, and founded a pro bono program to assist active duty service members.

The recipient of numerous accolades, Ms. Rosing was recognized by the Daily Journal as Top Lawyer of the Decade in 2021, as well as Top 100 Lawyers in California (2018-2021). Best Lawyers in America® has recognized Ms. Rosing for a number of years, and honored her in both 2014 and 2022 as Lawyer of the Year in Legal Malpractice Law Defense. She also has been frequently honored by San Diego Super Lawyers, including Top 25 Women San Diego Super Lawyers, Top 50 San Diego Super Lawyers, and Number 1 Attorney in San Diego County. Ms. Rosing was named Woman of Influence in Law 2021 by the San Diego Business Journal, which previously honored her as CFO of the Year (2011, 2014, 2016). She is the recipient of the San Diego Law Library Foundation's Excellence in Public Service Award (2019), Fastcase 50 (2019), Earl B. Gilliam Bar Foundation's Corporate Commitment to Diversity Award (2016), Lawyer of the Year by the San Diego Defense Lawyers (2015), and the Exemplary Service Award by San Diego Volunteer Lawyer Program (2014). She holds the Highest AV®-Preeminent™ Peer Review Rating by Martindale-Hubbell.



Geoffrey S. Sheldon

As the Chair of the Liebert Cassidy Whitmore's Public Safety Practice Group, Geoff oversees the firm's extensive public safety practice. In addition to help establishing best practices for service to the firm's public safety clients, Geoff routinely assists public agency clients and law enforcement and fire service executive associations with matters such as personnel management, investigation and discipline, unfair labor practices, grievances, medical and other types of leaves of absence, fitness for duty and disability accommodation, and public safety retirement issues.



Daniel Sodergren

Dan Sodergren is the City Attorney for the City of Pleasanton. Mr. Sodergren previously served as City Attorney for the cities of Tracy and Livermore and as Special Counsel for the cities of Palo Alto and Oakland. He began his career as a law clerk and served in that capacity in Palo Alto, Santa Clara and San Jose. Mr. Sodergren is a graduate of U.C. Berkeley and Santa Clara University School of Law.



Teresa L. Stricker

Teresa Stricker recently began as City Attorney of San Pablo, succeeding Lynn Tracy Nerland following her retirement. Previously, Ms. Stricker served as City Attorney for the City of Richmond, California. Before joining Richmond, Ms. Stricker was a partner at Renne Public Law Group where she headed the firm's general local government practice. Ms. Stricker previously served as Town Attorney for the Town of Corte Madera, Interim City Attorney for the City of Santa Rosa, Deputy City Attorney for the City and County of San Francisco and City of Brisbane, and General Counsel and Special Counsel for a variety of local agencies statewide. Ms. Stricker has been a member of the Cal Cities' City Attorney's Department FPPC Committee since 2019, and served as its chair from March 2020 through March 2022.



Vida Thomas

Vida Thomas is a Partner and Co-Owner of Oppenheimer Investigations Group. An AV-rated attorney, Vida has practiced employment law for over 25 years, and spent much of that time advising employers on all aspects of employment law and human resources management. Over the years she also developed a substantial workplace investigations practice. Vida has conducted hundreds of workplace investigations, and teaches human resources professionals how to conduct effective workplace investigations. She also conducts inherent bias and diversity and inclusion training for private and public sector employers. Clients have complimented Vida's knack for making the law accessible, explaining complex legal concepts in a way that is both thorough and easy to understand. She believes training is most effective when it provides concrete, useful tips for navigating today's complicated and highly regulated workplace. She also serves as an expert witness in state and federal employment lawsuits and mediates litigation and non-litigation matters. Vida assists parties and attorneys in resolving employment claims, and routinely conducts sexual harassment prevention training (including AB1825 compliance training) for state agencies and private companies. Before joining Oppenheimer Investigations Group, Vida was an Of Counsel attorney with Stoel Rives LLP and Weintraub Tobin Chediak Coleman Grodin Law Corporation. She began her legal career as an employment litigator at Kronick Moskowitz and then co-founded Carlsen Thomas, LLP, a boutique employment law firm that offered workplace investigations and employee training throughout California for 13 years.



Brian Walter

Brian Walter represents clients in all aspects of employment and labor law, including litigation, counseling on employment and labor relations matters, training and presentations, employee discipline matters, administrative hearings, and investigations. Brian has handled class actions and collective actions in federal and state courts and is Chair of the firm's Litigation Practice Group. Brian has extensive experience handling FLSA issues and representing law enforcement agencies, including successfully defending employee discipline matters for sworn and civilian law enforcement personnel.