LEGAL ADVOCACY PROGRAM REPORT

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INTRODUCTION AND OVERVIEW

Cal Cities advocates before the courts through the Legal Advocacy Program because laws affecting cities are made in the courts as well as in the Legislature. Cal Cities weighs in on legal issues when participation is likely to affirmatively advance cities' collective legal interests by establishing legal precedent that will help cities more effectively serve their communities. The charge of the Legal Advocacy Committee (LAC) is to identify those cases and Attorney General opinions that are of such significance on a statewide basis as to merit the collective investment of city resources through Cal Cities' participation.

This report summarizes notable rulings and legal victories, pending Cal Cities litigation, and cases in which Cal Cities filed amicus briefs or letters between **April 29, 2022, to July 1, 2022**. The report is provided to keep the Board informed of Cal Cities' legal advocacy. **No further Board action is required.** Cal Cities legal staff is available to answer any questions.

NOTABLE RULINGS AND LEGAL VICTORIES

- Upon request by Cal Cities and the California State Association of Counties (CSAC), the Third District Court of Appeal published *Vatalaro v. County of Sacramento*. The case provides a legal framework for how local government can successfully move for summary judgment in unlawful retaliation cases under Labor Code section 1102.5. **Cal Cities thanks amicus letter writers Ryan McGinley-Stempe, Imran Dar, and Shajuti Hossain with Renne Public Law Group**.

- The California Attorney General issued an opinion guiding cities on the conduct of closed session meetings under the Ralph M. Brown Act. First, the Attorney General opined that support staff of individual city council members may not attend closed sessions unless such staff has an official or essential role to play in a particular closed session. Second, the Attorney General opined that city council members may not share information

obtained in that closed session with their non-attending support staff unless the city council authorizes the disclosure of such information. Finally, the Attorney General opined that the Brown Act does not prohibit a joint closed session of two local agencies if each agency is authorized to meet in closed session based on the same exceptions and set of facts. As urged by a letter submitted by Cal Cities, the Attorney General acknowledged that determining whether a closed session meeting complies with the requirements of the Brown Act requires a fact-specific analysis. **Cal Cities thanks letter writer, Cal Cities Senior Deputy General Counsel, Alison Leary.**

PENDING CAL CITIES LITIGATION

When authorized by the Board, Cal Cities may initiate or affirmatively participate as a party in litigation to advance cities' collective interests. Cal Cities is currently participating in the following case:

- ***League of California Cities v. Federal Communications Commission (FCC)***
  Ninth Circuit Court of Appeals, Case No. 20-71765

  The Middle Class Tax Relief and Job Creation Act requires local governments to approve certain modifications to existing wireless facilities that do not substantially change the physical dimensions of the site. FCC implementing rules address what constitutes a substantial change. In 2019, the FCC adopted a Declaratory Ruling to "clarify" and change the rules to allow a significant increase in the height of additional antenna permitted to be added to existing towers and to undo protections used by local governments to preserve concealment elements or enforce prior conditions of approval.

  With approval of the LAC and the Cal Cities Board, Cal Cities joined a coalition of cities, counties, and other municipal leagues in challenging the Ruling in the Ninth Circuit Court of Appeals. The coalition filed its opening briefs in January 2021.

  Significance to Cities: If the Ruling takes effect, it will limit local control over modifications to existing telecommunications facilities.

AMICUS BRIEFS FILED

An amicus curiae brief is a "friend-of-the-court" brief filed by a non-party in a lawsuit who nonetheless may be affected by the outcome. With approval of the LAC and Cal Cities' Executive Director, Cal Cities filed amicus briefs in the following cases:

Liability/ Labor and Employment

- ***County of Sacramento v. Everest National Inst. Co.***
  Ninth Circuit Court of Appeals, Case No. 22-15250

  Issue: Whether Insurance Code section 533 prohibits employment practices liability insurance.

  Several County employees sued the County in state court, asserting various claims under California's Fair Employment and Housing Act (Cal. Gov. Code, §§ 12900 et seq.). A jury heard the retaliation claim, only, and returned a verdict in favor of the employees. While appeals were pending, the employees and the County settled for $6.9 million.

  The County kept its employment practice liability insurance carrier, Everest, apprised of the claim and proceedings. After the verdict, Everest denied all coverage to the County and refused to participate in the appeal, asserting, for the first time, that: (1) the retaliation claim was not an "employment practice liability wrongful act" under the policy; and, (2) that coverage was precluded by Insurance Code section 533, which provides that "[a]n insurer is not liable for a loss caused by the willful act of the insured." The County sued Everest in federal district court for its failure to provide coverage. The district court granted Everest's motion for summary judgment holding that section 533 bars coverage because a retaliation claim necessarily implicates willful and intentional conduct, and the fundamental policy underlying section 533 is to preclude coverage for "willful wrongs."

  The County appealed to the Ninth Circuit Court of Appeals. Cal Cities joined a local government brief in support of the County. The brief provided the Ninth Circuit Court of Appeals with practical and policy reasons for why obtaining such insurance is important to public entities.

  Significance to cities: Public entities make up almost 40 percent of the defendants against whom Employment Practices Liability Insurance (EPLI) verdicts are rendered. A negative ruling would make EPLI claims uninsurable

under California Insurance Code section 533, which could increase risk and raise costs for cities.

Cal Cities thanks brief writer Jeffrey Ehrlich from the Ehrlich Law Firm.

Tax

- ***CSHV 1999 Harrison LLC and CSHV 1956 Webster, LLC v. County of Alameda and City of Oakland***
  First District Court of Appeal, Case No. A163369

  Issue: Whether a corporation formed and owned by CalSTRS can avoid property transfer taxes as a government entity.

  CalSTRS created two limited liability companies (LLCs) to purchase two investment properties for the CalSTRS investment portfolio and the City and County both assessed transfer taxes. The County assessed $259,050 under its documentary transfer tax ordinance, adopted pursuant to the Documentary Transfer Tax Act. The City assessed $3,532,500 under its real property transfer tax ordinance, adopted pursuant to Article XI, Section 5 of the California Constitution. Both transfer taxes include an exemption for property transferred to the State of California and to political subdivisions of the State (Government Entity Exemptions).

  The LLCs requested refunds of the transfer taxes, asserting that the transfers fell within the Government Entity Exemptions, but the City and County denied the LLCs' requests. The LLCs then filed a petition for writ of administrative mandate, which the court denied. The court held the Government Entity Exemptions did not apply to the LLCs because a member of an LLC has no ownership in real property belonging to the LLC and the LLCs themselves are not governmental entities. The LLCs appealed.

  Cal Cities filed a joint amicus brief with CSAC arguing that if CalSTRS elects to obtain the benefits of a corporate structure, it is then precluded from also enjoying the benefits of a public entity (including exemption from transfer taxes).

  Significance to cities: In recent years, CalSTRS has invested large amounts of money in real estate throughout California. If these transactions must be treated as tax-exempt purchases of property by government entities, regardless of the nature of CalSTRS' investment, it will result in a substantial

loss of tax revenue for both charter cities that adopt their own transfer taxes and general law cities that adopt transfer taxes under the Documentary Transfer Tax Act.

Cal Cities thanks brief writer Ryan Dunn with Colantuono, Highsmith & Whatley, PC.

AMICUS LETTERS FILED

Letters Requesting Publication of an Appellate Court Opinion

California courts accept letter briefs on various issues, such as letters requesting case publication, so that the opinion is precedential.

During this reporting period, Cal Cities filed two publication requests. The first, *Vatalaro v. County of Sacramento,* summarized in more detail above, was ordered published upon request by Cal Cities.

The second case, *City of San Diego v. California State Mandates* concerned whether the State Water Resources Control Board created a new program or higher level of service when it required free lead testing at K-12 schools. In an unpublished opinion, the court held that providing water services is "peculiar to government," and thus meets the test of a new program or higher level of service. Cal Cities filed a joint publication request with CSAC; however, the court allowed the case to remain unpublished.

Cal Cities thanks letter writer Jennifer Bacon Henning with CSAC.

Letters Requesting Depublication of an Appellate Court Opinion

California courts accept letter briefs on various issues. For example, the California Supreme Court accepts letter briefs on the issue of whether the Court should depublish an appellate opinion so that the opinion is no longer precedential.

During this reporting period, Cal Cities filed one depublication request: *Save the Hill Group v. Livermore*, an appellate case holding that the City violated the California Environmental Quality Act (CEQA) by failing to adequately analyze the "no project alternative" in an Environmental Impact Report (EIR). Cal Cities filed a joint depublication request with CSAC which articulated that the opinion was unclear and would cause confusion because it conflated two distinct legal issues under CEQA and improperly treated them as a singular issue.

If the court's ruling were to stand, this case would impose new difficulties for lead agencies' preparation of EIRs under CEQA. The court's opinion notably undercuts the standard for the exhaustion of administrative remedies, which would provide an opening for petitioners to raise entirely new arguments in court that were not specifically presented to the agencies during their consideration of the project. The decision is still pending.

Cal Cities thanks letter writer Tyson Sohagi with Sohagi Law Group.