General Municipal Litigation Update

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GENERAL MUNICIPAL
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FOR

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I. ELECTIONS

A. *San Bernardino County Fire Protection District v. Page* (2024) 99 Cal.App.5th 791.

Holding: The Court of Appeal upheld the trial court's determination that statements in an initiative measure challenging the imposition of a special tax via annexation were false and misleading and ordering that the measure, although approved by voters, not be enforced.

Facts/Background: A fire protection district (the "District") annexed certain additional properties into its service area, thereby subjecting the area to a previously approved special tax that funded the District. Representatives from the newly annexed area submitted an initiative measure challenging the imposition of the tax on the ground that it was not approved by the voters and was therefore illegal under Prop. 218. The initiative contained multiple affirmative statements that the tax was illegal on that basis. The trial court found these statements to be false and misleading under Evidence Code section 18600 and, although the initiative was ultimately placed on the ballot and approved by the voters, the court ordered that it not be enforced.

Analysis: The Court of Appeal upheld the trial court's determination. According to the Court, the law was clear that the voter-approval requirements of Prop. 218 do not apply to taxes imposed on property due to annexations, citing various cases. The appellate court stated that "This legal authority was accessible to the [initiative proponents], either through conducting legal research or through representation by their attorneys." Therefore, statements to voters that the tax was illegal due to a lack of voter approval were false and misleading, and the initiative measure was properly invalidated.

Impact: Despite the normally sacrosanct nature of First Amendment protections in the political context, and the often "grey" nature of the legal interpretations, initiative measures will be stricken as false and misleading if they contain statements that are inconsistent with well-established law. Thus, initiative proponents should confirm that legal statements made in proposed initiatives are not inconsistent with that law.

B. *Move Eden Housing v. City of Livermore* (1st App. Dist., Mar. 6, 2024) No. A167346, 2024 WL 959630.

Holding: The Court of Appeal held that (1) the city's adoption of a resolution was a legislative act subject to local referendum power because it involved the definitive policy

decision to construct a public park at city expense, (2) even if the resolution was not a legislative act subject to referendum, the city clerk was not authorized in refusing to process it, and (3) despite the property being on the city's Long Range Property Management Plan approved by the State, the city was not acting as the State's administrative agent, under redevelopment-dissolution statutes, in deciding to develop it in this manner.

Facts/Background: In May of 2022, the City of Livermore ("City") adopted an amended and restated DDA that, among other things, called for the developer to construct a public park at the City's expense. Prior versions of the DDA, although envisioning the potential development of the park, did not require its construction.

Objectors to the project sought to process a referendum against the adoption of the amended DDA, but although they obtained the requisite number of signatures, the city clerk refused to process it on the ground that the adoption of the resolution was purportedly an administrative act (and thus not subject to the referendum power) rather than a legislative one. In response, the objectors filed a petition for writ of mandate. The trial court denied the petition, holding that (1) the resolution was not subject to challenge by referendum because it was an administrative act or, in the alternative, because the City was acting as an administrative agent of the State in adopting it, and (2) the city clerk did not act unlawfully in refusing to process the referendum petition on this basis.

Analysis: The Court of Appeal reversed the decision of the trial court, on the following grounds:

<u>Actions of City Clerk</u>: According to the Court, an elections official such as a city clerk may not refuse to submit a referendum measure to the electorate on the ground that it deals with a matter not subject to referendum. Rather, in certifying a referendum petition, the clerk's sole duty is the ministerial function of determining whether the procedural requirements have been met. Thus, it was unlawful here for the city clerk to refuse to process the procedurally valid referendum petition, even if it was substantively invalid because it purportedly targeted an administrative act. If the City had believed the petition to be invalid on that basis, its remedy was to file a petition for writ of mandate seeking to remove it from the ballot. (citing *Save Lafayette v. City of Lafayette* (2018) 20 Cal.App.5th 657, 663; *Friends of Bay Meadows v. City of San Mateo* (2007) 157 Cal.App.4th 1175, 1185–1186, 68 Cal.Rptr.3d 916 (*Bay Meadows*).)

<u>Whether Act Was Subject to Referendum:</u> Although it is well established that administrative actions are not subject to referendum, here the City's adoption of the

subject resolution was a legislative act because it constituted the definitive policy decision of the City to construct a public park at City expense. According to the court, "legislative acts generally are those which declare a public purpose and make provisions for the ways and means of its accomplishment," whereas administrative acts "are those which are necessary to carry out the legislative policies and purposes already declared by the legislative body." (*San Bruno Comm. for Econ. Just. v. City of San Bruno* (2017) 15 Cal.App.5th 524, 530.) Although a prior version of the DDA contemplated the construction of the park, it did not constitute a definitive expression of legislative policy because it merely gave the City the *option* to negotiate a future agreement for such construction. Not until the challenged 2022 DDA did the city council make a definitive decision to construct the park and apply City resources toward it. In support, the Court cited *Hopping v. Council of Richmond* (1915) 170 Cal. 605, and *Burdick v. City of San Diego* (1938) 29 Cal.App.2d 565, 569, 84 P.2d 1064.

In addition, the Court held that the City was not acting as the administrative agent of the State in adopting the resolution, even though the property had been included on the City's Long Range Property Management Plan approved by the State pursuant to the redevelopment-dissolution laws. According to the Court, because the State's approval was limited to whether the Plan identified the property and proposed a general disposition under Health & Safety Code section 34191.5(c), and the City still maintained discretion to "implement one of multiple approaches" to comply with the Plan, its decision of how to deal with the property remained legislative in character.

Impact: City clerks must refrain from proactively declaring referendum petitions invalid, and should instead seek to challenge them via petition for writ of mandate. In addition, cities should be mindful of when their decisions involve a policy decision and therefore are legislative in character.

C. *Schlesinger v. Sachs* (2023) 97 Cal.App.5th 800.

Holding: State and city "holdover provisions" for city councilmembers did not allow councilmembers to extend their terms beyond the two years for which they were elected, where election materials and related documents expressly stated that members were being elected for only two years.

Facts/Background: Pursuant to a stipulated judgment entered into in settlement of a lawsuit under the California Voting Rights Act, an election was held for three city councilmember positions for the City of Mission Viejo ("City") in November of 2018. Various documents, including the stipulated judgment, the notice of election required by Elections Code section 12101, and a city council resolution certifying the election results, all expressly stated that the councilmembers would be elected for a term of only two years. The winners of the election were councilmembers Sachs, Bucknam, and Raths.

Although the original stipulated judgment stated that, beginning in November of 2020, the City would implement a "cumulative voting" system, under which all five council seats are open and elected at once, the judgment was amended in July of 2020 to state that this would begin in November of 2022. As a result, when the November 2020 election occurred, Sachs, Bucknam, and Raths were not placed on the ballot as originally planned, but were instead permitted to stay in office until the planned cumulative voting began in November of 2022.

In January of 2022, the plaintiff sought leave to pursue a *quo warranto* action to remove Sachs, Bucknam, and Raths from office. After leave was granted, on August 21, 2022, the trial court ruled in favor of the plaintiff and issued an order removing the councilmembers from office on the ground that their prescribed term of office was only two years.

Analysis: The Court of Appeal upheld the trial court's ruling. According to the Court, the will of the voters in the November 2018 election, as reflected in the notice of election and other materials and statements issued in conjunction therewith, was to elect Sachs, Bucknum, and Raths to the city council for only two-year terms, not four-year terms. Moreover, the City Council ratified the voters' decision after the election by declaring that Sachs, Bucknum, and Raths had been elected to two-year terms of office. In light of these facts, maintaining the "integrity of the election process" required that the councilmembers be limited to two-year terms.

This result did not change based on the "holdover provisions" contained in Government Code section 57377 or the City's municipal code, both of which stated that councilmembers had the right to hold office "until their successors are elected and qualified." According to the Court, the holdover provisions were intended only to prevent brief vacancies in office following an election and did not permit elected officeholders who have the power to call an election to stay in office by failing to call one. Meanwhile, under Government Code section 36512(b), a city council is required to fill vacancies in

an elected municipal office within 60 days of the commencement of the vacancy, either by appointment or by calling as special election. Had this requirement been followed, Sachs, Bucknum, and Raths would have been permitted to holdover in office only for so long as it would take to call and hold a special election or to have the city council meet and appoint their replacements, which the City did not do here.

Impact: Cities and councilmembers should scrupulously comply with the will of the voters as reflected in the election materials presented to the voters and on which they presumptively based their votes.

II. LAWMAKER ACTIVITIES

A. *Lindke v. Freed* (Mar. 15, 2024) No. 22-611, 601 U.S. ___, 2024 WL 1120880

Holding: To establish that a city manager was acting under color of state law on his social media page, the plaintiff social-media user was required to show that the city manager had both actual authority to speak on behalf of the city on the particular matter in question *and* that he purported to exercise that authority in the relevant posts.

Facts/Background: A social-media user brought an action under Section 1983 against a city manager, alleging that the city manager violated the user's First Amendment rights by deleting his comments on the city manager's Facebook page and by blocking him from the page. Overall, the posts on the page mostly related to the city manager's personal life, but they occasionally addressed city-related issues. The page also identified the city manager as holding that position with the city. The district court granted summary judgment in favor of the city manager, and the user appealed.

Analysis: The U.S. Supreme Court affirmed the ruling of the district court. The issue before the Court was whether the city manager was acting under color of state law for purposes of a claim under Section 1983. The Court held that the state-action doctrine required the plaintiff to show that the city manager (1) had actual authority to speak on behalf of the City on a particular matter, and (2) purported to exercise that authority in the relevant posts. Under this standard, the Court held that the city manager was not acting under color of state law here.

With respect to the first prong, the Court held that authority to speak on behalf of a city or other public entity comes from "statute, ordinance, regulation, custom, or usage," with the first three of these referring to "written law," and the latter two (*i.e.*, custom and

usage) encompassing “persistent practices of state officials” that are “so permanent and well settled” that they carry “the force of law.” Thus, according to the Court, “a city manager . . . would be authorized to speak for the city if written law like an ordinance empowered him to make official announcements,” or if, “even in the absence of written law . . . prior city managers have purported to speak on its behalf and have been recognized to have that authority for so long that the manager’s power to do so has become ‘permanent and well settled.’” The Court noted that the inquiry in such cases “is not whether making official announcements *could* fit within the [official’s] job description; it is whether making official announcements is *actually* part of the job that the State entrusted the official to do” (emphasis in original). This statement underscores that actual authority must be demonstrated and cannot simply be implied from broad descriptions.

With respect to the second prong, the Court held that, generally, a public employee purports to speak on behalf of the public agency while speaking “in his official capacity” or when he uses his speech to fulfill “his responsibilities pursuant to state law.” On the other hand, “if the public employee does not use his speech in furtherance of his official responsibilities, he is speaking in his own voice.”

The Court acknowledged that this prong would entail a fact-specific inquiry that, in the realm of on-line social media, could turn on such factors as (1) disclaimers on a page or post (*e.g.*, expressly stating that posts or comments are not made in an official capacity), (2) the manner in which a page is used (*e.g.*, a page in the name of an individual, with largely personal posts, versus the formal page of a public entity), (3) the context of the particular statement (*e.g.*, whether a public official is purporting to make a formal announcement or simply sharing publicly-available information), and (4) the nature of the technology in question and the breadth of its impact on the social-media user (*e.g.*, deleting a single comment versus blocking from an entire page, which would apply the issue to all posts).

Impact: This decision will make it more difficult for plaintiffs to establish claims against public officials based on conduct on their personal social media pages. In addition, it provides a good set of guidelines as to how public officials can protect themselves from liability through disclaimers and contextual comments on their posts and pages.

B. *Linthicum v. Wagner* (9th Cir. 2024) 94 F.4th 887.

Holding: State senators' failure to attend legislative sessions was not protected activity under First Amendment.

Facts/Background: A recent amendment to Oregon's Constitution disqualifies from the next election any state senator or representative who has accrued ten or more unexcused absences from legislative floor sessions. The amendment was adopted by an initiative measure approved by more than 68% of the state's voters, in an effort to address the increase in legislative "walkouts." The walkouts had become a concern particularly because, in light of the state's supermajority quorum requirement, a minority of legislators could prevent legislative business from occurring at all by not attending legislative sessions.

In 2023, two state senators engaged in a legislative walkout spanning several weeks, each accumulating more than ten unexcused absences. As a result, Oregon's Secretary of State disqualified them from appearing on the ballot for the 2024 election. In response, the senators sought a preliminary injunction, arguing that their walkouts constituted protected speech under the U.S. Constitution. After the district court denied the request for preliminary injunction, the senators appealed.

Analysis: Citing the U.S. Supreme Court case of *Nevada Commission on Ethics v. Carrigan*, 564 U.S. 117 (2011), the Ninth Circuit held that "not attending legislative sessions—depriving a legislature of the quorum required to consider legislative action (or risking that result)—is '*an exercise of the power of the legislator's office*' and therefore is *not* activity protected under the First Amendment" (emphasis added).

Carrigan had involved a Nevada state law that prohibited legislators from voting on legislative matters in which they were privately interested. Thr Supreme Court concluded that the rule did not run afoul of the First Amendment because "a legislator has no right to use official powers for expressive purposes." *Id.* at 127. Because "[t]he legislative power thus committed is not personal to the legislator but belongs to the people," *id.* at 126, the Supreme Court held that Nevada's rule did not infringe on any personal right of the legislators guaranteed by the First Amendment. According to the Ninth Circuit, the Supreme Court "thus explicitly 'rejected the notion that the First Amendment confers a right to use governmental mechanics to convey a message.'"

In further support of its holding, the Ninth Circuit cited to the "historical tradition of legislatures retaining the power to physically compel absent members to attend legislative

sessions." According to the Court, the recognized power to punish (even jail) legislators for not performing their functions meant that refusing to perform such functions could not constitute protected activity under the First Amendment.

Finally, the Ninth Circuit distinguished its prior case of *Boquist v. Courtney*, 32 F.4th 764 (9th Cir. 2022), where the Court had overturned the dismissal of a claim by a state senator who had challenged a policy that he provide 12 hours' notice of his intent to enter the state capitol due to statements he made on the senate floor and to a reporter, which some found threatening. The Court noted that, in that case, the underlying conduct for which the policy was imposed was clearly speech, as opposed to an exercise of legislative power.

Impact: Although clearly establishing that "walkouts" do not constitute protected activity under the First Amendment, this case also provides helpful guidance with respect to *other* acts that "exercises of legislative power" that might also not be subject to such protection. In each instance, a city councilmember or other member of a governing body should evaluate whether its act constitutes such an exercise.

Notably, this determination could be read as inconsistent with California law establishing that the *votes* of individual councilmembers constitute protected speech activity, which is commonly observed in the anti-SLAPP context. (See, for instance, *Mary's Kitchen v. City of Orange*, discussed next.)

III. PUBLIC MEETINGS

A. *Mary's Kitchen v. City of Orange* (2023) 96 Cal.App.5th 1009.

Holding: Decision by city council confirming decision of city manager to cancel license agreement of homeless-service provider did not constitute protected conduct under the anti-SLAPP statute (Code of Civil Procedure section 425.16).

Facts/Background: The city manager of the City of Orange ("City") cancelled the City's license-service agreement with a homeless-service provider, Mary's Kitchen, over safety concerns. Thereafter, the city council held a closed session that was agendized as a discussion of unspecified "anticipated litigation" under Government Code section 54956.9, subdivisions (d)(2)-(4). The agenda item did not mention Mary's Kitchen or the license-agreement cancellation. After the closed session, the city attorney announced that the council had "unanimously confirmed" the termination of the license agreement. The minutes of the meeting stated the same.

Mary's Kitchen filed a lawsuit, alleging violations of the Ralph M. Brown Act, and contending that the manner in which the matter was agendized deprived the public of the ability to speak on the item or know what was under consideration in the closed session. The City responded by filing an anti-SLAPP motion under Code of Civil Procedure section 425.16. Accompanying that motion was a declaration from the city attorney, stating that no action was taken in the closed session because the city manager's action to cancel the license agreement was legally sufficient, and therefore the "decision" in closed session was simply to "do nothing" in response to the city manager's action.

The trial court denied the anti-SLAPP motion on the ground that the actions challenged in the lawsuit—the City's alleged "action" in closed session and its failure to provide adequate notice—did not constitute protected conduct under the anti-SLAPP statute.

Analysis: The Court of Appeal upheld the trial court's decision, and found that the anti-SLAPP statute was inapplicable. The Court held that the critical distinction for purposes of the anti-SLAPP statute was between protected speech (to which the statute applies) and unprotected conduct (to which it does not). The Court cited *San Ramon Valley Fire Protection Dist. v. Contra Costa County Employees' Retirement Assn.* (2004) 125 Cal.App.4th 343, 354, which held that a lawsuit challenging a county board's decision to increase pension-contribution requirements was not susceptible to an anti-SLAPP motion because the gravamen of the lawsuit "was not the board hearing or the votes thereafter (*i.e.*, speech), but instead the <u>*action*</u> of the county retirement system increasing the pension contribution requirements" (emphasis added).

In contrast, the Court cited *Holbrook v. City of Santa Monica* (2006) 144 Cal.App.4th 1242, where the court held that a lawsuit seeking to enjoin a city from continuing its city council meetings past 11 p.m. <u>*was*</u> subject to the anti-SLAPP statute because it was premised on protected activity—namely, the speech that occurred at meetings past 11:00 p.m., as well as the meetings themselves. (*Id.* at pp. 1247-1248.)

Finally, the Court cited *Schwarzburd v. Kensington Police Protection & Community Services Dist. Bd.* (2014) 225 Cal.App.4th 1345, as being "particularly instructive in drawing the distinction between unprotected activity and protected speech." There, a lawsuit challenging a district board's decision to increase the police chief's pay was brought against both the district itself <u>*and*</u> its individual board members. The court held that the anti-SLAPP statute did not apply to the action against the district pursuant to the rationale in *San Ramon*, but that it did apply to the action against the individual board members, as it is necessarily premised on how they <u>*voted*</u>, which is protected speech.

Applying this law to the facts before the Court, it held that the lawsuit by Mary's Kitchen challenged unprotected action—namely, the "unanimous confirmation" of the city manager's decision, and the City's alleged failure to provide proper notice of that action in the agenda. Although the City contended that no action was taken, and that the declaration of its city attorney clearly established that fact, the Court held that this declaration was contradicted by the meeting minutes, which referred to the "unanimous confirmation" announced by the city attorney. The Court concluded that "[i]t is crystal clear that plaintiffs base their lawsuit on a claim that an action occurred, which is supported by a plausible inference from the meeting minutes," and that "[t]he action of ratifying the termination of the licensing agreement, assuming it occurred, is not conduct in furtherance of free speech; it is ordinary business.

Impact: Before bringing an anti-SLAPP motion, a city or public-official defendant should closely analyze the distinction between protected speech and unprotected conduct.

IV. LOCAL GOVERNMENT

A. *Temple of 1001 Buddhas v. City of Fremont* (1st App. Dist., Mar. 6, 2024) No. A167719, 2024 WL 973921.

Holding: The Court of Appeal held that (1) a city's appeals process on nuisance abatement was not preempted by the California Building Code to the extent its nuisance determinations rested *solely* on violations of its zoning ordinance; (2) the city's appeal process *was* preempted to the extent its nuisance determinations rested on Building Code violations, even if such violations also constituted a violation of the city's zoning ordinance; and (3) the deputy city attorney's presence at the administrative appeal hearing was not a due process violation because it was not shown that the attorney advised the hearing officer during the hearing.

Facts/Background: After an administrative-appeal officer for the City of Fremont ("City") issued a final administrative decision upholding the City's nuisance determination for a particular property, the property owner filed a petition for writ of mandate challenging the decision on the grounds that (1) the City's appeal process was invalid under the California Building Code, which requires that such administrative appeals be heard by an established board or panel rather than a single hearing officer, and (2) the hearing was unfair for various reasons, including the fact that the deputy city attorney acted as both an advocate for the City in the underlying nuisance determinations

and an advisor to the hearing officer on appeal. The trial court denied the petition, and the property owner appealed.

Analysis: The Court of Appeal reversed the decision of the trial court, in part, as follows:

Preemption of City Appeal Process: In *Lippman v. City of Oakland* (2017) 19 Cal.App.5th 750, the Court of Appeal held that California Building Code section 1.8.8 requires a city to provide for appeals covered by that section to be held before an independent agency or board, or before the city's governing body—*i.e.*, by an established panel of multiple officers. By its terms, Section 1.8.8 applies to matters involving "the application and interpretation of this code and other regulations governing construction, use, maintenance and change of occupancy."

Based on *Lippman*, the Court held that the City of Fremont's appeal process regarding nuisance determinations was invalid because it provided for the appeal to be heard by only a single hearing officer. However, the Court held that this invalidity only applied to nuisance determinations based on violations of the Fremont Building Standards Code, not to nuisance determinations that were based solely on violations of the City's zoning ordinance. Although every violation of Fremont's Building Standards Code also constituted a nuisance under the City's zoning ordinance, in such instances, the violations would be treated as based on the Building Standards Code, and Section 1.8.8 would appluy. Thus, the City could not circumvent the requirements of Section 1.8.8 by styling a claim as one for "nuisance" as opposed to an underlying building code violation.

With respect to claims of unfairness of the hearing, the plaintiffs contended that they were denied due process because the deputy city attorney acted as both an advocate for the City on the underlying charges and as an adviser to the hearing officer at the administrative hearing. On this point, the Court recognized that "an attorney cannot act as both an advocate for an agency and then as an adviser to the decision maker who reviews the result that the advocate achieved," and cited *Nightlife Partners, Ltd. v. City of Beverly Hills* (2003) 108 Cal.App.4th 81, which was relied upon by the plaintiffs. As described by the Court, in *Nightlife Partners*, the same attorney took "an active and significant part in the renewal application process" for the subject permit, and then "also appeared and participated in the administrative review of the denial of that application by advising and assisting" a city employee acting as a hearing officer. (*Id.* at p. 90.)

In distinguishing *Nightlife Partners*, the Court noted that the plaintiffs in the present case had failed to ***object*** to the deputy city attorney's alleged dual role, despite their "obvious presence at the administrative hearing," thereby ostensibly waiving it. (Citing *Attard v.*

Board of Supervisors of Contra Costa County (2017) 14 Cal.App.5th 1066, 1083.) Furthermore, the Court held that, "while [the deputy city attorney] undisputedly served as Fremont's counsel," the plaintiffs failed to show that, "like the attorney in *Nightlife*, [she] ***advised*** the entity that reviewed the decision for which she advocated." (Emphasis added.) In other words, the plaintiffs only showed that the deputy city attorney attended the hearing, not that she advised the hearing officer while there.

Impact: A city's administrative appeals process relating to building matters is subject to the requirements of Building Code section 1.8.8, and a city cannot avoid those requirements by styling the underlying violations as ones for "nuisance," unless those violations are based solely on violations of the City's zoning code, independent of any building code violations. In addition, a city attorney who advocates for an underlying decision may nevertheless attend the hearing on the appeal of the decision, so long he or she does not advise the hearing officer at the hearing. Furthermore, if the appellant in that process fails to object to the city attorney's presence, they may be deemed to have waived the "dual roles" issue.

V. GOVERNMENT CLAIMS ACT

A. *A.S. v. Palmdale School District* (2023) 94 Cal.App.5th 1091, cert. pet. pending, U.S., Mar. 7, 2024.

Holding: The Court affirmed the trial court's ruling sustaining the district's demurrer because the complaint form did not substantially comply with Government Claims Act ("Act"), Government Code section 910 specifying necessary contents of a claim.

Facts/Background: A teacher grabbed child's arm and twisted it, resulting in injury requiring medical treatment. The next day, appellant's mother went to the school to file a complaint. The mother submitted a complaint form to the assistant superintendent who told her that a full inquiry would be made.

Eleven months later, the child, now represented by counsel and acting through his mother, sued for damages. He alleged compliance with the Act and attached a copy of the complaint form the mother had submitted to the assistant superintendent. The trial court sustained the District's demurrer to the third amended complaint without leave to amend.

Analysis: The Act required the child to file a claim with the District before suing. The Act required the claim include information specified in Government Code section 910. The section required the child to substantially comply with the Act by showing the claim

disclosed sufficient information to enable the District to adequately investigate the merits of the claim and to consider settlement. (*County of Los Angeles v. Superior Court* (2008) 159 Cal.App.4th 353, 360.)

The Court held the complaint form did not substantially comply with the Act because it did not include a statement the child "was seeking monetary damages and made no attempt at all to estimate, even roughly, an amount of damages or state whether or not the claim would be a limited civil case." (*A.S.*, *supra,* 94 Cal.App.5th at p. 1098.)

The Court held the District was not obligated to notify the child of deficiencies in the form or lose the right to assert noncompliance as an affirmative defense. The Court recognized there is a difference between a claim that does not substantially comply with the Act and "a document that is not a claim at all." (*Id.* at p. 1099.) To be a claim, the document must contain "an indication that litigation might ensue if the defendant does not comply with the terms under discussion." (*Ibid.*) Here, the Court found that there was nothing in the complaint form that threatened litigation. Therefore, the complaint form is not a claim. (*Id.* at p. 1100.)

Impact: Upon receiving a complaint, local governments should always review it to determine if it is a claim that threatens litigation and substantially complies with the Act. Cities should aggressively defend against a plaintiff's failure to comply with the Act by demurrer.

VI. MUNICIPAL FINANCE

A. *Traiman v. Alameda Unified School District* (2023) 94 Cal.App.5th 89, review den. Dec. 27, 2023.

Holding: Reversing trial court ruling that parcel tax violates state law requiring uniform application of the tax. The cap on taxed square footage did not transform a permissible square footage parcel tax into an impermissible non-uniform tax.

Facts/Background: Voters approved an annual school district parcel tax of 26.5-cents per square foot on improved properties capped at $7,999 per parcel. The cap effectively lowered the tax rate for properties larger than 31,000 square feet. Petitioners argued the measure violates the statute authorizing school districts to impose such taxes, which requires parcel taxes to apply uniformly. The trial court ruled the tax was not uniform and invalidated it.

Analysis: The Court of Appeal reversed and held the tax applied uniformly as required by statute.

Relying on *Borikas v. Alameda Unified School District* (2013) 214 Cal.App.4th 135, 158 and *Dondlinger v. Los Angeles County Regional Park & Open Space District* (2019) 31 Cal.App.5th 994, the Court of Appeal ruled the tax applied uniformly despite the cap causing the imposition of different effective tax rates.

Borikas held that a school district's imposition of a higher parcel tax on commercial property over 2,000 square feet did not apply uniformly because it created classifications of taxpayers and property and taxed them differently, i.e., by using a flat rate for commercial property and a per square-foot rate for other properties. (*Borikas*, 214 Cal.App.4th at p. 165.) *Borikas* held a parcel tax must be applied to all nonexempt properties in the District without variation. (*Id.* at p. 164.)

Dondlinger approved a park and recreation district's parcel tax subject to a substantially similar statutory uniformity requirement based on the square footage of developed land "even though it yielded a different tax bill depending on the size of the property and whether the property contained improvements used for parking." (*Dondlinger*, 31 Cal.App.5th at p. 1000.)

Applying these cases, *Traiman* held "what taxpayers end up paying is not relevant to whether a [parcel] tax is uniformly applied." (*Traiman*, 94 Cal.App.5th at p. 101.) Therefore, "different outcomes for taxpayers, such as their effective tax rates, due to the application of a tax formula does not mean the tax formula fails the uniform application test." (*Id.* at p. 102) Instead, a tax is uniformly applied if the "tax formula that is imposed on all taxpayers or property types is applied uniformly, even if it results in a different effective tax bill or tax rate due to the size of the property." (*Id.* at p. 103.)

The Court also emphasized the legislative history and underlying public policy of Government Code section 50079 governing school district taxes to support the holding that the law requires uniform application of the tax and not a uniform outcome. (*Id.* at pp. 103–106) The Court noted there is nothing in the legislative history "to suggest that anyone thought a tax rate could not take account of the size of the property." (*Id.* at p. 104.) The Court also recognized that when enacting the provision, "legislators were well aware that school districts imposed parcel taxes at a flat rate, resulting in different effective tax rates." (*Id.* at p. 105.)

Impact: Parcel taxes are now a realistic option for cities after *City & County of San Francisco v. All Persons Interest in the Matter of Proposition G* (2021) 66 Cal.App.5th 1058, 1074–1075 held that an initiative parcel tax need only be approved by a simple majority. Cities are not subject to a statutory uniformity requirement as school districts and other special districts are, but some have subsidiary special districts that are.

B. *Mojave Pistachios, LLC v. Superior Court* (2024) 99 Cal.App.5th 605.

Holding: The Court of Appeal held the pay-first-litigate-later rule applies to challenges to fees imposed by a groundwater sustainability agency even where the fee is many millions of dollars and perhaps more than the value of the property on which the fee is imposed. Demurrer properly sustained because pistachio grower failed to pay fee before filing lawsuit.

Facts/Background: Mohave owns orchards in the Mojave desert irrigated exclusively with groundwater pumped form the local water basin. After Mojave planted the trees, the Legislature adopted the Sustainable Groundwater Management Act ("SGMA") which requires the creation of groundwater sustainability management plans and authorizes fees to fund groundwater replenishment projects. The local ground water authority imposed a replenishment fee on basin groundwater extraction of $2,130 per acre-foot, but allowed a credit against chargeable pumping to residential users, water retailers and the U.S. military, but not Mojave. Mojave owed over $8 million annually in replenishment fees starting in 2021. Mojave claimed it lacked the ability to pay, made no payments, and sued. The trial court sustained the authority's demurrers to all causes of action notwithstanding federal due process and takings claims. Mojave petitioned for an appellate writ and the Court of Appeal issued an order to show cause to allow briefing and argument.

Analysis: Under the Act, a person may pay a fee under protest and sue for refund. (Wat. Code, § 10726(d).) The Court held Mojave was required to pay the fee under protest before suing to challenge the fee notwithstanding its very high amount in relation to the value of its property. (*Mojave Pistachios, supra,* 99 Cal.App.5th at p. 200.) The Court further found that none of the circumstances that justify exception to the pay-first rule were present. (*Id.* at p. 199.) Finally, the Court declined to create an new exception when an agency allegedly acts inconsistent with the law. (*Id.* at pp. 199–200.)

The Court relied on cases interpreting Health & Safety Code section 5472, which imposes a similar pay-under-protest rule to sue for a refund of municipal charges for

sewer and trash service. (*Id.* at p. 198.) The Court recognized that *Los Altos Golf & Country Club v. County of Santa Clara* (2008) 165 Cal.App.4th 198 rejected the argument the pay-under-protest requirement in section 5472 is permissive rather than mandatory. (*Mojave Pistachios, supra,* 99 Cal.App.5th at 198.) "Given the two statutes use nearly identical language, we further presume the Legislature intended that the *Los Altos* court's interpretation of section 5472 should apply to section 10726.6(d)." (*Id.* at p. 199).

Impact: The ruling affirms that Health & Safety Code section 5472 and similar pay-under-protest requirements mandates—as opposed to allows—plaintiffs pay under protest before filing suit against a city. The rule applies even if the charge allegedly violates the law and when the fee to be paid is very high in relation to the property to be assessed, barring claims that such a requirement for suit violates due process or the takings clause. As the court notes, pay-under-protest requirements serve important public policy interests. (*Id.* at p. 195.)

C. *City of Lancaster v. Netflix* (2024) 99 Cal.App.5th 1093.

Holding: The Court made a three-part ruling: (1) The Digital Infrastructure and Video Competition Act ("DIVCA") does not expressly create a private right of action for local governments against non-franchise-holder streaming services; (2) DIVCA does not establish an implied private right of action for local governments against such services; and (3) trial court appropriately preserved Public Utilities Commission's ("PUC") jurisdiction.

Facts/Background: DIVCA requires "video service providers" to obtain a franchise from the PUC and pay franchise fees to local governments in exchange for use of public rights-of-way to operate video service networks. (*City of Lancaster*, 99 Cal.App.5th at p. 426.) The Act originally targeted cable TV and home internet providers with equipment installed in the rights-of-way.

Lancaster brought a class action against streaming services seeking unpaid franchise fees for video services and declaratory relief compelling streaming services to obtain state franchises and pay franchise fees. (*Id.*) The Superior Court sustained the streaming services' demurrers without leave to amend. City appealed. (*Id.*)

Analysis: DIVCA does not expressly create a private right of action for local governments against non-franchise-holder steaming services for unpaid video service

provider fees. (*Id.* at p. 433.) DIVCA makes clear that fees from streaming services operating within a local government's jurisdiction are franchise fees, and only holders of state franchises are obligated to pay them. (*Ibid.*)

The Act indicates legislative intent that the PUC, not local governments, be responsible for enforcement of the franchise requirement because it allows the PUC to bring suit against streaming services that fail to obtain a franchise. (*Ibid.*) Further, the Act's legislative history makes no mention of a local government private right of action against non-franchise holders. (*Ibid.*)

The Court ruled that the trial court appropriately preserved the PUC's jurisdiction by sustaining the demurrer to Lancaster's declaratory relief claim. (*Id.* at p. 438.) The Court held that the claim was wholly derivative of Lancaster's claim asserting a private cause of action seeking past due video service provider fees, which was meritless because the Act grants enforcement authority to the PUC and not local governments. (*Id.*) The Court also found Lancaster's claim was essentially a thinly veiled request that the court order the PUC to issue franchises to streaming services or initiate enforcement actions against them. (*Id.*)

Impact: Following this decision, cities cannot use litigation to force streaming services to pay franchise fees similar to fees paid by cable TV providers. This does not mean that cities will never collect such fees. The opinion leaves open the underlying question whether California law requires streaming services to pay franchise fees as cable TV providers do. However, the PUC, not local governments, must sue the streaming services to properly put the issue before a court. A legislative solution may be more likely.

VII. PUBLIC RECORDS ACT

A. *State of California v. Superior Court (Energy and Policy Institute)* (Apr. 5, 2024, B330847) ___ Cal.5th ___.

Holding: Governor's Office must disclose calendar entries for meetings with a small number of people and entities, including invitees, attendees, date, time, and location. The Office is not required to disclose substantive information regarding the meetings such as the agenda.

Facts/Background: Energy Policy Institute ("Institute") made a PRA request for the calendar entries of Alice Reynolds, the Governor's Senior Advisor for Energy. In a subsequent more narrow request, the Institute sought calendar entries for Reynolds's

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meetings with ten utility organizations for a limited period of time. The Governor's Office rejected the request, declaring the entries exempt from disclosure under the deliberative process privilege and *Times Mirror Co. v. Superior Court* (1991) 53 Cal.3d 1325.

The Institute petitioned for a writ, explaining that during the period covered by the request, the Governor's Office participated in the Public Utility Commission's ("CPUC's") decision-making regarding net metering tariffs. Therefore, the public had an interest in knowing who Reynolds met with during that time because she eventually became head of the CPUC. The Governor's Office argued that the "mere fact that a meeting occurred reveals that … the advisors decided to explore a concept or prioritize one issue over another." The Governor's Office then reasoned that forced disclosure of the information would "expose the governor to premature public pressure" to take certain actions before the issue is fully vetted. The trial court granted the writ and ordered disclosure of the entries.

Analysis: The Court of Appeal affirmed. The Court performed the balancing test required by the catchall exemption to determine that the the public's interest in the information requested is more compelling than the minimal impact on the Governor and his advisor's deliberative process that may result from the disclosure of the limited information requested. (Cal. Gov't Code, § 7920.000, subd. (a).)

The Court recognized that the deliberative process privilege and the catchall provision allow the Governor's Office to withhold the documents only if it shows that the public's interest in nondisclosure clearly outweighs the public's interest in the entries.

The Governor's Office relied on *Times Mirror,* 53 Cal.3d at p. 1342 and its progeny to argue that the Governor's interest in withholding the entries clearly outweighs the interest in disclosure. In *Times Mirror*, the Supreme Court held the public's interest in disclosure of all appointment schedules, calendars, and other lists of the Governor's daily activities for five years did not clearly outweigh the Governor's interest in nondisclosure. The Supreme Court held that the deliberative process privilege protects disclosure of the requested documents. The Supreme Court found that "whatever merit disclosure might otherwise warrant in principle is simply crushed under the massive weight of the Times's request." (*Id*. at p. 1345.)

In conducting the balancing test here, the Court reasoned the public's interest in nondisclosure is low because the Institute sought benign data regarding meetings with only 10 organizations: invitees, attendees, date, time, and location. The Institute did not

seek substantive information regarding the meetings such as agenda or notes. Therefore, the entries responsive to the targeted requests will reveal little about Reynolds' mental processes, deliberations, or policy positions. The Court also noted that the Governor failed to present evidence that disclosing the fact of Reynolds's meetings with the utility organizations would not discourage future meetings between those organizations and the Governor's Office.

Weighing in favor of public disclosure, the Court of Appeal noted that the burden is high because the Governor must show that the interest in nondisclosure *clearly* outweighs the public interest in disclosure. The Court recognized the public has an interest "in the extent to which the current CPUC president met with the CPUC and its regulated entities when she served as the Governor's senior energy advisor."

Finally, the Court rejected the Governor's argument that *Times Mirror* limits disclosure of calendar entries to the exceptional case because the *Times Mirror* court expressly recognized that a more limited request could overcome the deliberative process privilege.

Impact: The Court's interpretation limits *Times Mirror's* protection of calendar entries by affirming that narrow requests for benign calendar information will be allowed. As a result, cities will be required to produce public officials' calendar entries in response to narrow and specific PRA requests.

B. *City of Gilroy v. Superior Court of Santa Clara County***, 96 Cal.App.5th 818 (2023);** ***Law Foundation of Silicon Valley v. Superior Court***, **Case No. H049554, review granted Feb. 21, 2024, Case No. S282950.**

Holding: CPRA requestor cannot obtain declaratory relief based on Gilroy's failure to preserve records while the requests for those records were pending; and (2) it was not a violation of CPRA for Gilroy to fail to preserve records it determined were exempt from disclosure before the court had opportunity to review that determination. The Supreme Court granted review on February 21, 2024 but the published decision remains persuasive authority pending that review.

Facts/Background: As part of a 2018 investigation of complaints about homeless encampment cleanups, the Law Foundation of Silicon Valley ("Law Foundation") made numerous public record requests to the City of Gilroy for body-worn camera footage of those cleanups. City provided responsive materials, but withheld the bodycam video, stating: "law enforcement records generally, and Quality of Life criminal code

enforcement records specifically, are exempt from disclosure under the [CPRA].” *(City of Gilroy*, 96 Cal.App.5th at pp. 825–826.)

In August 2019, Law Foundation notified Gilroy it intended to petition for a writ of mandate to compel Gilroy to release video and audio recordings of encampment sweeps from 2016 through the present. (*Id.* at p. 826.) Gilroy then voluntarily placed a litigation hold on the video to preserve it beyond the one-year retention period. (*Id.*)

Gilroy released video footage from encampment sweeps in 2018 and 2019 that did not relate to citations or arrests. (*Id.* at p. 827.) Gilroy withheld video showing encounters in which officers issued citations. Gilroy said it had no other video of sweeps from 2016 to 2019. (*Ibid.*) In July 2020, Gilroy notified Law Foundation that it had destroyed potentially responsive video while the records requests were pending. (*Ibid.*)

Law Foundation petitioned for writ of mandate alleging Gilroy violated the CPRA by delaying responses, failing to search for records, and destroying records. (*Id.* at pp. 827–828.) The trial court denied the petition and granted declaratory relief in part, finding Gilroy violated the CPRA in responding to Law Foundation’s public records requests but rejecting Law Foundation’s request for a declaration that Gilroy violated the CPRA by destroying responsive video it claimed was exempt while the public records requests were pending. (*Id.* at p. 829.) Both parties petitioned for appellate writs (the CPRA does not authorize direct appeals).. (*Id.* at p. 830.)

Analysis: The Court ruled Law Foundation could not seek declaratory relief under the CPRA regarding Gilroy’s past conduct. (*Id.* at pp. 833–834.) Complaints about past acts does not constitute an actual controversy under the declaratory relief statute. (*Id.* at p. 834.)

The Court held CPRA lacks any provisions pertaining to records retention. (*Id.* at p. 836.) The CPRA does not require Gilroy to retain records potentially responsive to a request. The Court also concluded statutes other than CPRA govern record retention. The Court held CPRA does not “impose a duty on public agencies to advise persons requesting public records of the existence of retention statutes.” (*Id.* at pp. 837–838.)

On February 21, 2024, the Supreme Court granted review on two issues: “(1) May an organization obtain declaratory relief under the [CPRA] based on a public entity’s failure to preserve records while the organization’s requests for those records were pending? (2) Is it a violation of the [CPRA] for a public entity to fail to preserve records it determined were exempt from disclosure before a court has had an opportunity to conduct a review?”

Impact: The Supreme Court's opinion in this case, likely in late 2025 or 2026, will frame a cities' obligations to retain records subject to CPRA requests that would otherwise be destroyed pursuant to statutory document retention requirements. If the Supreme Court reverses the Court of Appeal, cities may required to indefinitely retain requested records even after the city deems the records exempt from disclosure. Such a long-term document storage requirement will place a heavy burden on cities to manage and store large volumes of records in various forms without the ability to recover the related costs particularly given how easy it is to make a CPRA request.

C. *BondGraham v. Superior Court of Alameda County* (2023) 95 Cal.App.5th 1006, review den. Dec. 27, 2023.

Holding: The Court rejected City's reliance on subsections of Penal Code section 832.7(b) to support redactions of an internal investigation report concerning allegations of sexual assault by officers. The Supreme Court denied review.

Facts/Background: Journalists challenged redactions of information from an internal investigation report Oakland produced in response to records requests relating to scandal involving several Oakland police officers who allegedly sexually assaulted a minor. (*BondGraham*, 95 Cal.App.5th at pp. 1009–1010.) The City redacted the report's training and policy recommendations, witness statements containing general information about the minor and her social-media use, portions of the minor's statements to investigators, evaluations of officers' conduct in other incidents, and the officers' names of officers. The trial court ruled the redactions permissible. (*Id.* at p. 1011.) The journalists sought an appellate writ.

Analysis: The Court issued a writ ordering the trial court to reconsider the case in light of the opinion.

In 2018, the Legislature enacted legislation amending Penal Code section 832.7 to require public access to records of police misconduct and use of force. (*Id.* at p. 1013.) The Court of Appeal made three important holdings that clarify the scope of information that may be withheld from disclosure under Penal Code section 832.7(b) as amended in 2018. (*Id.* at pp. 1015–1016.) **First**, the Court held that the report's training and policy recommendations and witness statements containing general information cannot be withheld under Penal Code section 832.7(b)(5), which allows redactions of information about allegations of officer misconduct. (*Ibid.*) General statements and information are not related to misconduct and cannot be redacted under this section. (*Ibid.*)

Second, the Court held Penal Code section 832.7(b)(4), which provides a "record from a separate and prior investigation … shall not be released unless it is independently subject to disclosure," does not allow the redactions. (*Id.* at pp. 1016–1017.) The subsection only allows an agency to withhold entire records from a prior investigation, not selected information contained in a record. (*Id.* at p. 1017.) The Court noted the subsection uses the word "record" rather than "information" meaning the Legislature did not intend to allow redaction of a record to remove information relating to other incidents. (*Ibid.*) Because the redacted information was in a single record, section 832.7(b)(4)'s exemption does not apply. (*Ibid.*)

Third, the Court of Appeal held Penal Code section 832.7(b)(6) does not authorize redactions of officers' names. The section allows an agency to redact a record to preserve the anonymity of whistleblowers, complainants, victims, and witnesses. (*Id.* at p. 1020.) The City relied on the section to redact statements regarding officers' credibility and summaries of interviews with officers discussing social media accounts. (*Ibid.*) The Court rejected the redactions because statements could not "fairly be described as one officer describing or witnessing another officer's misconduct." (*Ibid.*)

Impact: This case is a reminder that courts broadly construe the CPRA in favor of disclosure and narrowly construe exceptions to the CPRA. This is particularly true for the public's right of access to police officer misconduct records.

D. *First Amendment Coalition v. Superior Court* (2023) 98 Cal.App.5th 593.

Holding: Documents obtained during the course of an Attorney General's civil pattern-and-practice investigation of a police department are not categorically exempt from disclosure, but documents reflecting confidential unemployment information are. A report prepared by the Office of the Inspector General ("OIG") relating to its investigation of alleged misconduct by prison guards is not a "public record."

Facts/Background: Under Penal Code section 832.7(b), records relating to officers who engage in specified types of misconduct are deemed nonconfidential and must be made available for public inspection pursuant to the CPRA. Section 832.7(b) applies notwithstanding "any other law" or CPRA exemption. Under the section, personnel records regarding certain types of officer conduct "shall not be confidential and shall be made available for public inspection pursuant to the [CPRA]."

After section 832.7(b) became effective, the First Amendment Coalition and a television station served CPRA requests on the Attorney General for records regarding officers' discharges of firearms, use of force, or sexual assault. (*First Amendment Coalition*, 98 Cal.App.5th at p. 601.) Section 832.7(b) includes these types of records among those that are deemed not confidential and requires the records be made available for public inspection pursuant to the CPRA.

When the case first came to the Court of Appeal, it held section 832.7(b) "generally requires disclosure of all responsive records in the possession of the Department, regardless whether the records pertain to officers employed by the Department or by another public agency and regardless whether the Department or another public agency created the records." (*Becerra v. Superior Court* (2020) 44 Cal.App.5th 897, 910.)

On remand, the trial court interpreted the Court of Appeal's initial opinion in the case as holding that section 832.7(b) preserves all disclosure exemptions codified in the CPRA, with the exception of Government Code section 7923.600, which section 832.7(b)(1) expressly overrides. (*First Amendment Coalition*, 98 Cal.App.5th at p. 602.) The trial court then held the Department may withhold officer-related documents pursuant to Government Code section 11183, Penal Code section 6126.3, and Unemployment Insurance Code section 1094. (*Ibid.*) The Court entertained the merits of a second petition for appellate writ.

Analysis: The Court or appeal rejected the argument that the Department records can be withheld pursuant to Government Code section 11183, which protects records that the Department obtains pursuant to an investigatory subpoena. The Court ruled section 11183 conflicts with Penal Code section 832.7(b) and the latter prevails. (*Id.* at pp. 607–608.) The Court found the specificity of Penal Code section 832.7(b) "evinces the Legislature's intent that, regardless of Government Code section 11183, the [] records obtained as part of the Department's investigation of conduct falling under section 832.7(b) are nonconfidential and subject to public inspection." (*Id.* at p. 609.) The Court supported its holding by noting that it ensures the same officer-related records must be made available for public inspection whether they are in possession of the Department or in the hands of a local agency. (*Id.* at p. 611.)

Next, the Court allowed the Department to withhold the OIG report because the report is not a public record as a matter of law. (Penal Code § 6126.3(c)(2)–(4).) (*Id.* at p. 615.) To require disclosure of such a document would "override the explicit intent of the

Legislature and the more limited disclosure scheme it crafted specifically for OIG documents." (*Id.* at p. 617.)

Impact: The key takeaway is that Courts will broadly interpret the 2018 amendments to Penal Code section 832.7 requiring public access to public access to records of police misconduct and use of force even where disclosure would otherwise be statutorily barred. Section 832.7 trumps CPRA exceptions and most other statutory prohibitions on disclosure of such records.