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# Land Use and CEQA Litigation Update

Wednesday, May 8, 2024

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# **CEQA Litigation Update**

Cases Reported from August 1, 2023 through March 31, 2024

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## **I. Introduction**

The landscape of CEQA litigation remains vibrant but is changing. In contrast to prior years, most of the published cases from the last year do not involve housing development projects. This likely reflects the growing number of statutory schemes which mandate ministerial approval of – or limited local agency discretion over – housing development projects<sup>1</sup>, particularly projects which include affordable units.<sup>2</sup> The Legislature’s housing law actions suggest that it will continue efforts to reign in local control and discretion, thereby limiting the applicability of CEQA to more categories or types of residential projects.

With respect to non-residential projects, CEQA is alive and well. This year, the judicial branch has generally upheld agency CEQA decisions and deferred to local discretion.

## **II. CEQA Exemptions**

### **A. *Historic Architecture Alliance v. City of Laguna Beach* (2023) 96 Cal.App.5th 186**

#### **Holding:**

- When a project relies on a Class 31 (CEQA Guidelines Section 15331) exemption for restoration and maintenance of historic resources and it complies with the Secretary of the Interior’s Standards for the Treatment of Historic Properties (SOI Standards), the CEQA Guidelines Section 15300.2 exception to categorical exemptions does not apply.

#### **Practice Tips:**

- Projects involving historic resources are generally fodder for CEQA lawsuits from both actual historians and “concerned neighbors” masquerading as historians. Handle these projects with care, and diligently build a record of compliance with SOI Standards.
- Typically, when evaluating whether a project may have a significant impact on a historic resource, courts will apply the deferential “substantial evidence” standard of review to the agency’s threshold determination as to whether the resource is historically significant in the first place. However, once the agency makes that determination, courts have

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<sup>1</sup> See, e.g. SB 330 (Skinner, 2019), streamlining housing approvals by allowing developers to vest into General Plan and zoning standards by filing a cursory pre-application, limiting discretionary body meetings, and eliminating a city’s ability to adopt or enforce new development standards unless they are objective; SB 35 (Wiener, 2017), requiring cities and counties that have not met RHNA obligations to use a streamlined, ministerial review process for qualifying multifamily residential projects; AB 2011 (Wicks, 2022), requiring streamlined, ministerial approvals for qualifying housing projects meeting specific affordability and site criteria on sites that are not even zoned for residential uses; and SB 6 (Caballero, 2022), allowing certain residential uses on commercially zoned property and providing Housing Accountability Act protections to such projects.

<sup>2</sup> See, e.g. the 100% affordable and ministerially-approved housing project involving 364 rental units in 3 buildings on a 2.2-acre site in Emeryville (described more fully in the attached staff report prepared for an applicant-requested study session: <https://www.ci.emeryville.ca.us/DocumentCenter/View/15160/Item-92-Christie-Ave-Affordable-Housing-Study-Session>).

suggested that the less deferential “fair argument” standard will apply to whether a project may have a significant impact on the resource (and thus make it ineligible for a categorical exemption). This decision is thus important in holding that such a fair argument standard cannot apply to the Class 31 exemption.

### **Summary:**

The case involved the proposed remodeling of a historic single-family home. The City determined that the project was exempt from CEQA under Class 31 (CEQA Guidelines Section 15331) for restoration and maintenance of historic resources consistent with the Secretary of the Interior’s Standards for the Treatment of Historic Properties (SOI Standards). Petitioner sued the City claiming that the City improperly relied on the Class 31 exemption because an exception to categorical exemptions applied (under CEQA Guidelines Section 15300.2) due to the project causing an adverse change to a significant historic resource.

The trial court denied the petition, finding that the City’s determination was supported by substantial evidence and that Petitioner had not met its burden of demonstrating that an exception precluded reliance on the Class 31 exemption. The Court of Appeal affirmed, reiterating that the Class 31 exemption was supported by substantial evidence including various rounds of review to confirm the project’s compliance with SOI Standards. The court also confirmed that these rounds of project revisions were not “mitigation measures” that would otherwise suggest additional environmental review was required. Finally, the court rejected Petitioner’s argument that the historical resources exception applied – and that a fair argument test should be used to determine its application – because projects that comply with SOI Standards are considered to have less than significant impacts on historic resources pursuant to CEQA Guidelines Section 15064.5(b)(3) and the Class 31 exemption requires the same analysis. Application of a fair argument standard to the factual determination underlying the exemption would render the exemption meaningless. Thus, the substantial evidence standard applied and the City’s record contained such evidence.

### **B. *California Construction and Industrial Materials Association v. County of Ventura* (2023) 97 Cal.App.5th 1**

### **Holding:**

- An ordinance establishing wildlife migration corridors falls within the Class 7 exemption (for the protection of natural resources) and the Class 8 exemption (for the protection of the environment).

### **Practice Tip:**

- We see a lot of Class 7 and 8 exemptions employed erroneously by staff (e.g. for construction projects that remediate some hazardous area or that might otherwise have a beneficial impact on the environment for some reason). This case is a good example of what these exemptions are actually intended to cover – projects specifically designed to protect the environment.

### **Summary:**

This case involves a Ventura County ordinance creating overlay zones to protect wildlife migration corridors throughout the County. When approving the Ordinance, the County relied on the common sense exemption, as well as the Class 7 (actions by regulatory agencies for protection of natural resources) and Class 8 (actions by regulatory agencies for protection of the environment) CEQA exemptions. Two construction associations sued the County on CEQA and other grounds, claiming (ironically if not shamelessly) that the CEQA exemptions did not apply and that there was a fair argument that environmental impacts would occur so an EIR should be prepared. The court held that the project fit within the plain language of the Class 7 and Class 8 exemptions, and that there was substantial evidence supporting this conclusion. While the project's scope covers large swaths of the County, Petitioners failed to show an unusual circumstance existed under CEQA Guidelines Section 15300.2, which requires that "the project has some feature that distinguishes it from others in the exempt class, such as its size or location." The court noted that the Class 7 exemption specifically refers to even larger, statewide projects (i.e. State Department of Fish and Wildlife preservation activities with a statewide scope).

**C. *Los Angeles Waterkeeper v. State Water Resources Control Board*  
(2023) 92 Cal.App.5th 230**

### **Holding:**

- Public Resources Code Section 21002 does not impose environmental review requirements independent of the rest of CEQA; it only has force to the extent that an entity is otherwise required to prepare an EIR.

### **Practice Tip:**

- While this case reminds us that NPDES permit activities are generally exempt from CEQA pursuant to Water Code Section 13389, there is still an open question as to the true scope of that exemption. Beware reliance on Water Code Section 13389 for non-NPDES activities.

### **Summary:**

Los Angeles Waterkeeper filed writ petitions against both the State Water Resources Control Board (State Board) and the Los Angeles Regional Water Quality Control Board (Regional Board) alleging that they violated the California Constitution and the State Water Code by permitting four publicly owned treatment works (POTWs) to discharge millions of gallons of treated wastewater daily into the Los Angeles River (and Pacific Ocean). Specifically, Waterkeeper alleged that they had a duty to prevent waste and unreasonable use of water, and that both the State and Regional Boards failed in that duty by issuing the permits without evaluating whether quantities discharged were reasonable or whether treated wastewater could be recycled or otherwise put to better use as required under CEQA. The trial court held that the

Regional Board did not have to comply with CEQA when issuing wastewater discharge permits to the POTWs because Water Code section 13389 exempts wastewater discharge permits from all of CEQA because it was meant to mirror a federal statute that exempts wastewater discharge permits from all of NEPA.

The Court of Appeal affirmed and explained that Pub. Res. Code Section 21002 (declaring it the policy of the state that agencies should not approve projects if there are feasible alternatives or feasible mitigation which would lessen significant environmental impacts) does not impose its own environmental review requirements. But the court declined to reach “the broader question whether Water Code section 13389 provides a complete exemption from CEQA.” In short, the Court of Appeal diluted (pun intended) the trial court’s conclusion about Water Code Section 13389 being a complete exemption from CEQA. The scope of that exemption for issues not related to discharge permits remains unsettled.

### **III. Tiering and Standards for Supplemental or Subsequent Review**

#### **A. *Hilltop Group, Inc. v. County of San Diego* (2024) 99 Cal.App.5th 890**

#### **Holding:**

- The San Diego County Board of Supervisors committed a prejudicial abuse of discretion by overturning the Planning Commission’s decision to rely on CEQA Guidelines section 15183 for a recycling facility project and ordering the project to prepare an EIR.

#### **Practice Tips:**

- It is rare for a court to overturn a local legislative body’s determination that a project has site-specific impacts warranting further CEQA review. But if the record creates the appearance that the legislative body is reacting more to local political pressure rather relying on actual evidence, a court can and will step in.
- Be aware of the types of controversial projects for which the City Council may be influenced by politics and project opponents in its CEQA determination. Such projects often include gas stations, parking garages, and higher density residential projects that spark “NIMBY” opposition and have mere hints of environmental issues that such opponents attempt to highlight or inflate in order to use CEQA to obtain project denial. This case provides an example where courts might not give local officials the deference generally afforded to their evidentiary findings.

#### **Summary:**

The recycling facility project in this case had a lengthy processing history with the County, and in 2015 the project developer had actually prepared a draft EIR and supplemental environmental studies. However, County staff changed its mind about the required CEQA review for the project and concluded that the project was subject to review under CEQA Guidelines section 15183 because it was consistent with the County General Plan Update (GPU) and did not



contemplate significant environmental impacts that were not identified by the program EIR (PEIR) prepared for the GPU. Multiple community groups and the City of Escondido appealed the approval of the CEQA exemption to the Board of Supervisors, which heard 150 public comments expressing project opposition and then ignored the staff conclusions and voted to require preparation of an EIR. The developer then filed a petition for writ of mandate alleging that the Board had abused its discretion, and the trial court entered judgment in favor of the County.

The Court of Appeal reversed, finding that the project was eligible for streamlining under CEQA Guidelines section 15183 because it was consistent with the GPU and its related zoning designation for which a program EIR was certified. The court also rejected the County's argument that the fair argument test should apply to decisions as to whether Section 15183 *does not* apply because it is settled that the substantial evidence standard applies to decisions that it *does* apply. Further, the court found that there was insufficient evidence to support the Board of Supervisors' findings that the project would result in "project-specific peculiar impacts that were not analyzed as significant impacts in the [PEIR] related to air quality, traffic, noise, and greenhouse gas emissions." The court stated that if a project is consistent with the land use designation of a General Plan for which an EIR was certified, the lead agency must limit its environmental review to significant impacts that "(1) [a]re peculiar to the project or the parcel on which the project would be located, (2) [w]ere not analyzed as significant effects in a prior EIR on the zoning action, General Plan or community plan with which the project is consistent, (3) [a]re potentially significant off-site impacts and cumulative impacts which were not discussed in the prior EIR prepared for the General Plan, community plan or zoning action, or (4) [a]re previously identified significant effects which, as a result of substantial new information which was not known at the time the EIR was certified, are determined to have a more severe adverse effect than discussed in the prior EIR."

**B. *Save Our Access v. City of San Diego*  
(2023) 92 Cal.App.5th 819**

**Holding:**

- City improperly determined that its proposed ballot measure to remove a 30-foot height limit from a 1300-acre community plan in a coastal area was within the scope of an earlier program EIR.

**Practice Tip:**

- A city generally should not try to "tier" directly from a General Plan program EIR if it wants to make a material change from what is in its General Plan. This case might have had a different result if the City had instead prepared an addendum to its General Plan program EIR to evaluate the removal of the 30-foot height limit. The court would have then been obligated to apply the deferential substantial evidence standard to evaluate the adequacy of that addendum, rather than to apply the less deferential "fair argument" standard to evaluate the impacts of a change that was outside the scope of the prior program EIR.

## **Summary:**

This case involves a challenge to the City of San Diego's approval of a ballot measure to remove a community plan area from a 30-foot building height limit regulating development within the City's self-described Coastal Zone (unaffiliated with the Coastal Zone as defined by the California Coastal Act). In 2018, the City approved an update to the applicable community plan, including certifying a program environmental impact report (PEIR). When two City Council members proposed a ballot measure to remove the height restriction (which eventually passed), City staff determined that the PEIR accounted for this possibility and held that no supplemental EIR would be required. Petitioner sued, arguing that the City did not adequately address the environmental impacts of removing the 30-foot height limit. The trial court agreed, holding that the City must set aside its approval of the ballot measure.

The Court of Appeal held that there was no substantial evidence in the administrative record supporting the City's argument that the PEIR had adequately evaluated the impacts of removing the height limit. In fact, the PEIR was silent on the height limit, and internal City documents demonstrated that the PEIR had analyzed development with this height limit in effect. The court thus applied the less deferential fair argument standard, and not the substantial evidence standard, in analyzing the City's decision not to prepare a subsequent EIR when the initial EIR was a PEIR. And because the administrative record supported a fair argument that removing the height limit could cause significant environmental impacts, further environmental review was required to comply with CEQA, and thus the court of appeal upheld the trial court decision.

### **C. *Marina Coast Water District v. County of Monterey* (2023) 96 Cal.App.5th 46 (certified for partial publication)**

## **Holding:**

- County was not required to prepare a supplemental EIR for a proposed desalination plant merely because a responsible agency (the City of Marina) later denied a subsequent permit for a component of the project as originally envisioned (specifically, coastline water wells), as that denial was not final and was subject to an administrative appeal to the Coastal Commission, and as the applicant was still pursuing the project as originally envisioned.

## **Practice Tip:**

- Mere uncertainty over whether all necessary permits will ultimately be issued on a complex project is not a sufficient basis for triggering further environmental review. Of course, if a component of such a project is denied and the denial triggers changes in the project that are potentially environmentally significant, the agency must then evaluate whether supplemental CEQA review is necessary.

## **Summary:**

The water district challenged Monterey County’s approval of a water company’s application for a permit to construct a desalination plant and associated facilities. The CPUC had previously been designated as the lead agency, and it certified an EIR for the project in 2018. The project originally anticipated that it would rely on coastline water wells within the City of Marina’s jurisdiction, but the City had denied the water company’s application for the requisite coastal development permit (“CDP”). The water company appealed the denial of the CDP to the Coastal Commission. Despite the uncertain status of the CDP within the City of Marina and thus the project’s water supply, Monterey County acted as the responsible agency, relied upon the EIR previously certified by the CPUC, and approved the water company’s permit to construct and operate the desalination plant.

Petitioner challenged the County’s approval of the permit, arguing that the County violated CEQA by failing to prepare a supplemental EIR to account for the uncertainty surrounding the project’s water supply source in light of the City’s permit denial. Petitioner also argued that the County’s statement of overriding considerations was not supported by substantial evidence and that the County violated its own General Plan in approving the project without an identified long-term water source.

The trial court granted the water district’s petition in part, agreeing with its argument that the County improperly relied on the benefits of the project in the statement of overriding considerations without addressing the uncertainty surrounding the project’s water supply. The Court of Appeal reversed, determining that the County was entitled to rely on the project’s anticipated benefits, even though there was uncertainty about the water supply, and that the statement of overriding consideration’s failure to explain these uncertainties was not prejudicial given the other relevant evidence contained in the administrative record. Additionally, the court affirmed the trial court’s decision that environmental review was not required, concluding that the City’s denial of the CDP did not change the project plan or the circumstances under which it had been undertaken.

## **IV. EIR Adequacy**

### **A. *Santa Rita Union School District v. City of Salinas* (2023) 94 Cal.App.5th 298**

## **Holding:**

- City’s EIR for large-scale specific plan was legally adequate notwithstanding school district arguments that it did not adequately address possibility that schools would not ultimately be constructed due to lack of adequate funding.

## **Practice Tip:**

- In light of statutory limits on what development fees may be imposed to fund future school construction, school districts may continue to try to turn to CEQA litigation as leverage to obtain additional funding. Courts will likely continue to rebuff such challenges.

### **Summary:**

The City of Salinas issued a Final EIR for the West Area Specific Plan, a project that would lead to the development of over 4,000 units of housing and contemplated five schools to accommodate the increased population. The Salinas school districts (“Districts”) sued the City, contending that they would never receive sufficient funding to build these new schools and argued that they would have to accommodate this influx of new students at their current properties. The Districts argued that because the EIR did not discuss the indirect, off-site environmental impacts that would result from the current schools having to absorb these new students, it was inadequate. The City argued that the EIR had correctly analyzed the impacts of the proposed Specific Plan, that the inadequate funding argument was an economic or social issue that was too speculative and uncertain, and that the scenario that the Districts envisioned was too vague and uncertain and did not require a response.

While the trial courts ruled in favor of the Districts, the Court of Appeal reversed. The court found that the City properly assumed in the EIR that new schools would be built and that the imposed developer impact fees and other mitigation measures discussed in the EIR constituted sufficient analysis. The City was not required to analyze any potentially “off-site impacts of ill-defined, uncertain, generalized, and speculative alternative to new school construction” because these “what-if alternatives” were premised on the assumption of inadequate school funding. Without more evidence supporting the District’s claims, no further environmental review or response from the City was required.

The court also ruled on several key procedural issues. The court held that the City’s voluntary compliance with the writ of mandate did not moot or waive the landowners’ separate right to appeal, and if the appellants prevailed, the City’s certification of the EIR would be restored. Second, distinguishing *Meinhardt v. City of Sunnyvale* (2022) 76 Cal.App.5th 43 (under review by the California Supreme Court (Case No. S274147)), the court held that the trial court order did not determine the final rights of the parties by specifying what relief it would order, therefore the trial court’s subsequent entry of judgment, not the earlier order, triggered the deadline to appeal. Third, the correct standard of review for the omission of information from an EIR can constitute a failure to proceed as required by CEQA, which is reviewed de novo, *only if* the analysis is clearly inadequate or unsupported by evidence. The challenger must demonstrate that the omitted information is both required by CEQA and necessary to an informed discussion of the impacts. Because the question of whether the EIR was required to discuss the “no new schools” scenario was a question of both law and fact, the court applied an independent review while affording deference to the City’s factual determinations under the substantial evidence standard of review. And in applying this substantial evidence standard to the City’s factual finding that the District’s comments were too speculative, the court agreed and reversed the trial court judgment.

**B. *Tsakopoulos Investments, LLC v. County of Sacramento*  
(2023) 95 Cal.App.5th 280 (certified for partial publication)**

**Holding:**

- County properly exercised its discretion in setting significance thresholds when analyzing the greenhouse gas emissions from projects, insofar as it used fact-specific data derived from local data as opposed to statewide thresholds.

**Practice Tip:**

- This case provides a helpful example of a GHG analysis upheld by a court and demonstrates that courts will defer to lead agency determinations when they are supported by robust analysis and evidence in the record.

**Summary:**

In the published portion of this decision, the Court upheld Sacramento County’s GHG analysis used in an EIR prepared for a community master plan for a project that included thousands of housing units, schools, retail and commercial space, open space, and an environmental education center. Petitioner challenged the validity of the GHG analysis, claiming it was based on methodology that the California Supreme Court and the Fourth District Court of Appeal have rejected in *Center for Biological Diversity v. Department of Fish & Wildlife* (2015) 62 Cal.4th 204 (*Center for Biological Diversity*) and *Golden Door Properties, LLC v. County of San Diego* (2018) 27 Cal.App.5th 892 (*Golden Door*), respectively.

The court rejected petitioners challenge and distinguished Sacramento County’s GHG analysis from the two methodologies that were rejected by their respective courts. Unlike *Center for Biological Diversity*, where the EIR relied on the statewide GHG emission reduction target of 29% below business-as-usual, Sacramento County used County-specific GHG significance threshold, derived from countywide data from different sectors. And unlike *Golden Door*, the County-specific data and local thresholds for different sectors would each be applied at the project level. Thus, because Sacramento County used County data and sector-specific thresholds of significance, the EIR’s analysis was distinguishable from the rejected methodologies and the court presumed that the GHG emissions analysis was adequate.

**C. *Yerba Buena Neighborhood Consortium, LLC v. Regents of University of California* (2023) 95 Cal.App.5th 779**

**Holding:**

- UC Regents’ EIR for long-range planning document for its existing Parnassus Heights campus adequately complied with CEQA, and more specifically, it:
  - properly declined to consider off-campus development alternatives;
  - committed only harmless error in not directly analyzing impacts on public transit;

- was not required to consider aesthetic impacts given a statutory presumption that such impacts within transit priority areas were not significant;
- properly rejected as infeasible proposed mitigation measures to preserve historically significant buildings; and
- adequately set forth performance standards for mitigation of wind impacts.

**Practice Tip:**

- The court seemed to struggle with applying recent CEQA legislation and Office of Planning and Research (OPR) guidance providing that projects near transit stops should be presumed to cause a less than significant transportation impact, insofar as it found that the EIR erred in not specifically analyzing transit impacts as a category, but that the error was harmless in light of the presumption. The court’s muddled analysis of this question creates confusion as to whether EIR’s for projects near transit centers actually need to analyze transit impacts. When presented with a transit-adjacent project, confirm that the environmental review clearly explains the approach to transit impact analysis.

**Summary:**

This case involves the adequacy of an EIR prepared in connection with UCSF Parnassus Heights Plan (“Plan”), a long-range development planning document. The EIR contemplates considerably more development than was envisioned in the university’s old long-range development plan. Petitioners proffered various challenges to the EIR, all of which the trial court rejected.

The Court of Appeal affirmed. First, in discussing alternatives, the court was persuaded that they were a reasonable range of alternatives because they represented different approaches to addressing environmental harm. Petitioners had primarily argued that the EIR should have considered an off-site alternative for a portion of the project (specifically, a new hospital), but the court found that the EIR sufficiently explained how that would not accomplish the Plan’s objectives.

Second, in discussing public transit, the court agreed with Petitioners that substantial evidence support an argument that the Plan might have a significant impact on public transit, and further found that the EIR had erred in concluding that such transit impacts were outside the scope of CEQA. But the court forgave this error as nonprejudicial, as it found that the EIR nonetheless provided sufficient information about transit impacts to serve the EIR’s function as an informational document. The EIR described existing public transit serving the campus and analyzed the projected effects of the Plan on travel demand. The court emphasized that its decision was based on the fact that the project was located near a transit priority area and that it complied with recent OPR guidance for such development, including guidance that projects near transit stops generally “should be presumed to cause a less than significant transportation impact” (quoting CEQA Guidelines section 15064.3(b)). But the court’s conclusion here begs the question as to why it found that the EIR erred in the first place.

Third, in discussing historic buildings, the court rejected Petitioners argument that it is “feasible” to avoid demolishing the buildings because the prior 2014 plan had suggested an alternative use for the building that would have preserved it. The purpose of demolishing these buildings is to make room for new structures, and the EIR adequately analyzed this issue.

Fourth, in discussing aesthetics, the court agreed with the Regents that the Plan qualifies under a CEQA provision (section 21099(d)(1)) declaring that the aesthetic impacts of certain projects are not considered significant. Specifically, the project is located on property zoned for commercial uses, and thus qualifies for the infill exception.

Fifth, in discussing wind, the court held that the EIR’s requirement that wind testing of the design of any new building over 80 feet and make changes to the design as necessary was an adequate mitigation measure. This was not an improper deferral of a mitigation measure because, among other reasons, the mitigation measure identifies a specific performance criteria (26 mph in pedestrian areas).

**D. *Planning and Conservation League v. Department of Water Resources*  
(2024) 98 Cal.App.5th 726**

**Holding:**

- The Department of Water Resources adequately complied with CEQA in preparing a program EIR for its renewal of long-term contracts (to 2085) providing State Water Project water to 29 local government contractors, ultimately determining that such renewals would not result in any significant effects on the environment, given that the existing baseline already had the contracts in place.

**Practice Tip:**

- The court’s holding has limited practical utility outside the unique facts of this case, which involved historic baseline conditions that pre-existed the enactment of CEQA. But the case does provide limited support for the proposition that a lead agency’s re-approval of an existing activity does not need to freshly analyze impacts resulting from continued operations.

**Summary:**

The State Department of Water Resources (DWR) has long-term (75-year) contracts with 29 local government contractors giving each of them the right to receive a certain portion of the available water supplies under the State Water Project (SWP). The project at issue in this case involves DWR’s approval of the renewals of each of these contracts until 2085, for which it prepared a program EIR concluding (arguably counter-intuitively) that the renewals would not result in any significant environmental impact. It reached this conclusion in large part in reliance on the existing baseline where all of these contracts have already been in place (and, indeed, have been in place since before the enactment of CEQA).

Following such approval (and likely anticipating litigation), DWR filed a validation action. Various conservation groups and public agencies responded seeking to challenge DWR's compliance with CEQA and other law. The trial court rejected all of the challenges, and the Court of Appeal affirmed.

Much of the litigation turned on DWR's determination as to the existing baseline already including having the contracts in place, which the court upheld. The court also rejected what was essentially a "reverse-segmentation" challenge, claiming that the DWR should have prepared separate CEQA documents for each contract, and rebuffed challenges to the EIR's project description and analysis of alternatives.

**E. *V Lions Farming, LLC v. County of Kern*  
(2024) 100 Cal.App.5th 412 (certified for partial publication)**

**Holding:**

- County failed to comply with CEQA by not including use of Agricultural Conservation Easements (ACEs) as compensatory mitigation to partially offset the significant and unavoidable loss of agricultural land.

**Practice Tip:**

- This case continues a troubling trend in which courts appear to hold that Agricultural Conservation Easements must necessarily be considered (if not actually adopted and imposed) as mitigation under CEQA to compensate for the loss of significant agricultural resources. But we believe that there are reasonable grounds for a lead agency to find such measures to be infeasible. This issue can often be a political "hot button" for agricultural interests and even the Department of Conservation. Under the current state of the case law, lead agencies analyzing projects that will result in the "significant and unavoidable" loss of agricultural resources must either impose such easements to partially mitigate the impact, or carefully develop an evidentiary record demonstrating why such mitigation is not feasible. We believe that there is still room in the law for an evidence-based determination of infeasibility here, notwithstanding the reasoning of this and other cases.

**Discussion:**

This case involves a second appeal by a farm company and environmental organizations against Kern County regarding the County's approval of an ordinance streamlining the permitting process for new oil and gas wells. In the first appeal, the court determined that the EIR prepared for the ordinance was defective and issued a writ requiring the County to correct the defects before reapproving the ordinance. Once the County prepared a revised supplemental EIR (SEIR) and an addendum for a slightly modified ordinance, the trial court discharged the writ but Petitioners appealed.



In the published portion of the appeal, the court determined that agricultural conservation easements (ACEs) partially mitigate a conversion of agricultural land caused by the project and that ACEs qualify as compensatory mitigation. Under CEQA Guidelines Section 15370(e), mitigation is defined to include “compensating for the impact by ... providing substitute resources.” The court stated that the phrase “providing substitute resources” was ambiguous, and resolved the ambiguity by adopting the interpretation that best effectuates CEQA’s purpose, which would encompass preserving existing agricultural land. Thus, ACEs qualify as compensatory mitigation, even though they do not replace or otherwise offset the acres of agricultural land converted by the project and they do not ensure the project results in no net loss of agricultural land.

## **V. CEQA Litigation and Remedies**

### **A. *Natural Resources Defense Council, Inc. v. City of Los Angeles* (2023) 98 Cal.App.5th 1176**

#### **Holding:**

- When a court concludes that an agency violated CEQA, it may void the agency’s action in whole or in part and may suspend specific project activity that may damage the environment until the agency has taken actions that are necessary to comply with CEQA.

#### **Practice Tip:**

- Mitigation Monitoring and Reporting Programs do not evaporate as they age. Devise a program to monitor (no pun intended) adopted MMRPs and confirm that your city is fulfilling any required obligations thereunder. Doing so will necessarily involve keeping an eye on existing operations. And if a project requests changes requiring new discretionary approvals, ensure that the supplemental environmental review confirms compliance with any previously-adopted mitigation.

#### **Summary:**

This case involves a challenge to the Port of Los Angeles’s 2019 certification of a supplemental EIR (SEIR) for a project involving the continued operation of the China Shipping Container Terminal. The plaintiffs sued the Port, alleging a broad variety of CEQA violations with respect to the SEIR. The trial court determined that the SEIR had violated CEQA in multiple ways, including its failure to ensure that mitigation measures were actually legally enforceable. The trial court also found that the SEIR failed to adequately analyze the emissions impact of the project and had improperly modified or deleted mitigation measures that were adopted in the original 2008 EIR regarding the use of alternative marine power and implementation of an electric yard tractor pilot project. Accordingly, the trial court ordered the Port to set aside its certification of the SEIR and prepare a revised SEIR that complies with CEQA.

Petitioners appealed the trial court’s decision, alleging that the trial court erred in concluding that certain other mitigation measures constituted feasible mitigation and that the trial court erred in determining that the only available remedy was to set aside the 2019 SEIR. The Court of Appeal agreed and determined that the trial court did not understand its authority under the CEQA statute when it stated that the only available remedy was to set aside the SEIR while allowing operations at the Port to continue as those operations were occurring prior to the certification of the SEIR (without certain adopted mitigation measures being made enforceable and being implemented). Public Resources Code section 21168.9, subdivision (c) makes clear that a court retains all of its traditional equitable powers to remedy violations of CEQA, such as an order directing an agency to take specific action as may be necessary to bring its determination in compliance with CEQA. Further, the trial court misapprehended the scope of authority under Section 21168.9, subdivision (a)(2) and (a)(3), which allows a court to suspend a specific project activity that may damage the environment until the agency complies with CEQA. The court concluded that the trial court’s remedy – ordering the Port to set aside the SEIR while still allowing the Port to continue operations without any of the purportedly-adopted mitigation being enforced during preparation of a new SEIR – would permit the Port to violate CEQA without any real consequence. The case has been remanded to the trial court with orders to exercise its discretion to fashion an appropriate remedy, such as setting a timeline for SEIR adoption or suspension of certain shipping activities unless specific mitigation measures from the 2008 EIR or the SEIR are implemented.

**B. *Guerrero v. City of Los Angeles*  
(2024) 98 Cal.App.5th 1087**

**Holding:**

- Any CEQA action challenging the adequacy of a facially valid NOD must be filed within 30 days.

**Practice Tip:**

- File a Notice of Determination after the first of any discretionary approvals in a project with multiple approvals. Like voting, employ NODs early and often.

**Summary:**

This case involves a 42-lot residential single-family home subdivision in northeast Los Angeles. The City prepared a 2016 MND and an updated 2017 MND after the project was redesigned several times. The project required a number of discretionary approvals in addition to the subdivision map, including a rezoning and retaining wall approvals. On March 3, 2020, the City’s Planning Department conditionally approved a vesting tentative tract map and adopted the MND and a mitigation monitoring program. On March 25, 2020, the City filed a NOD pursuant to CEQA. On May 25, 2020, the East Los Angeles Area Planning Commission also adopted the previously prepared MND, approved various zoning determinations and adjustments to the project’s retaining walls, and recommended to the City Council to adopt the necessary zone change. The City filed a second NOD on February 4, 2021.

The City Council thereafter adopted the previously prepared MND and approved the recommended rezoning on June 8, 2021, and followed it with a third NOD on June 18, 2021. Petitioners filed a writ action challenging the project approvals under CEQA on July 16, 2021, within 30 days of the filing of the City’s *third* NOD for the project. The trial court overruled the City’s demurrer regarding the CEQA claim, finding that the petition was timely filed. At trial, the trial court rejected the CEQA statute of limitations claim again, and also found that the MND was inadequate and an EIR was required. The City and developers filed consolidated appeals, and the Court of Appeal reversed. The court directed the trial court to dismiss the petition as time-barred under CEQA because any challenge must be filed within 30 days after the filing of a valid NOD. Since CEQA review must occur at the earliest meaningful opportunity, the first approval triggers the statute of limitations.

**C. *Vichy Springs Resort, Inc. v. City of Ukiah*  
(March 29, 2024) 2024 WL 1340842 (certified for partial publication)**

**Holding:**

- A CEQA challenge is not moot just because the project is completed if there are specific, feasible, and operational-based mitigation measures available to mitigate significant environmental impacts.

**Practice Tip:**

- City Attorneys should conform that the City’s standard conditions of approval contain adequate project indemnity and defense provisions because even project construction – to completion! – may not moot a timely CEQA lawsuit.

**Summary:**

The Ukiah Rifle and Pistol Club (“Club”) operates a shooting range on unincorporated land it leases from the City of Ukiah (“City”) in Mendocino County (“County”). Half a mile away from the shooting range is the Vichy Spring Resort (“Vichy”). When the Club planned to demolish the existing shooting range and construct a brand new shooting range (the “Project”), Vichy sued both the City and the County (because Vichy was uncertain which entity had regulatory authority over the Club’s actions), alleging that the new project would have significant environmental effects, such as lead contamination and increased noise and traffic. Vichy did not ask the court to enjoin construction of the shooting range, so while the case was pending in the trial court, the project was completed and the City and County entered into a Joint Powers Agreement to resolve the uncertainty regarding their respective regulatory authority over the project. After multiple rounds of motions, the trial court entered judgment in favor of the City and County.

The Court of Appeal reversed the trial court’s judgment with respect to some of the CEQA claims. In a partially published opinion, the court rejected the Club and City’s argument that the CEQA claim is moot because there is no effective relief that the Court can order now that the

Project is complete. The court reasoned that the claim is not moot because Vichy has adequately alleged that mitigation measures could still be imposed to reduce or avoid the significant environmental impacts alleged in the Petition (such as using lead-free ammunition, engaging in a proactive lead removal program, and implementing a pollution prevention plan to prevent pollution of lead to Sulfur Creek and the Russian River). The City could revoke and hold in abeyance the building permit and certificate of occupancy while the County completes its review. The court also rejected the Club's argument that because Vichy did not seek a preliminary injunction, the claim is moot because the court concluded that there is no legal basis for such an argument.

Additionally, the court concluded that the County's position, which was that the City's ownership of the property rendered the Club's activity immune from the County's regulatory authority, was incorrect. Rather, Vichy's allegation that the County's local ordinances required a discretionary use permit for a project which had reasonably foreseeable environmental impacts, thus requiring CEQA review, was sufficient to survive demurrer. The court rejected the County's argument that CEQA does not apply to governmental inaction because the Petition alleges, with supporting documentation, that the County determined the Project was not subject to CEQA. CEQA's definition of a project does not require a permit to be issued, but rather that the proposed activity "involve[] the issuance to a person of a ... permit." (Pub. Res. Code § 21065.)



# Introduction to the New Surplus Land Act

Wednesday, May 8, 2024

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## **Introduction to New Surplus Land Act\***

League of California Cities  
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*\*Please note that this paper is an updated version of an article by the same authors that recently ran in the LA Lawyer magazine.*

## **Introduction to New Surplus Land Act**

Since the Surplus Land Act (“Act”) was enacted in 1968, the population of California has more than doubled, outpacing the production of new housing and creating a significant affordable housing crisis. In response, the state significantly amended the Act in 2019 in order to leverage it as a mechanism to create opportunities to redevelop public land suitable for new affordable housing. Yet, public agencies around the state have experienced difficulties in grappling with the Act in its amended form.

In the most recent legislative session ended in October 2023, Gov. Gavin Newsom signed further amendments to the Act into law in order to clarify certain aspects that had proved cumbersome in practice. This article provides an overview of the Act, its recent 2023 amendments, and some of the changes the Act has wrought in its amended form. This article also highlights the California Department of Housing and Community Development’s (“HCD”) forthcoming amendments to the Surplus Land Act Guidelines.

### **Overview of the Act**

The California Legislature originally enacted the Act, codified in Government Code section 54220 et seq., with the intention of increasing the amount of public land available for public uses and affordable housing. Prior to selling public land no longer necessary for agency use, the Act required local agencies (i.e., cities, counties and special districts) first to offer such land to certain specified entities for purchase. The Act also established a negotiation process that local agencies were required to follow when disposing of land in accordance with the Act.<sup>1</sup> In its original form, the Act was not considered a significant impediment to the alienation of public land.

In 2019, the California Legislature passed Assembly Bill 1486 (“AB 1486”), which significantly expanded the scope of the Act and imposed new penalties for noncompliance. The amendments made by AB 1486 caused confusion among public agencies and made the property disposition process much more onerous. In response, Gov. Newsom recently signed Senate Bill 747 (“SB 747”) and Assembly Bill 480 (“AB 480”) into law in October 2023, which, together, provide public agencies much-needed clarity and flexibility in complying with the Act.

Below we consider the historical development of the Act and provide analysis and commentary regarding how the recent amendments have affected public agencies. We also look at the potential impacts of HCD’s forthcoming amendments to the Surplus Land Act Guidelines.

### **Historical Development of the Act**

Before AB 1486, the Act defined surplus land as “land owned by any local agency that is determined to be no longer necessary for the agency’s use, except property being held by the agency for the purpose of exchange.”<sup>2</sup> The Act did not define the term “agency’s use,” nor did it require an agency to identify property as surplus land prior to the land’s disposition.<sup>3</sup>

Under the pre-2019 version of the Act, local agencies “disposing” of surplus land were required to offer the property to various entities prior to disposing of it to a desired transferee or

the general public.<sup>4</sup> Although the Act did not define the word “disposing,” it was widely interpreted to apply only to fee title transfers of properties, and therefore not leases, even though other provisions of the Act did in fact refer to leases.<sup>5</sup>

After receiving notice from a public agency of its intent to “dispose” of a specific piece of land, entities had 60 days to notify the disposing agency of the recipient entity’s intent to purchase or lease the surplus land.<sup>6</sup> Upon the disposing agency’s receipt of notice of an interested entity’s desire to purchase or lease the surplus land, the parties were required to enter good faith negotiations for a period of not less than 90 days in an attempt to determine a mutually satisfactory sales price or lease term.<sup>7</sup> If the parties failed to agree on terms, the land could be disposed of without further compliance with the Act, except for certain provisions related to acquisition of surplus land for the purposes of developing affordable units.<sup>8</sup>

The Act stated that it should not be interpreted to limit the power of any local agency to sell or lease surplus land at fair market value or at less than fair market value.<sup>9</sup> Further, any sale or lease at or below fair market value could not be used to argue that a disposition was inconsistent with the agency’s purpose.<sup>10</sup>

The Act had limited application because it expressly stated “[n]o provision of this article shall be applied when it conflicts with any other provision of statutory law.”<sup>11</sup> Moreover, under the pre-AB 1486 Act, enforcement was limited because failure to comply with the notice provision did “not invalidate the transfer or conveyance of real property to a purchaser or encumbrancer for value,”<sup>12</sup> and the pre-AB 1486 Act provided no enforcement mechanism for violations.

Although the Act underwent minor amendments after its inception, the general intent of and processes created by the Act remained largely unchanged until 2019, when the California Legislature passed AB 1486.

### **AB 1486 Implements Significant Changes to the Act**

AB 1486, which took effect in 2020, established additional, more onerous, requirements for local agencies to comply with the Act, including by expanding the Act’s reach, imposing additional procedural requirements, requiring HCD to supervise surplus land sales, and imposing penalties for noncompliance.<sup>13</sup>

#### Declaration of Surplus Land

In a change from prior versions of the Act, AB 1486 required local agencies to identify “surplus land” and “exempt surplus land” with written findings prior to taking any action to dispose of the land.<sup>14</sup>

AB 1486 redefined “surplus land” as “land owned in fee simple by any local agency for which the local agency’s governing body takes formal action in a regular public meeting declaring that the land is surplus and is not necessary for the agency’s use.”<sup>15</sup> AB 1486 further defined “agency’s use” to include “land being used, is planned to be used pursuant to a written plan adopted by the local agency’s governing board for ... agency work or operations, including, but not limited



to, utility sites, watershed property, land being used for conservation purposes, land for demonstration, exhibition, or educational purposes related to greenhouse gas emissions, and buffer sites near sensitive governmental uses, including, but not limited to, waste water treatment plants.”<sup>16</sup>

AB 1486 also expressly provided that “‘agency’s use’ shall not include commercial or industrial uses or activities, including nongovernmental retail, entertainment, or office development” and that “[p]roperty disposed of for the sole purpose of investment or generation of revenue shall not be considered necessary for the agency’s use.”<sup>17</sup>

### Exempt Surplus Land

Under AB 1486, the requirements of the Act do not apply to the disposition of any land determined by the agency to be “exempt surplus land.”<sup>18</sup> Pursuant to Section 54221(f)(1) of the Act, “exempt surplus land” includes, without limitation, the following:

- Surplus land that is: (a) less than 5,000 square feet in area, less than the minimum legal residential building lot size for the jurisdiction in which the parcel is located, or has no record access and is less than 10,000 square feet in area, (b) not contiguous to land owned by a state or local agency that is used for open-space or low- and moderate-income housing purposes, and (c) transferred to an owner of contiguous land.
- Surplus land exchanged for another property necessary for the agency’s use.
- Surplus land transferred to another local, state, or federal agency for the agency’s use.
- Surplus land that is a former street, right of way or easement, and is conveyed to an owner of an adjacent property.
- Surplus land that is subject to valid legal restrictions that are not imposed by the local agency and that would make housing prohibited, unless there is a feasible method to satisfactorily mitigate or avoid the prohibition on the site.

### Inventory of Sites

AB 1486 required cities and counties to create a central inventory of “surplus land” by Dec. 31 each year.<sup>19</sup> Beginning on April 1, 2021, and annually thereafter, these agencies were to report annual information about all surplus land in accordance with the HCD Guidelines (defined and discussed below).<sup>20</sup> The HCD Guidelines provide forms and specific guidance for reporting this information.

### Notice of Availability and Negotiation Process

Once an agency determines that land is “surplus land” and not “exempt surplus land” and seeks to dispose of it, AB 1486 required the agency to comply with various procedural requirements. The following bullet points outline the general process for disposing of “surplus

land” under the Act after AB 1486. There are slight nuances to the process depending on how the land will ultimately be used by the transferee.

- Issuance of Notice of Availability. The local agency must issue a notice of availability to certain specified entities prior to disposing of property or participating in negotiations to dispose of property.<sup>21</sup>
- Response to Notice of Availability. Any interested party must respond to the notice of availability within 60 days.<sup>22</sup> If more than one interested party responds to the notice of availability, then the local agency must give first priority to the entity that agrees to use the site for housing and agrees to make at least 25% of the units affordable. If more than one entity agrees to these terms, the local agency is required to give priority to the entity willing to construct the most affordable housing or, if the entities propose the same number of affordable units, the entity committing to the highest level of affordability.<sup>23</sup>
- Good Faith Negotiation. The local agency is required to negotiate in “good faith” for at least 90 days with an eligible interested party that responds to the notice of availability. If no agreement can be reached, then the local agency has no further obligation to negotiate.<sup>24</sup>
- Affordability Covenant. Any disposition of land for construction of 10 or more residential units, subsequent to failed negotiations with an interested entity or if no interested entity responds to a notice of availability, must be encumbered by a recorded covenant that requires at least 15% of the units constructed to be affordable.<sup>25</sup>

### Enforcement and Remedies

AB 1486 authorized HCD to enforce violations of the Act after issuing a notice of violation to a local agency.<sup>26</sup> If an agency disposes of property after receiving a notice of violation from HCD and without resolving the violation, HCD can refer the issue to the California attorney general to seek a penalty in the amount of 30% of the sale price or fair market value of the land disposed of in violation of the Act. AB 1486 also allowed third parties to enforce alleged violations of the Act by filing suit. However, dispositions in violation of the Act are not invalidated as a result of the non-compliance.<sup>27</sup>

The City of Anaheim’s (“Anaheim”) proposed disposition to an Angel Baseball (“Angels”) entity provides one example of how an enforcement action initiated by HCD in connection with an alleged violation of the Act may play out. Anaheim and the Angels had an ongoing lease, dating back to 1966, for Angel Stadium and the surrounding property. Starting in early 2019, Anaheim and the Angels began discussing a potential sale of the property from Anaheim to the Angels. Apparently without complying with the Act, Anaheim approved a purchase and sale agreement with the Angels in 2019. Anaheim later approved an amended version of the purchase and sale agreement in September 2020, which HCD challenged. After a series of discussions regarding the amended purchase and sale agreement, HCD issued a notice of violation in December 2021.<sup>28</sup> From there, the parties ultimately reached a settlement agreement by which Anaheim and the Angels would proceed with the sale, but Anaheim would contribute \$96 million of the sale proceeds into an affordable housing trust, the proceeds of which would be used within Anaheim.<sup>29</sup>

The Act does not include an attorneys' fee clause; however, Code of Civil Procedure section 1021.5 (California's private attorney general statute) may provide a successful petitioner an avenue to claim attorneys' fees for enforcing an important right affecting the public interest.

### HCD Guidelines

AB 1486 empowered HCD to provide guidance on how to comply with the Act's provisions and to make available educational resources and materials that inform each agency of its obligations under the Act.<sup>30</sup>

HCD published guidelines ("HCD Guidelines") in 2021, which significantly expanded the scope of the Act. The HCD Guidelines defined a "disposition" of surplus land to include leases involving demolition or development (e.g., ground leases) or leases for a term of five or more years.<sup>31</sup> The HCD Guidelines also required local agencies to notify HCD and obtain HCD's input at various points in the disposition process, thereby providing HCD with multiple opportunities to assess whether an agency's disposition complies with the Act (and initiate enforcement action in the event it does not).

The extensive amendments made by AB 1486 resulted in public agencies significantly modifying their existing disposition processes and procedures. This led to confusion and frustration among agencies across the state. In response to these concerns, the Legislature took up two "clean-up" bills to make clarifying revisions to the Act—SB 747 and AB 480. In fact, the Legislature made the enactment of each bill contingent on the enactment of the other. Gov. Newsom signed both into law in October 2023.

### **Amendments to the Act Under AB 480 and SB 747**

While AB 480 and SB 747 may not completely resolve the confusion and obstacles created by AB 1486, they do provide helpful clarity to public agencies, and they also create some flexibilities for public agencies.

### Key Changes to the Act

SB 747 and AB 480 make several changes to the Act, including the following:

- For some categories of exempt surplus land, the Act now allows agencies to publish a 30-day notice finding that the land is exempt surplus, rather than making such a finding in a public meeting.<sup>32</sup>
- Clarify that the Act only applies to leases of more than 15 years and in which development or demolition will occur.<sup>33</sup>
  - *Note:* This is a significant change from the current HCD Guidelines, which assert the Act applies to leases of as little as five years (subject to some exceptions).

- Clarify that property that is used for the “agency’s use” (and therefore not surplus land) includes: (i) property owned by a port that is used to support logistic uses, sites for broadband equipment or wireless facilities, and waste disposal sites, and (ii) property owned by certain districts and disposed of for commercial or industrial uses or activities or for the sole purpose of investment or generation of revenue, provided that the disposition will directly further the express purpose of the agency or is authorized by statute.<sup>34</sup>
  - *Note:* For ports, this could mean that land leased from a port to a cell tower company is “exempt” surplus, even if the lease is over 15 years or includes development, since the land is arguably still being used for the “agency’s use” and thus is not surplus.
  - *Note:* For districts, this could mean that land leased or sold by certain districts, such as school districts, for revenue-generating purposes is “exempt” surplus if the revenue is used to directly further the express purpose of the district, since such a disposition is arguably for the “agency’s use” and thus is not surplus.
- Expand the definition of “valid legal restrictions” that prohibit housing on a parcel and thereby qualify the parcel as “exempt” surplus land.<sup>35</sup>
- Create new categories of “exempt” surplus land, including:
  - Land where the property is sold for development and includes a required minimum percentage of affordable housing units.<sup>36</sup>
  - Certain land transferred to a community land trust.<sup>37</sup>
  - Land that is owned by a California public-use airport on which residential uses are prohibited pursuant to Federal Aviation Administration Order 5190.6B, Airport Compliance Program, Chapter 20 – Compatible Land Use and Airspace Protection.<sup>38</sup>
  - Certain land owned by an agency whose primary mission or purpose is to supply the public with a transportation system.<sup>39</sup>
- Require that HCD maintain on its internet website not only an up-to-date listing of, but also a link to, all notices of availability throughout the state and a listing of all entities, including housing sponsors, which have notified HCD of their interest in surplus land for the purpose of developing low- and moderate-income housing.<sup>40</sup>
- Identify certain activities that do not constitute “participating in negotiations,” including such as obtaining an appraisal or issuing a request for proposal in accordance with certain exempt surplus designations.<sup>41</sup>

- *Note:* This is helpful for public agencies as there was previously some confusion regarding whether agencies could conduct due diligence activities prior to negotiating the disposition of surplus land.
- Clarify that the Act does not: (i) prevent a local agency from obtaining fair market value for the disposition of surplus land, (ii) limit a local agency’s authority or discretion to approve land use, zoning, or entitlement decisions in connection with the surplus land, (iii) require a local agency to dispose of land that is determined to be surplus, or (iv) apply when it conflicts with any other provision of statutory law.<sup>42</sup>
  - *Note:* As is discussed in greater detail below, multiple agencies have argued that the Act does not apply to dispositions governed by the Economic Opportunity Law (codified in Government Code section 52200 et seq.) on a theory that the Act conflicts. Initial drafts of SB 747 identified compliance with the Economic Opportunity Law as an express alternative to compliance with the Act, but these references were ultimately deleted after the Assembly Committee on Housing and Community Development reviewed the draft bill and noted that authorizing compliance with the Economic Opportunity Law as an alternative to compliance with the Act undermined the legislature’s housing goals. In light of this, it is uncertain whether agencies will be able to argue compliance with the Economic Opportunity Law is an alternative to complying with the Act. See discussion, below.
- Prohibit the imposition of financial penalties for violating the Act for non-substantive violations that do not impact the availability or construction of affordable housing.<sup>43</sup>
- Clarify the definition of “disposition value,” which is important as financial penalties are calculated as a percentage of the disposition value. Specifically, in the case of a sale, the “disposition value” is the greater of the final sale price of the land or the fair market value of the surplus land at the time of sale, as determined by an independent appraisal of the land; in the case of a lease, the discounted net present value of the fair market value of the lease as of the date the lease was entered into, as determined by an independent appraisal of the lease of the land.<sup>44</sup>
- Extend the deadline to utilize the exclusive negotiating agreement (“ENA”) exception from Dec. 31, 2022, to Dec. 31, 2027.<sup>45</sup>
  - *Note:* This means that agencies which, prior to the passage of AB 1486, entered into an ENA regarding disposition of a specific piece of land may comply with the less onerous pre-AB 1486 version of the Act instead of the post-AB 1486 version of the Act, provided that the disposition is complete by Dec. 31, 2027.

### Key Takeaways from the Legislative Process

While the actual amendments to the Act made by SB 747 and AB 480 are clearly important, the legislative analysis also has significant impacts. For example, the legislative analysis for SB

747 includes critical analysis and commentary on the relationship between the Act and the Economic Opportunity Law, codified in Government Code section 52200 et seq.

As background, the Economic Opportunity Law authorizes cities and counties to acquire property in furtherance of the creation of an economic opportunity, subject to compliance with certain public noticing and related procedures. On a theory that the Act does not apply when it conflicts with other laws, multiple agencies have sought to avoid compliance with the Act by instead complying with the Economic Opportunity Law. To date, this argument has not been considered by a court of law, but HCD itself has rejected it in technical assistance letters and notices of violation.<sup>46</sup>

Interestingly, the initial drafts of SB 747 included language that expressly identified compliance with the Economic Opportunity Law as an alternative to compliance with the Act. This language would have benefitted many public agencies by allowing them to focus on maximizing revenue from dispositions rather than complying with the tedious notice of availability and negotiation process required by AB 1486. However, as SB 747 made its way through the legislative process, the language regarding the Economic Opportunity Law was struck. During the Assembly Committee on Housing and Community Development's review of the draft bill, the committee staff commented that identifying the Economic Opportunity Law as an alternative to the Act "undermines the changes the Legislature has made over the last few years to prioritize affordable housing in the [Act] by stating that the [Act] would not apply in instances when local agencies are disposing of land pursuant to the state's Economic Opportunity Law." Further, staff recommended that "to maintain the preeminence of the [Act] on publicly-owned land, the committee may wish to amend the bill to remove the ability of Economic Opportunity Law to supersede the [Act]." Thereafter, reference to the Economic Opportunity Law was indeed struck from SB 747.

With the reference to the Economic Opportunity Law pulled from SB 747, coupled with the above legislative history and discussion during the Assembly Committee on Housing and Community Development's review of the draft bill, it is unlikely that agencies will be able to argue that the agency may comply with the Economic Opportunity Law as an alternative to complying with the Act.

In addition to the legislative analysis on the relationship between the Act and the Economic Opportunity Law, another key takeaway from SB 747 and AB 480 is that the legislation essentially blesses the HCD Guidelines. Specifically, while the legislation clarifies the type of leases subject to the Act (and thereby invalidates the portion of the HCD Guidelines regarding the type of leases subject to the Act), the legislation otherwise does not comment on the HCD Guidelines, even though such guidelines arguably went far beyond the scope of the Act. Further, the legislation did not include any provisions clarifying or limiting HCD's authority to issue guidelines. Thus, HCD will continue to have the authority to interpret the Act and publish guidance based on its interpretation.

Although the Act may still have some ambiguities and create some challenges for those subject to it, AB 480 and SB 747 do provide much needed clarity and flexibility that is helpful for public agencies.

## **What Does This Mean for Public Agencies?**

In all of its versions, the Act imposes specific requirements on public agencies disposing of surplus land. The amendments enacted through AB 1486 created the most onerous version of the Act that has existed to date and resulted in confusion and challenges for public agencies across the state. Although SB 747 and AB 480 do not completely eliminate the confusion or the challenges, they are a step in the right direction toward providing clarity and flexibility for public agencies.

For example, as discussed above, the legislative analysis for SB 747 clarifies that compliance with the Economic Opportunity Law is not an alternative to compliance with the Act. While this clarification does not result in increased flexibility for agencies, it does clarify the relationship between the two sets of laws. Additionally, as also discussed above, AB 480 extends the deadline to utilize the ENA exception from Dec. 31, 2022, to Dec. 31, 2027. This results in additional flexibilities for agencies as it allows agencies to comply with the pre-AB 1486 Act for dispositions that are the subject of an ENA entered into prior to the passage of AB 1486. Given that the pre-AB 1486 Act was much less onerous and arguably did not apply to leases, the ability to comply with the pre-AB 1486 Act instead of the current Act is likely to be seen as a positive by many agencies. Finally, as also discussed above, the legislation's silence on the HCD Guidelines clarifies that HCD is in fact authorized to issue such guidelines and that agencies must comply with the same.

How the amended law will interplay with an agency's disposition is an extremely fact-specific analysis that hinges on both the type of agency as well as the unique facts of the contemplated disposition. Given that the amended law took effect Jan. 1, 2024, agencies should start reviewing the amendments and considering how the same may impact their surplus property plans for the upcoming year. Also, agencies should keep in mind that a violation of the Act should not invalidate the transfer but may lead to an enforcement action by HCD that results in the agency being required to distribute a portion of the disposition proceeds into a housing trust.

## **What Happens Next?**

Following the recent enactment of AB 480 and SB 747, HCD released the draft Updated Surplus Land Act Guidelines ("Updated Guidelines"), issued on February 23, 2024. If enacted as proposed, the Updated Guidelines would likely result in significant operational challenges for public agencies.

For example, Section 502(b) of the draft Updated Guidelines purports to grant third-party entities (i.e., not HCD) the ability to issue notices of alleged violations of the Act directly to local agencies. Allowing third parties to directly trigger enforcement deadlines for local agencies without HCD initiation is likely to result in local agencies receiving significant frivolous notices of alleged violations that agencies would then be tasked with responding to. Further, the draft Updated Guidelines include a subjective, open-ended definition of "good faith negotiations". Government Code Section 54223 requires that "After the disposing agency has received a notice of interest from the entity desiring to purchase or lease the surplus land on terms that comply with this article, the disposing agency and the entity shall enter into good faith negotiations to determine

a mutually satisfactory sales price and terms or lease terms. If the price or terms cannot be agreed upon after a good faith negotiation period of not less than 90 days, the local agency may dispose of the surplus land without further regard to this article....” The draft Updated Guidelines undermine the certainty of the statute by requiring in Section 202(a)(1)(C)(iv)(V) that a local agency not “arbitrarily end active negotiations after 90 days of good faith negotiations.”

HCD accepted public comments on the Updated Guidelines through March 25, 2024. As of the time that this paper was written, final Updated Guidelines have not been issued. We are continuing to monitor the Updated Guidelines and look forward to sharing any additional updates during our presentation.

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<sup>1</sup> All unlabeled statutory references are to the Government Code.

<sup>2</sup> Gov. Code, § 54221(b) (2019).

<sup>3</sup> Gov. Code, § 54221 (2019).

<sup>4</sup> Gov. Code § 54222 (2019).

<sup>5</sup> AB 1486’s legislative history indicates that the Act was not interpreted as applying to leases. When AB 1486 was first introduced, it contained a definition of “dispose of” that included sales, leases, transfers, or other conveyances of interest in real property. This definition was subsequently removed following the Assembly Committee on Local Government’s consideration of the draft bill, during which they discussed that local governments opposed including “lease” in the definition of “dispose of” because of the problems it would pose for local agencies, thereby indicating that agencies had historically not treated the Act as applying to leases.

<sup>6</sup> Gov. Code § 54222(f) (2019).

<sup>7</sup> Gov. Code § 54223 (2019).

<sup>8</sup> *Id.*

<sup>9</sup> Gov. Code § 54226 (2019).

<sup>10</sup> *Id.*

<sup>11</sup> Gov. Code § 54226 (2019).

<sup>12</sup> Gov. Code § 54230.5 (2019).

<sup>13</sup> Stats. 2019, c. 664 (AB 1486).

<sup>14</sup> Gov. Code § 54221(b)(1) (2023).

<sup>15</sup> *Id.*

<sup>16</sup> Gov. Code § 54221(c)(1) (2023).

<sup>17</sup> *Id.* at (c)(2).

<sup>18</sup> Gov. Code § 54222.3 (2023).

<sup>19</sup> Gov. Code § 54230(a)(1) (2023).

<sup>20</sup> Gov. Code § 54230 (2023); HCD Guidelines §§ 101(b)(1)(E), 200(c), 400(d).

<sup>21</sup> Gov. Code § 54222 (2023).

<sup>22</sup> Gov. Code § 54222(e) (2023).

<sup>23</sup> Gov. Code § 54227(a) (2023).

<sup>24</sup> Gov. Code § 54223(a) (2023).

<sup>25</sup> Gov. Code § 54233 (2023).

<sup>26</sup> Gov. Code § 54230.5(a) (2023).

<sup>27</sup> Gov. Code § 54230.6 (2023).

<sup>28</sup> The Notice of Violation issued by HCD to Anaheim is available at <https://www.hcd.ca.gov/community-development/housing-element/docs/oraanaheim-nov-120821.pdf>.

<sup>29</sup> The settlement agreement between Anaheim and HCD was ultimately never finalized because the deal with the Angels was terminated as a result of FBI investigations related to the Chamber of Commerce CEO’s and Anaheim mayor’s involvement in and actions related to the deal. See, for example, <https://www.justice.gov/usao-cdca/pr/former-mayor-anaheim-agrees-plead-guilty-federal-charges-stemming-attempted-sale->



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[angel#:~:text=During%20the%20investigation%2C%20FBI%20agents,Angels%2C%20the%20plea%20agreement%20states.](#)

<sup>30</sup> Gov. Code § 54230.5(b)(2)(A) (2023). AB 1486 further authorizes HCD to review, adopt, amend, or repeal guidelines to establish uniform standards to implement the statute pertaining to HCD enforcement and specifies that HCD's adopted standards, forms and definitions are exempt from the rulemaking provisions of the California Administrative Procedure Act. Gov. Code § 54230.5(b)(2)(D) (2023).

<sup>31</sup> HCD Guidelines § 102(h).

<sup>32</sup> Gov. Code § 54221(b)(4).

<sup>33</sup> Gov. Code § 54221(d).

<sup>34</sup> Gov. Code § 54221(c).

<sup>35</sup> Gov. Code § 54221(f)(1)(J).

<sup>36</sup> Gov. Code § 54421(f)(1)(F) and (G).

<sup>37</sup> Gov. Code § 54221(f)(1)(R).

<sup>38</sup> Gov. Code § 54421(f)(1)(Q).

<sup>39</sup> Gov. Code § 54221(f)(1)(S).

<sup>40</sup> Gov. Code § 54222(a)(2).

<sup>41</sup> Gov. Code § 54222(f).

<sup>42</sup> Gov. Code § 54226.

<sup>43</sup> Gov. Code § 54230.5.

<sup>44</sup> *Id.*

<sup>45</sup> Gov. Code § 54234.

<sup>46</sup> See, for example, <https://www.hcd.ca.gov/sites/default/files/docs/planning-and-community/HAU/moreno-valley-nov-101823.pdf>.



# (Not) Burning Down the House

Wednesday, May 8, 2024

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# (Not) Burning Down the House

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## I. Introduction

In the dynamic landscape of urban planning and sustainability, local governments face a delicate balancing act. On one front, there is a pressing need to address housing shortages through state-mandated policies aimed at increasing available housing. Simultaneously, local governments contend with conflicting policies aimed at both mitigating fire risks for housing and preserving environmental integrity. We will delve into the interplay between these seemingly conflicting objectives, exploring laws designed to boost housing availability, policies aimed at mitigating fire risks, and the complex task of resolving the tensions between the two. Through an analysis of the applicable laws and the proposal of practical tools, we aim to unravel these tensions and shed light on navigating the nuanced complexities of these competing policies.

## II. Topics

- (A) Laws Increasing Available Housing
- (B) Policies to Reduce Fire Risk
- (C) Resolution of the Two

## III. Laws Increasing Housing

### (A) Builder's Remedy Housing Accountability Act

#### Government Code § 65589.5

- To Deny an Eligible Housing Development Project or Emergency Shelter, the City must make one of five findings:
  - 1. Met or Exceeded regional housing need allocation (RHNA)
  - 2. Specific Adverse Impact on Public Health and Safety based on Objective, Written Public Health, or Safety Standards
  - 3. Required to Meet State or Federal Law
  - 4. On Land Zoned for Agriculture or Resource Prevention or There are Not Adequate Water or Sewage Facilities
  - 5. Inconsistent with Both the Zoning and the General Plan
    - **But, a City cannot make this finding if it has not adopted a Housing Element in Substantial Compliance with State Law**
- If a City has not adopted a housing element in substantial compliance with state law, developers may propose eligible housing development projects that do not

comply with either the zoning or the general plan. The term “Builder’s Remedy” is used to describe the situation where a local agency may be required to approve an eligible housing development project because it cannot make one of the other four findings.

- However, CEQA is still required unless the project is otherwise exempt.
- Note – Separately, Government Code § 65589.5 (j) is more broadly applicable and prevents agencies from denying most housing projects that comply with objective standards, with few exceptions.

(B) Accessory Dwelling Units (ADU)

Government Code §§ 66310 *et seq.*

- A City may, by Ordinance, provide for the creation of ADU’s in Areas Zoned for Single Family or Multifamily dwelling residential use. Among other things:
  - Designate the Areas Where ADU’s are Permitted based on adequacy of water and sewer service and the impact of accessory dwelling units on traffic flow and public safety.
  - Impose objective standards on ADU’s that include, but are not limited to, parking, height, setback, landscape, architectural review, maximum size of a unit, and prevent adverse impacts on property listed in the California Register of Historical Resources. This shall not include requirements on minimum lot size.
  - New Law (AB 976) prohibits the imposition of an owner-occupant requirement, but the City may require that the property be used for rentals of terms 30 days or longer.
- Permits for ADU’s are subject to ministerial approval, without discretionary review.
- Streamlined Approval Process
- If the City has not adopted such an Ordinance, then applications for permits for ADU’s will still be subject to a ministerial approval process.
- Without an ordinance, it is not clear what objective standards would be used to evaluate the application on a ministerial basis.

(C) Accessory Dwelling Units

AB 1332 – Government Code § 65852.27

- By Jan. 1, 2025, local agencies must develop a program for the preapproval of ADU plans whereby the local agency accepts ADU plan submissions for preapproval.
- Once an ADU plan is approved, local agencies are required to either approve or deny an ADU application utilizing a preapproved ADU plan within 30 days.
- Local agencies must maintain a website page with preapproved ADU plans and the contact information of companies offering preapproved ADU plans.
- AB 1332 specifies that ADU plans approved by the local agency or "other agencies within the state" (i.e., HCD) can be admitted into the local preapproval program.
- The local agency shall approve or deny the application for preapproval pursuant to the standards established in Government Code §§ 66310 et seq.

(D) SB 9 (Duplexes & Urban Lot Splits)

- Overrides Existing Density Limits in Single-Family Zones
- Waives any Discretionary Review & Public Hearings for:
  - Building two homes on a parcel in a single-family zone (“Single Lot Duplex”) (Government Code § 65852.21);
  - Subdividing a lot into two that can be smaller than required minimum size (“Urban Lot Split”) (Government Code § 66411.7)
- Impose Objective Standards
  - May impose objective zoning standards, objective subdivision standards, and objective design review standards, within certain limits.
- Findings of Denial
  - The proposed housing development would have a specific, adverse impact, as defined, upon public health and safety or the physical environment and for which there is no feasible method to satisfactorily mitigate or avoid the specific, adverse impact.
  - “Specific, adverse impact” means a significant, quantifiable, direct, and unavoidable impact, based on objective, identified written public health or

safety standards, policies, or conditions as they existed on the date the application was deemed complete.

(E) SB 35 & SB 423

Government Code § 65913.4

- SB 35 provides for a streamlined ministerial approval process for qualifying housing development projects in local jurisdictions that have not made sufficient progress towards their Regional Housing Needs Allocation.
- SB 423 (New Law) subjects local governments to this streamlined, ministerial approval process if they fail to adopt a compliant housing element as determined by the Department of Housing & Community Development, as specified.
- To qualify for this ministerial process, projects must comply with a locality's "objective" standards, meet a long list of qualifying criteria designed to capture "infill" sites, commit to paying "prevailing wage" rates for construction labor, and meet significant affordability requirements.
- Authorizes Development in the Coastal Zone
- Revises the standard that prohibits a multifamily housing development from being subject to the streamlined, ministerial approval process if the development is located in a coastal zone to apply only if the development that is located in the coastal zone meets any one of specified conditions.
- Requires a development that is located in a coastal zone that satisfies the specified conditions to obtain a coastal development permit. Requires a public agency with coastal development permitting authority to approve a coastal development permit if it determines that the development is consistent with all objective standards of the local government's certified local coastal program, as specified. Provides that the changes made apply in a coastal zone on or after January 1, 2025.
- Clarifies Development in Very High Fire Hazard Zones and the State Responsibility Area. At minimum:
  - Development Must Meet Defensible Space Requirements (Public Resources Code § 4291 or Government Code § 51182, as applicable)
  - Development Must Meet Minimum Fire Safe Regulations (Public Resources Code § 4290)

- Development Must Meet Home Hardening Requirements (Chapter 7A of the California Building Code)
- Local government may establish objective zoning standards, objective subdivision standards, and objective design review standards applicable to such applications, as specified.
- Limits review conducted by a local elected body.
- Requires approval if a local government’s planning director or equivalent position determines the development is consistent with the objective planning standards.
- SB 35 previously authorized the local government’s planning commission or any equivalent board or commission responsible for review and approval of development projects, or the City Council or Board of Supervisors, as appropriate, to conduct any design review or public oversight of the development.
  - SB 423 removed the above-described authorization to conduct public oversight of the development and would only authorize design review to be conducted by the local government’s planning commission or any equivalent board or commission responsible for design review.
- Limits review conducted by a local elected body.
- Cannot require any of the following prior to approving the development:
  - (1) Studies, information, or other materials that do not pertain directly to determining whether the development is consistent with the objective planning standards applicable to the development.
  - (2)(A) Compliance with any standards necessary to receive a postentitlement permit.
  - (2)(B) This paragraph does not prohibit a local agency from requiring compliance with any standards necessary to receive a postentitlement permit after a permit has been issued pursuant to SB 423.



(F) AB 2011

Affordable Housing & High Road Jobs Act

Government Code §§ 65912.100 et seq.

- Creates ministerial approval process for multifamily housing developments on sites within a zone where office, retail or parking are the principally permitted use.
- The law provides for slightly different qualifying criteria depending upon whether the project is (1) for 100-percent affordable projects or (2) for mixed-income projects located in "commercial corridors."
- Projects must pay prevailing wages to construction workers, among other labor standards.
- Authorizes the creation of objective zoning standards, objective subdivision standards, and objective design review standards, as specified.
- Local Agency may exempt parcels as specified.

(G) SB 6

Middle Class Housing Act of 2022

Government Code § 65852.24

- Also permits residential development on sites currently zoned and designated for commercial or retail use.
- Normal approval process but does not require a rezoning.
- Projects meeting SB 6 criteria may invoke the Housing Accountability Act if they meet all other criteria.
- A project proposed under SB 6 may be either a 100-percent residential project or a mixed-use project where at least 50 percent of the square footage is dedicated to residential uses.
- SB 6 projects are not exempt from CEQA but need not provide any affordable housing.
- SB 6 projects are required to pay prevailing wages and utilize a "skilled and trained workforce."
- Local Agency may exempt parcels from this statute if it makes certain findings, as specified.

- The development shall be subject to local zoning, parking, design, and other ordinances, local code requirements and applicable procedures applicable to the processing and permitting of a housing development in a zone that allows for the housing with the density allowed by SB 6.

(H) SB 684

Government Code § 66499.41

- Requires a local agency to ministerially consider, without discretionary review or a hearing, a parcel map or a tentative and final map for a housing development project that meets specified requirements.
- Requires the proposed subdivision to result in 10 or fewer parcels and the housing development project to, among other things, consist of 10 or fewer residential units, meet certain minimum parcel size and density requirements, and be located on a lot zoned for multifamily residential development that is no larger than 5 acres and is substantially surrounded by qualified urban uses.

(I) SB 684

Government Code § 65852.28

- Requires a local agency to ministerially consider, without discretionary review or a hearing, an application for a housing development project on a lot that is subdivided pursuant to the provisions of SB 684.
- Authorizes a local agency to impose on the housing development objective zoning standards, objective subdivision standards, or objective design standards that are related to a housing development or to the design or improvement of a parcel, as specified.
- Prohibits a local agency from imposing on the housing development certain standards, including those that physically preclude the development of a project built to specified densities, impose a requirement that applies to a project solely or partially on the basis that the subdivision or housing development receives approval pursuant to the bill's provisions, or impose certain requirements related to parking, setbacks, or floor area ratios, as specified.

(J) SB 4

Government Code § 65913.16

- Creates a "by right," CEQA-exempt, time-limited (90-180 day) approval process closely modeled on SB 35 of 2017 and AB 2011 of 2022 for affordable housing projects (including qualifying ground-floor commercial, childcare center and community center uses) on land owned by religious organizations and higher education institutions.
- Such a project can be entitled to approval even if the project is inconsistent with applicable local general plan and zoning requirements.
- A project is entitled to a height of one story above applicable local requirements and to specified minimum residential densities of between 10-40 dwelling units per acre, depending upon the project's location.
- Local agencies may establish objective development standards consistent with this statute.
- Design review may be conducted by the Planning Commission or the Board of Supervisors. That design review shall be objective and be strictly focused on assessing compliance with criteria required for streamlined, ministerial review of projects, as well as any reasonable objective design standards published and adopted by ordinance or resolution by a local jurisdiction before submittal of the development to the local government and shall be broadly applicable to developments within the jurisdiction.

**IV. Policies to Reduce Fire Risk**

(A) General Authority

- Public Resources Code § 4117:
  - Any county, city, or district may adopt ordinances, rules, or regulations to provide fire prevention restrictions or regulations that are necessary to meet local conditions of weather, vegetation, or other fire hazards. Such ordinances, rules, or regulations may be more restrictive than state statutes in order to meet local fire hazard conditions.

(B) Fire Hazard Severity Zone Maps

- Government Code §§ 51175 et seq.
- A local agency shall designate, by ordinance, moderate, high, and very high fire hazard severity zones in its jurisdiction within 120 days of receiving recommendations from the State Fire Marshal.
- A local agency can include areas not identified by the State Fire Marshal following findings supported by substantial evidence that such designations are necessary.
- A local agency shall not decrease the level of fire hazard severity zones identified by the State Fire Marshal.

(C) Significance for Development: Defensible Space

- In areas within a Very High Fire Hazard Severity Zone:
  - 1. Maintain Defensible Space of 100 feet from each side and from the front and rear of the structure, but not beyond the property line. Government Code § 51182.
  - 2. Local Ordinance may require greater distances.
  - 3. Local Ordinance may also require fuel modification beyond the property line in order to maintain 100 feet of defensible space from a structure.

(D) Significance for Development: State Minimum Fire Safe Regulations

- In areas within a Very High Fire Hazard Severity Zone:
  - 1. New Development Must Comply with the State's Minimum Fire Safe Regulations. Public Resources Code § 4290; 14 CCR §§ 1270 *et seq.*
  - 2. State's Minimum Fire Safe Regulations provide for emergency access; signing and building numbering; private water supply reserves for emergency fire use; vegetation modification, fuel breaks, greenbelts, and measures to preserve undeveloped ridgelines.
- Building Setback Requirements (14 CCR § 1276.01)
  - All parcels shall provide a minimum 30-foot setback for all buildings from all property lines and/or the center of a road, except as follows:

- A reduction in the minimum setback requirement shall be based upon practical reasons, which may include, but are not limited to, parcel dimensions or size, topographic limitations, development density requirements or other development patterns that promote low-carbon emission outcomes, sensitive habitat, or other site constraints, and shall provide for an alternative method to reduce Structure-to-Structure ignition.
    - What types of alternative methods?
      - (1) non-combustible block walls or fences; or
      - (2) non-combustible material extending five (5) feet horizontally from the furthest extent of the Building; or
      - (3) hardscape landscaping; or
      - (4) a reduction of exposed windows on the side of the Structure with a less than thirty (30) foot setback; or
      - (5) the most protective requirements in the California Building Code, California Code of Regulations Title 24, Part 2, Chapter 7A, as required by the Local Jurisdiction.
- Fuel Break Requirements for New Development (14 CCR § 1276.03)
  - When Building construction meets the following criteria, the Local Jurisdiction shall determine the need and location for fuel breaks in consultation with the local Fire Authority:
    - a. Approval of three or more new parcels, excluding lot line adjustments.
    - b. Zoning Application to increase zoning intensity or density; or
    - c. Use Permit Application increasing use intensity or density.
- Strategic Ridgelines (14 CCR § 1276.02)
  - The Local Jurisdiction shall identify Strategic Ridgelines, if any, to reduce fire risk and improve fire protection through an assessment of certain enumerated factors.
  - Preservation of Undeveloped Strategic Ridgelines shall be required.
  - New Development On Strategic Ridgelines is Restricted.

- 1. New Residential Units are prohibited within or at the top of drainages or other topographic features common to Ridgelines that act as chimneys to funnel convective heat from Wildfires.
- 2. Nothing in this regulation shall be construed to alter the extent to which utility infrastructure, including but not limited to wireless telecommunications facilities, or Storage Group S or Utility and Miscellaneous Group U Structures, may be constructed on Undeveloped Ridgelines.
- 3. Local Jurisdictions may approve Buildings on Strategic Ridgelines where Development activities such as mass grading will significantly alter the topography that results in the elimination of Ridgeline fire risks.

(E) Significance for Development: Enhanced Building Standards

Chapter 7A of the State Building Code

- Health & Safety Code § 13108.5
- Fire Protection building standards for roofs, exterior walls, structure projections (porches, decks, balconies, and eaves) and structure openings (attic and eave vents and windows)
  - 1. Applicable in Very High Fire Hazard Zones and Other areas Designated by the Local Agency Based on Findings Supported by Substantial Evidence that the Requirements are Necessary for Effective Fire Protection.
  - 2. Also applicable to Buildings Located in Urban Wildland Interface Communities, as defined, unless a local jurisdiction finds they are not necessary for effective fire protection in that area.
  - 3. “Urban wildland interface community” means a community listed in “Communities at Risk from Wild Fires,” produced by the California Department of Forestry and Fire Protection, Fire and Resource Assessment Program, pursuant to the National Fire Plan, federal Fiscal Year 2001 Department of the Interior and Related Agencies Appropriations Act (Public Law 106-291).

(F) California Attorney General’s guidance for evaluating wildfire impacts under CEQA:

- <https://oag.ca.gov/system/files/attachments/press-docs/Wildfire%20guidance%20final%20%283%29.pdf>. - among other things, suggests that project-level CEQA documents should include evacuation and wildfire modeling studies to quantify the project’s impacts, but offers no specific guidance on how to do this – it’s often not practical.

## **V. Resolution of the Competing Policies - Can We Sue Them?**

(A) State Preemption Over Local Land Use

- *Big Creek Lumber Co. v. County of Santa Cruz*, 38 Cal. 4<sup>th</sup> 1139 (2006)
  - Land Use Regulation is a function of a local government under the police power contained in California Constitution, Article XI, section 7.
  - When enacting state zoning laws, the State has declared its intention to provide only a minimum of limitation so counties and cities may exercise the maximum degree of control over local zoning matters. Government Code 65800.
  - Absent a clear indication of preemptive intent from the Legislature, California courts will presume that local land use regulation is not preempted by state statute.
- *Chevron U.S.A. Inc. v. County of Monterey*, 15 Cal. 5<sup>th</sup> 135 (2023)
  - Local ordinance banning land uses in support of new oil and gas wells conflicted with state statute granting state oil and gas supervisor authority to supervise drilling operations.
  - Local Ordinance was preempted.

## **VI. Resolution of the Competing Policies – Use Tools Provided**

(A) Objective Criteria in Implementing Ordinances

- **Establish Objective Standards Where Authorized, Focusing on Fire Protection**
  - **Housing Accountability Act**
    - Specific Adverse Impact on Public Health and Safety based on Objective, Written Public Health or Safety Standards, which can include fire protection (Government Code § 65589.5(d)(2)).

- Establish objective development standards appropriate to, and consistent with, meeting the regional housing need and/or the need for emergency shelter. (Government Code § 65589.5(f)).
- **Accessory Dwelling Units Ordinance**
  - Designate Areas Where ADU's may be permitted based on the adequacy of water and sewer service, traffic flow, and public safety, including fire concerns. (Government Code § 66314(a)).
  - Impose objective standards on ADU's to address fire concerns (Government Code § 66314(b)).
  - In residential or mixed use zones, the side and rear setbacks must be sufficient for fire and safety (Government Code § 66323(a)1(C)).
  - Consider adopting a fire or life protection ordinance relating to fire and life protection requirements within a single family residence that contains a junior accessory dwelling unit so long as the ordinance applies uniformly to all single-family residences within the zone regardless of whether the single-family residence includes a junior accessory dwelling or not (Government Code § 66337).
- **SB 9**
  - Establish Objective Standards to address fire concerns that do not conflict with the statute (Government Code § 65852.21(b)(1); Government Code § 66411.7(c)(1))
  - Include policies and standards relating to public health and safety impacts.
  - Implementing Ordinance Not Subject to CEQA (Government Code § 65852.21(j); Government Code § 66411.7(n))
- **SB 35 & 423**
  - Establish objective zoning, subdivision, and design review standards that address fire concerns (Government Code § 65913.4(a)(5))



- May be embodied in alternative objective land use specifications, and may include housing overlay zones, specific plans, inclusionary zoning ordinances, and density bonus ordinances.
- **AB 2011**
  - Establish objective zoning, subdivision, and design review standards that address fire concerns, consistent with the statutes (Government Code § 65912.113(f); Government Code § 65912.123(j))
  - Determine if parcels should be exempt (Government Code § 65912.114(i); Government Code § 65912.124(i)).
- **SB 684**
  - Establish objective zoning, subdivision, and design standards that address fire concerns, consistent with the statutes. (Government Code § 65852.28(b); Government Code § 66499.41(d))
  - Implementing Ordinance Not Subject to CEQA (Government Code § 65852.28(e); Government Code 66499.41(i))
- **SB 4**
  - Establish objective development standards that address fire concerns consistent with the statute (Government Code § 65913.16(c)(10))

(B) Types of Objective Criteria Focusing on Fire Protection

- Establish Very High Fire Hazard Zones Supported by Substantial Evidence
- Defensible Space
- Setbacks
- Fuel Breaks
- Limit New Development on Strategic Ridgelines
- Enhanced Building Standards



# Mass Casualty Events: What Nobody Taught You and You Didn't Want to Learn

Wednesday, May 8, 2024

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# **Mass Casualty Incidents: What Nobody Taught You and You Didn't Want to Learn**

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# Mass Casualty Incidents: What Nobody Taught You and You Didn't Want to Learn

## I. Background

Every year, cities in California and throughout the U.S. tragically experience mass casualty incidents (MCIs), which are events that overwhelm local governments and healthcare systems because the number of casualties vastly exceeds the local resources and capabilities in a short period of time.<sup>1</sup> MCIs include active shooter incidents, which involve one or more individuals actively engaged in killing or attempting to kill people in a populated area.<sup>2</sup> In a 20-year review between 2000 and 2019, California had the highest number of active shooter incidents (42), significantly higher than the states with the next three highest number of incidents: Florida (27), Texas (25), and Pennsylvania (21).<sup>3</sup> Most recently, in 2020-2022, California still had the overall highest number of active shooter incidents.<sup>4</sup> Most of the incidents in the last two decades, both nationally and in California, occurred at business locations.<sup>5</sup>

This paper focuses on three active shooter incidents as examples of MCIs that occurred in California cities in recent years. These active shooter incidents are considered mass shootings due to their substantial number of casualties,<sup>6</sup> and occurred in the following commercial locations in California:

- On November 7, 2018, a mass shooting occurred in Thousand Oaks when a single shooter attacked individuals inside Borderline Bar and Grill.<sup>7</sup> The shooter killed 12 people, in addition to himself, and injured 16 others.<sup>8</sup>

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<sup>1</sup> Renee L. DeNolf and Chadi I. Kahwaji. *EMS Mass Casualty Management*. StatPearls Publishing (2022), available at: <https://www.ncbi.nlm.nih.gov/books/NBK482373> (last visited Mar. 20, 2024).

<sup>2</sup> Fed. Bureau of Investigation, U.S. Dep't of Justice, *Active Shooter Incidents 20-Year Review, 2000-2019*, 2 (May 2021) [hereinafter FBI].

<sup>3</sup> *Id.* at 5.

<sup>4</sup> The Advanced Law Enforcement Rapid Response Training (ALERRT) Center at Tex. State Univ. and the FBI, U.S. Dep't of Justice, *Active Shooter Incidents in the United States in 2020*, 7 (July 2021); ALERRT and FBI, *Active Shooter Incidents in the United States in 2021*, 7, May 2022; ALERRT and FBI, *Active Shooter Incidents in the United States in 2022*, 6 (Apr. 2023).

<sup>5</sup> ALERRT and FBI, *supra* note 2 at 7.

<sup>6</sup> As there is no widely accepted definition of "mass shooting," this paper borrows the FBI definition of "mass killings," which defines active shooter incidents with three or more killings in a single incident. ALERRT and FBI, *supra* note 2 at 2.

<sup>7</sup> ALERRT and FBI, *Active Shooter Incidents in the United States in 2018*, 12 (Apr. 2019).

<sup>8</sup> *Id.*

- On January 21, 2023, a mass shooting occurred in Monterey Park when a single shooter attacked individuals at Star Ballroom Dance Studio.<sup>9</sup> The shooter killed 11 people and injured nine others.<sup>10</sup> The shooter left the scene in Monterey Park and drove to Lai Lai Ballroom & Studio in Alhambra where he attempted to replicate his crime.<sup>11</sup> Fortunately, the shooter’s weapon jammed and he was disarmed by Brandon Tsay before fleeing the scene. The shooter subsequently took his own life in Torrance, California. The victims ranged in age from 57 to 76, with six women and five men among those killed.
- Two days later, on January 23, 2023, a mass shooting occurred in Half Moon Bay and San Mateo County when a single shooter attacked individuals at a plant nursery along Cabrillo Highway South in Half Moon Bay, and at another nursery along Highway 92 in nearby San Mateo County.<sup>12</sup> The shooter killed seven people, and critically injured one person. As of the publication date of this paper, the alleged gunman remains in custody and is awaiting a trial date.

While hoping such tragedies will never occur, cities can plan and prepare for MCIs by applying lessons learned from these events, anticipating immediate aftermath needs of the community, and coordinating a response. Cities can include in such a response plan several key actions to take during and after an incident to assist victims and heal communities such as establishing a victim compensation fund and implementing policy changes that reduce harm associated with the MCI (e.g., deterring gun violence) and support directly affected communities. Cities should also take preventative measures and prepare for potential lawsuits under public agency liability. Cities cannot act alone and often work in tandem with local nonprofits and community foundations to support victims and their families. The process is complex, and cities would benefit from legislative efforts that standardize the victim compensation fund process. This paper examines these lessons and best practices while sharing perspectives from a community foundation and local governments from three city case studies.

## II. Anticipated Aftermath and Coordinated Responses – Case Studies

### A. Anticipated Aftermath

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<sup>9</sup> Richard Winton; Jeong Park; Libor Jany; Summer Lin; Summer Ellis, *10 people killed, 10 injured in mass shooting at Monterey Park dance studio*, L.A. TIMES (Jan. 22, 2023), <https://www.latimes.com/california/story/2023-01-22/la-me-monterey-park-mass-shooting> (last visited Mar. 19, 2024).

<sup>10</sup> *Id.*

<sup>11</sup> *Id.*

<sup>12</sup> *Resolution Declaring a Local Emergency Related to the January 23, 2023 Mass Shooting Event and Authorizing City Manager to Sign Executive Order*, HALF MOON BAY CITY COUNCIL (Feb. 7, 2023).

Much like experiencing the fallout of a natural disaster, cities should anticipate and prepare for the immediate aftermath needs of the community in the hours, days and weeks following an MCI.

The expected aftermath includes events such as heightened media focus, state and federal official visits, and community members convening in need of support. Note that in each example, multiple crises occurred around the same time, such as wildfires, rainstorms, and the COVID-19 pandemic.

1. Community Foundation Response: Thousand Oaks

At 11:18 p.m. on the night of November 7, 2018, a shooter attacked patrons and employees of the Borderline Bar & Grill of Thousand Oaks, California using a weapon equipped with a high-capacity magazine. An investigation into the mass shooting concluded that the gunman was motivated by “a strong disdain for civilians,” particularly college students, according to a Ventura County Sheriff’s Office report.<sup>13</sup>

At the request of the City of Thousand Oaks, the Ventura County Community Foundation (VCCF) established the Conejo Valley Victims Fund on the early morning hours of November 8, and began processing contributions via its website, phone, and mail immediately thereafter.

Several hours later, at approximately 2:00 p.m. on November 8, a significant wildfire known as the “Hill Fire” began approximately five miles away from the bar. The fire spread quickly and both mandatory and voluntary evacuations were in place, affecting many of the individuals present and injured by the gunman. The “Woolsey Fire” also started on November 8 at around the same time, approximately 30 miles from the Hill Fire. The Woolsey Fire affected locations in both Ventura and Los Angeles counties.

VCCF activated its Sudden and Urgent Needs Fund in support of those affected by the two fires at approximately 9:00 a.m. on November 9. Some donors making contributions from the period from November 8 – 10 intended that their contributions be split between the two funds: Conejo Valley Victims Fund and Sudden and Urgent Need Fund. VCCF followed its policy of attempting to contact donors by telephone or email if donor intent is not clear.

As part of its support for the Conejo Valley Victims Fund, VCCF committed to distribute all funds received (minus credit card processing fees) to the Borderline victims, without taking any administrative fees from that fund. VCCF raised and distributed more than \$4 million in accordance with the published Final Protocol. As a fiduciary, VCCF committed to

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<sup>13</sup> Mike Harris, *12 victims of Borderline mass shooting remembered on third anniversary of tragedy*, VENTURA CTY. STAR (Nov. 7, 2021), <https://www.vcstar.com/story/news/local/communities/conejo-valley/2021/11/08/victims-borderline-bar-grill-mass-shooting-thousand-oaks-remembered-anniversary/6247538001> (last visited Mar. 25, 2024).

have its independent accounting firm perform procures, or conduct an audit, on both contributions received and distributions from the fund.<sup>14</sup>

There were three phases of disbursement of funds raised:

- VCCF made the first disbursement in the immediate aftermath of the shooting by providing all those present at the emergency victims center with \$500 in a pre-paid Visa debit card. These funds were essential to help victims purchase cell phones, get keys made, get identification cards remade, and obtain essentials.
- VCCF made the second disbursement by distributing \$25,000 to each of the 12 families who had loved ones taken from them to help with memorial costs, including additional security needed due to the public nature of tragedy.
- VCCF made the third disbursement in accordance with the final protocol, which prioritized payments based on severity of injuries, including individual death claims, individual physical injury claims requiring overnight hospitalization, individual physical injury claims of victims treated on an emergency out-patient basis, and individual claims of victims present inside the bar.<sup>15</sup>

## 2. Local Government Response: Monterey Park

In Monterey Park, the mass shooting occurred at approximately 10:21 p.m. on January 21, 2023 on Lunar New Year's Eve, and led to a regional search by multiple federal, state and local law enforcement agencies. Initial reports suggested that the mass shooting may have been a hate crime as Monterey Park's population includes a significant Asian and Pacific Islander community. The mass shooting was the deadliest in Los Angeles County history and resulted in overwhelming attention from federal, state and local officials.<sup>16</sup> The day after the mass shooting, City Hall was flooded with representatives from the FBI, U.S. Marshall's Office, the Secret Service, Los Angeles Sheriff's Department, U.S. Attorney Office, Los Angeles County District Attorney Office, California Governor's Office, California Attorney General Office, U.S. Representatives Judy Chu and Adam Schiff, State Senators, California Assemblymembers, and Alhambra City Council Members. These officials were in addition to the City's own City Council Members, Police Department, Fire Department, and other agencies.

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<sup>14</sup> Conejo Valley Victims Fund, *Attestation Report* (Mar. 31, 2019), available at <https://vccf.org/wp-content/uploads/2019/10/vccf-conejo-valley-attestation-report-final.pdf>.

<sup>15</sup> Conejo Valley Victims Fund, *Final Protocol* (Jan. 8, 2019), available at <https://conejovalleyvictimsfund.org/wp-content/uploads/2019/01/Conejo-Valley-Victims-Fund-Final-Protocol.pdf>.

<sup>16</sup> KCAL News Staff, *Monterey Park mass shooting: Reaction pours in after LA County's worst mass shooting since 2008*, CBS NEWS (Jan. 22, 2023), <https://www.cbsnews.com/losangeles/news/monterey-park-mass-shooting-reaction-pours-in-after-la-countys-worst-mass-shooting-since-2008/> (last visited Mar. 26, 2024).

The City was not prepared for the number of officials and media present at City Hall. Asserting local control over the response to the shooting was difficult; much of the City's local assets were subsumed by, for example, the Los Angeles County Sheriff's Office which utilizes a full public information team, homicide investigation unit, and other regional assets. Additionally, the community's need to heal after the shooting – through community vigils and establishing a resiliency center – was tempered by high profile visits by President Joe Biden; Vice-President Kamala Harris; and Governor Gavin Newsom.

Because of the high-profile nature of the shooting, the City was delayed in making some crucial decisions such as the formation of a victim compensation fund. The 2018 Thousand Oaks mass shooting allowed City officials to tap into the experience of the City of Thousand Oaks and later form the "Monterey Park Community Healing Fund." But the timing of fund creation and implementation<sup>17</sup> was delayed to the extent that most donations were already directed to multiple donation sites established by various nonprofits.<sup>18</sup>

### 3. Local Government Response: Half Moon Bay

In Half Moon Bay, both shootings occurred at local farms that employed and housed farmworkers and farmworkers' families, displacing nearly 20 households and 40 individuals.<sup>19</sup> Localized flooding caused by catastrophic storm events in December 2022 and January 2023 complicated response efforts. The storm had caused the closure of local highways on December 31, 2022 due to landslides, mudslides, and fallen trees. The City was still recovering from these events, including responding to a sinkhole that had developed on Highway 92.

In the aftermath of the mass shooting, the City immediately worked to establish a reunification center in downtown Half Moon Bay at the IDES Hall. Learning that there were Latino and Chinese farmworkers among the victims, the City staff provided interpretation and cultural support at the reunification center by offering Spanish language services and contacting Senior Coastsiders for a Mandarin-speaking liaison.

On the day after the shooting, the City set up space and provided culturally appropriate flower arrangements for the seven victims at MacDutra Park. Hundreds of people visited the memorial and left candles and flowers, and other remembrances. The City maintained the space for many weeks. The City assisted with a candlelight vigil at MacDutra Park and provided seating, sound equipment, programs, candles, and other support before, during, and after the vigil. The City supported a larger indoor memorial event at the Boys and Girls Club to

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<sup>17</sup> City Council of the City of Monterey Park, *Resolution No. 2023-R7*, CITY OF MONTEREY PARK (Jan. 31, 2023).

<sup>18</sup> See e.g., Asian Americans Advancing Justice, *Monterey Park Lunar New Year Victims' Fund Eligibility*, available at <https://www.ajsocal.org/monterey-park-lunar-new-year-victims-fund-eligibility>.

<sup>19</sup> Memo to San Mateo County Supervisor Ray Mueller from City staff members Karen Decker and Jill Ekas, *Response to January 23, 2023 Shooting*, CITY OF HALF MOON BAY (May 22, 2023).



honor the victims in collaboration with local faith leaders, nonprofits, regional elected officials, and community members. The City also provided a dedicated space and interpreters to provide information and mental health resources to the shooter's spouse.

To provide immediate temporary housing, the City relocated the affected families to two local hotels procured by San Mateo County Human Services Agency (HSA) staff. City staff started regular morning huddles at the hotel for HSA staff and nonprofit partners to coordinate meals and resources for the upcoming day and coordinate each other's roles in addressing the needs of the displaced families. The City Public Works Department procured and delivered a Red Cross trailer and staff staged supplies and cots.

The City next transitioned to short-term housing due to lack of amenities and a (then) increasing risk of exposure to the COVID-19 virus. The City contacted Airbnb.org, the nonprofit branch of Airbnb, which issued free 30-day vouchers to cover Airbnb rentals. City staff created email addresses and accounts, and matched families based on household size, proximity to school and work, and transportation needs. The City sent hotel exit forms and contacted the District Attorney Office, HSA, Coastside Hope, and Ayudando Latinos A Soñar (ALAS) to coordinate food, resources, transportation, and move out schedules. The City and partners assisted families with moving into Airbnb properties through extensive case management, including walking families through access, technology, trash collection days, etc. The City also worked with the District Attorney Victims Unit and Self Help for the Elderly to start information sharing related to ongoing case management needs.

For long-term housing, the City contacted local property owners and compiled a list of potential unoccupied units as the County developed a contract with Abode, a local nonprofit, for interim, transitional housing solutions. City staff found a local property owner with rental units who could provide rental units for some of the displaced households. City staff also expedited permitting for renovation of a bed and breakfast lodging into studio apartments available for lease for individual farmworkers. Lastly, the City, Coastside Hope, and ALAS coordinated procurement of household items and toiletries.

#### A. Coordinated Responses

As soon as practicable after the incident, cities should advise elected officials and staff, contact families and victims, create a core support team, and if possible, procure crisis risk services. Cities can develop advance preparedness plans that instruct how to advise elected officials at local, state and federal levels; establish a process to contact impacted individuals; and identify personnel for the core support team. Cities should immediately establish a reunification center to help families find missing individuals, provide translation and cultural support, stage areas for supplies, and coordinate community vigils and memorial services. Cities may be called upon to support efforts to provide emergency housing, cover funeral costs, and provide physical and mental health services, etc. and should coordinate with community foundations and nonprofit organizations to identify the best way to meet these needs.

#### 1. Lessons Learned

Public relations/media: Cities should maintain local control over the narrative; separate emergency operations related to the MCI from politicians, media, entourage, etc.; prevent mission creep – the focus should be on responding to the aftermath of the MCI, not to accommodating media spotlight; make sure the community knows that the City officials are in charge; and activate an emergency operations center (EOC).

As these examples illustrate, crises of natural, health, political, social, and other causes can occur simultaneously with MCIs. Where possible, cities should consider existing resources for responding to natural disasters and identify applicable resources. For example, Cal Cities offers “Avoiding Total Disaster: The Law and Emergencies,” which provides disaster preparedness training for local government legal advisors.<sup>20</sup> Resources include a playbook of documents, forms, and materials to help local governments before, during, and after a disaster.<sup>21</sup> Considerations of how to balance new, around the clock workload with existing staff capacity; how to establish or activate an EOC; whether to proclaim a local emergency; and how to address immediate and long-term shelter needs<sup>22</sup> may be helpful.

Unanticipated lessons include the following: be prepared for personnel investigations of City officials and employees; make sure to care for the staff and community; and anticipate the lottery mentality of litigation. As to the former (see hardcopy attachment in Appendix B), the City of Monterey Park was required to undertake an investigation of an official regarding that individual’s conduct the night of the shooting and the day after. Additionally, investigation regarding conduct of a high-ranking public safety employee is still pending.

As to litigation, while the City of Monterey Park avoided lawsuits (thus far), that did not prevent 64 claims from being filed (see hardcopy attachment in Appendix B regarding response). These filed claims do not include the multiple individuals who provided public comment during City Council meetings seeking compensation for various maladies.

Lastly, while cities should work closely with community foundations to set up victim compensation funds to ensure equitable distribution and accountability (discussed below), they should also immediately connect with local and regional nonprofit organizations to utilize their established social media presence, memberships, networks, and fundraising expertise to raise and direct funds to victim compensation funds.<sup>23</sup>

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<sup>20</sup> League of California Cities, *Avoiding Total Disaster: The Law and Emergencies*, <https://www.calcities.org/resource/avoiding-total-disaster-the-law-and-emergencies> (last visited Mar. 20, 2024).

<sup>21</sup> *Id.*

<sup>22</sup> *Id.*

<sup>23</sup> For example, according to their GoFundMe pages, a fundraising team of 30 nonprofits and individuals raised \$1,017,869 for Monterey Park victims while a fundraising team of 12 nonprofits and individuals raised \$200,641 for the Half Moon Bay victims, both separately from the cities’ victim compensation funds. Many of these nonprofits, such as Stop AAPI Hate, and Hate is a Virus, were Asian American racial justice organizations already experienced in (footnote continued on next page)

### III. Victim Compensation Funds

Cities should consider establishing victim compensation funds to ensure that victims can access financial aid and prevent fraud, which frequently occurs after an MCI. A detailed discussion on how victim compensation funds can qualify for tax exemptions is provided in Appendix A.

#### A. Community Foundation

There are more than 800 community foundations across the United States, each serving as a trusted guardian of charitable resources.<sup>24</sup> These organizations possess a unique blend of local knowledge, credibility, and operational capabilities, which allows them to effectively address the complex challenges that arise in the aftermath of an MCI.

Community foundations play a crucial role in safeguarding the dignity of those affected by tragedy by ensuring that their voices are heard and respected. They prioritize fairness in distributing aid, and adjust their responses based on the nature of the disaster. For instance, while natural disasters often call for needs-based philanthropy, MCIs necessitate funding allocation based on the severity of injuries, irrespective of individual financial circumstances. Moreover, community foundations promote transparency, accountability, and community resilience through active participation and fostering a culture of giving.

It is essential that strong relationships between local government and community foundations be formed prior to an MCI. Fostering trust and collaboration beforehand increases the efficiency of response efforts and the success of fundraising efforts when tragedy does occur. Cities should consider preparing a draft executive order establishing a victim compensation fund that can be shared with local community foundations in advance of any tragic event. Such efforts would be used to clarify the tax-exempt status of a victim compensation fund in advance, and therefore eliminate uncertainty, confusion, and delay in the process. Example executive orders are listed in Appendix B.

#### 1. Thousand Oaks

The disbursement strategy for the victim compensation fund, known as the Conejo Valley Victims Fund, was developed by VCCF based on precedents set by similar tragedies. Before finalizing the guidelines, opportunities were provided for public and victim feedback on the draft protocol.<sup>25</sup> This feedback opportunity was crucial because many

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fundraising for victims of anti-Asian discrimination associated with the COVID-19 pandemic. See *Monterey Park Lunar New Year Victims Fund*, available at <https://www.gofundme.com/f/monterey-park-lunar-new-year-victims-fund>; see also *Half Moon Bay Victims Fund*, available at <https://www.gofundme.com/f/half-moon-bay-victims-fund>.

<sup>24</sup> See Council on Foundations, *About us*, <https://cof.org/about> (last visited April 10, 2024).

<sup>25</sup> See Ventura Cty. Cmty. Found. *CV Victims Fund Morning Town Hall – Conejo Valley Victims Fund Overview of Draft Final Protocol* (Jan. 3, 2019), [https://www.youtube.com/watch?v=9L\\_2mPGn6dM](https://www.youtube.com/watch?v=9L_2mPGn6dM) (last visited Mar. 25, 2024).

individuals injured by the gunman were unable to seek immediate medical attention due to fires that erupted shortly after the shooting. After careful consideration of all comments received, the Final Protocol was adopted.<sup>26</sup>

As outlined in the protocol, 100% of the funds raised were allocated according to the severity of the victims' injuries. This included families who lost loved ones (70%), those who sustained physical injuries (20%), and individuals present at the time of the shooting (10%). The specific amounts for each category were determined based on factors such as the fund balance, updated injury data, review of submitted claims, and approval by the relevant authorities.

The designation of a Special Oversight Committee – comprised of community leaders, board members, and victims' advocates – played a crucial role in governing the fund. They worked alongside a Fund Administrator, both of whom were entrusted with developing a distribution protocol for providing financial assistance to the most severely affected individuals.

To facilitate the claims process, uniform Claim Forms<sup>27</sup> were made available to all known and potential claimants, with assistance provided by local law enforcement and other agencies in notifying eligible individuals.

Give An Hour, a 501(c)(3) nonprofit organization, provided no cost mental health services, including hosting three Victim Assistance Clinics that were established to aid those in need with completing the Claim Form. These clinics were staffed with licensed mental health clinicians to offer support, and support groups and trauma-informed therapists were also available to assist those impacted by the tragedy.

## 2. Monterey Park

Consistent with best practices, the City Council established an Oversight Board to oversee the Monterey Park Community Healing Fund. A concern raised by the City Attorney was whether the solicitation for donations by elected officials (or the administration of the Oversight Board by an elected official) might cause a conflict for those officials. On July 20, 2023, the FPPC issued Advice Letter No. A-23-035 which provides guidance as to these concerns.<sup>28</sup>

## 3. Half Moon Bay

City of Half Moon Bay staff consulted with staff from Monterey Park, Thousand Oaks, and VictimsFirst and decided to establish a centralized victims fund following the

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<sup>26</sup> Conejo Valley Victims Fund, *supra* note 15.

<sup>27</sup> Ventura Cty. Cmty. Found. *Conejo Valley Victims Fund Claim Form*, available at <https://conejovalleyvictimsfund.org/wp-content/uploads/2018/12/Conejo-Application-Form-for-Deceased-Victims.pdf>.

<sup>28</sup> Advice Letter to City Attorney Karl H. Berger, *Your Request for Advice Our File No. A-23-035*, STATE OF CALIFORNIA FAIR POLITICAL PRACTICES COMMISSION (July 20, 2023), <https://fppc.ca.gov/content/dam/fppc/documents/advice-letters/2023/23035.pdf>.

examples from other communities.<sup>29</sup> The City Council adopted a resolution on February 7, 2023, declaring a local emergency, recognizing its burden to collect and distribute funds and limited ability to do so, and authorizing an executive order to establish a Coastside Victims and Family Support Fund as a disaster relief fund at the San Mateo Credit Union (SMCU) Community Fund in partnership with Mavericks Community Foundation (MCF). This was informed by best practices following the September 11, 2021 related fund, the Boston One Fund, and funds for many other incidents. VictimsFirst and the Ventura County Community Foundation provided invaluable advice to the City. The fund distributed all of the donations directly to victims' families and survivors. There were no fees or complicated eligibility/application processes, and allocations were made regardless of immigration status.

The City worked closely with the SMCU Community Fund and MCF to recommend potential members to serve on the Oversight Committee that was created to allocate funds to victims and survivors. The City contributed \$10,000 of its general fund to the Coastside Victims Fund and helped facilitate additional donations from the College of San Mateo, California Wellness Foundation, and other philanthropic and private donors. The City promoted the Coastside Victims Fund through HMB Radio interviews, its newsletter, Coastside Buzz, and presentations to various groups, including California Wellness, neighboring cities, etc. In total, the fund raised \$254,142 for distribution to 46 victims following the distribution protocols set by the fund Oversight Committee. The fund has been fully distributed and is now closed.

#### IV. Policy Changes

Cities can use MCIs as opportunities to consider, implement and adopt relevant protocols, policies and ordinances. For mass shootings, relevant policies include gun control measures and code enforcement.

##### A. Monterey Park

In the wake of the mass shooting, the City considered various amendments to the Monterey Park Municipal Code ("MPMC") that might reduce the likelihood of another shooting.<sup>30</sup> Ultimately, the City adopted several of these amendments<sup>31</sup> including: creating a health protection zone, requiring safe firearm storage within City limits, prohibiting firearms on City-owned property, adopting various policies related to Gun Violence Restraining Orders ("GVROs"), establishing standard conditions of approval for firearms dealers, ensuring the destruction of all seized weapons, and supporting new legislation regarding mass shootings and

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<sup>29</sup> City Council of the City of Half Moon Bay, *Staff Report* (Feb. 7, 2023), available at [https://legistarweb-production.s3.amazonaws.com/uploads/attachment/pdf/1777110/STAFF\\_REPORT.pdf](https://legistarweb-production.s3.amazonaws.com/uploads/attachment/pdf/1777110/STAFF_REPORT.pdf).

<sup>30</sup> City Council of the City of Monterey Park Resolution No. 2023-R15.

<sup>31</sup> Note that concerns regarding preemption – both by California law and recent decisions by the United States Supreme Court – were openly discussed during the City Council meetings at which these ordinances and resolutions were considered.

firearm regulation.<sup>32</sup> A summary of the actions taken are listed below and links to documents are provided in Appendix B:

- Health protection zone: Prohibits “gunsmiths” and “armorers,” as defined by the Penal Code, from locating within 1,000 feet of a sensitive receptor which includes a residence, education resource, community resource center, health care facility, or live-in housing;<sup>33</sup>
- Safe storage: Prohibits a firearm from being stored in a residence unless it is in a locked container or disabled with a trigger lock;<sup>34</sup>
- GVRO: Authorized the City Manager to lend the City’s resources to participate in the “Increasing Access to Gun Violence Restraining Orders” campaign initiated by the Los Angeles County Board of Supervisors; and
- New legislation: Authorized the Mayor to sign a letter on the City’s behalf supporting Assembly Bill (AB) 1406 and AB 1420 related to the U.S. Department of Justice’s authority concerning firearm transfers.

Additionally, the City Council adopted a firearms pledge to take all legal actions within its authority to help reduce the incidence of gun violence.

#### B. Half Moon Bay

San Mateo County and City of Half Moon Bay staff addressed life/safety code violations at the two farms involved in the shooting and established a program for inspecting other farms to ensure farmworker safety.<sup>35</sup> County and City staff coordinated and jointly conducted site inspections, working together to prepare and serve all required notices which were delivered via email, certified mail, and hand delivery. With County staff as lead, a City staff inspection team conducted two inspections of the Terra Gardens Farm site. The City inspection team included a Building Official, Building Inspector, Community Preservation Specialist (code enforcement), City Engineer/Public Works Director, and Community Development Director. Other agencies were consulted due to the range of identified code violations, and coordination is ongoing. Following the site inspections, County and City staff prepared and served notices of violation as applicable (County served notices to both farms; City served a notice to Terra Gardens Farm). Enforcement continues and is expected to take many months.

City staff supported the creation of the San Mateo County Farmworker Safety Task Force, with weekly meetings frequently attended by the City Attorney, Community Preservation Specialist, and Community Development Director. City staff also attend County’s Agriculture Commission and Farmworker Advisory Committee. The City prepared an inventory of all the properties in the city limits in agricultural or related use (e.g., equestrian uses) to identify where

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<sup>32</sup> City of Monterey Park Ordinance Nos. 2234, 2235, 2236, 2243; Resolution No. 2023-R67.

<sup>33</sup> City of Monterey Park Ordinance No. 2234.

<sup>34</sup> City of Monterey Park Ordinance No. 2236.

<sup>35</sup> Ventura Cty. Cmty. Found. *supra* note 26.

farmworker or other housing is, or may be, located. This inventory was shared with the County to include in their larger inventory and coordinate inspection efforts.

The City is currently developing several properties for long-term farmworker housing, expediting permitting process, requesting state and federal funding for housing, and encouraging interested parties to invest in farmworker housing development.

## V. Public Agency Liability

Public agencies should be prepared for litigation following an MCI. In general, public agency exposure is limited based on the defenses available under the California Supreme Court case, *Zelig v. County of Los Angeles* (2002) 27 Cal.4th 1112. In *Zelig*, the California Supreme Court held that the decedent's children could not state a claim for negligence in the death of a woman shot in the Central Courthouse by her ex-husband. The County owned Eileen Zelig no duty, either under state common law or a federal civil rights statute, to conduct weapons screening that would have revealed that Harry Zelig, then a San Fernando Valley physician, was carrying a gun.

The Court rejected defendants' potential liability for the death of plaintiffs' mother based on the alleged conduct of individual employees of defendants County and the Sheriff's department. The Supreme Court explained

As a general rule, one owes no duty to control the conduct of another, nor to warn those endangered by such conduct. A duty to control the conduct of another or to warn persons endangered by such conduct may arise, however, out of what is called a 'special relationship,' [...] Such a duty may arise if (a) a special relation exists between the actor and the third person which imposes a duty upon the actor to control the third person's conduct, or (b) a special relation exists between the actor and the other which gives the other a right to protection. This rule derives from the common law's distinction between misfeasance and nonfeasance, and its reluctance to impose liability for the latter.<sup>36</sup>

In most instances, these general rules bar recovery when plaintiffs, having suffered injury from third parties who were engaged in criminal activities, claim that their injuries could have been prevented by timely assistance from a law enforcement officer.

The Court also rejected plaintiffs' claims for liability based on a dangerous condition. Government Code Section 835 details the conditions under which a public entity may be liable for creating a dangerous condition. That statute provides in pertinent part that "a public entity is liable for injury caused by a dangerous condition of its property if the plaintiff establishes that the property was in a dangerous condition at the time of the injury, that the injury was proximately caused by the dangerous condition, that the dangerous condition created a reasonably foreseeable risk of the kind of injury which was incurred, and either: [¶] (a) A negligent or wrongful act or omission of an employee of the public entity within the scope of his employment created the dangerous condition; or [¶] (b) The public entity had actual or

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<sup>36</sup> *Zelig v. County of Los Angeles* (2002) 27 Cal.4th 1112, 1129 1130 [citations omitted].

constructive notice of the dangerous condition under Section 835.2 a sufficient time prior to the injury to have taken measures to protect against the dangerous condition.”<sup>37</sup>

While it is possible for a public entity to be liable for a negligent or illegal act of a third party on its property, it must be related in some way to the condition or physical characteristics of the property. “Third party conduct, by itself unrelated to the condition of the property, does not constitute a dangerous condition for which a public entity may be liable.”<sup>38</sup> There must be some defect in the physical condition of the property and that defect must have some causal relationship to the third-party conduct that injures the plaintiff. “Public liability lies under Section 835 only when a feature of the public property has increased or intensified the danger to users from third party conduct.”<sup>39</sup>

#### A. Case Studies

Despite the limitation for public agency liability as discussed above, plaintiffs are likely to pursue lawsuits against local governments following an MCI. As with any other claim against a local agency, persons seeking to file suit against a city for an MCI must comply with the Government Claims Act. Due to the nature of MCIs, claims often include a tenuous description of the alleged injuries and the city’s alleged liability for the incident. Accordingly, many law firms representing claimants are unable to comply with the Act, whether due to a lack of experience with the Act or inability to articulate the circumstances that give rise to the claim.

##### 1. Monterey Park

Approximately six months after the City’s mass shooting, it received claims from a law firm representing 64 individuals seeking damages for emotional distress resulting from the mass shooting. Although the claims sought to hold the City liable for the incident, they merely alleged the exact same boiler-plate language without regard to any of the claimants’ particular circumstances. For instance, the claims alleged that each claimant was a survivor of the shooting, but failed to identify whether each claimant was present during the shooting or was physically wounded. The City denied these claims for failure to comply with the basic requirements of the Government Claims Act, including the time within which to file the claims.

Additionally, approximately ten months after the shooting, the City received an application to file a late claim from one of the original 64 claimants. The application alleged that the claimant was unaware of the City’s involvement in the planning and preparation for the Lunar New Year Celebration. The application was denied for failure to make the showing required by Government Code Section 911.6(b).

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<sup>37</sup> Gov. Code § 835.

<sup>38</sup> *Zelig*, 27 Cal.4th at 1134.

<sup>39</sup> *Bonanno v. Central Contra Costa Transit* (2003) 30 Cal.4th 139, 155.



To date, the City has not been served with any lawsuit concerning the shooting and it is unlikely that a lawsuit will ensue because every claim submitted under the Government Claims Act was defective.

## 2. Half Moon Bay

The City of Half Moon Bay was named in one lawsuit brought by the daughter of two of the decedent farmworkers. The lawsuit alleges claims of negligence, wrongful death, and implied warranty of habitability against the two farms where the shootings took place, the City of Half Moon Bay, and the County of San Mateo. The City has subsequently been dismissed.

### B. Best Practices

The Public Agency Risk Management Association (PARMA) offers guidance based on its analysis of a mass shooting related lawsuit that has moved forward with trial.<sup>40</sup> As of February 2023, the trial court had granted defendants' motion for summary judgment in the main case on the ground of foreseeability.<sup>41</sup> PARMA reports that it expects appeals to be filed.<sup>42</sup>

PARMA recommends the following preventative measures to limit public agency liability: seek indemnification from third parties; maintain proper risk transfer and insurance levels; establish security measures and emergency action plans for large community events; and retain legal counsel specialized in MCI response, activate emergency operation centers, provide gun safety education to the public, adopt local gun policies (e.g., controlling procurement, conducting trace reports, requiring inspections), etc.<sup>43</sup>

## VI. Support for Cities through Laws and Policy

Even if cities apply every lesson learned and take all precautionary measures, they still cannot address MCIs alone. Local governments need support from other local, state, and federal agencies, as well as community foundations and local nonprofits, to mitigate the immediate effects of such events. Communities are often called upon to establish victim compensation funds but are often unfamiliar with the process to establish these funds and charitable organizations may have concerns regarding the federal income tax implications. Local agencies would benefit from legislation that simplified the victim compensation fund process and tax implications. At a logistical level, cities are consistently overwhelmed in the immediate

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<sup>40</sup> The Gilroy Garlic Festival mass shooting took place on July 28, 2019. The perpetrator killed three people and then killed himself by a self-inflicted gunshot wound. Subsequent litigation was filed against the City of Gilroy, the Gilroy Garlic Festival Association, and First Alarm Security. Namely, there had been no prior history of gun violence at the festival. Public Agency Risk Management Association, *Lessons Learned in the Aftermath of an Active Shooter Incident*, PARMA Annual Conference (Feb. 20, 2024) [hereinafter PARMA].

<sup>41</sup> PARMA, *supra* note 39.

<sup>42</sup> *Id.*

<sup>43</sup> *Id.*

aftermath of an MCI. Cities would benefit from a hotline or central contact with the California Governor's Office of Emergency Services and Federal Emergency Management Agency to provide immediate assistance.

## APPENDIX A: TAX EXEMPTION FOR VICTIM COMPENSATION FUNDS<sup>44</sup>

Cities can facilitate tax exempt status for victim compensation funds by a) establishing the fund as a charitable organization, b) using an existing charitable organization to administer the fund, or c) establishing a qualified disaster relief fund.

### A. Charitable Organization

To establish a victim compensation fund as a charitable organization, the fund must be organized and operated exclusively for exempt purposes.<sup>45</sup> Exempt purposes are those that are charitable (including lessening the burdens of government), religious, educational, scientific, literary, testing for public safety, fostering national or international amateur sports competition, or preventing cruelty to children or animals.<sup>46</sup> Note that new organizations may take many months to process and must show that it will assist a large number of people to demonstrate that it is providing a public, rather than private benefit.<sup>47</sup>

Victim compensation funds most likely fall under the purpose of lessening the burdens of government. The standard for lessening the burdens of government is met when a) the government considers the activities to be its burdens, and b) the activities actually lessen the governmental burden.<sup>48</sup> For example, a nonprofit organization that organized and operated as a volunteer fire company to provide fire protection and ambulance and rescue services to a community lessened the burdens of government because the government considered such services as part of its own burden and thus would have needed to provide those services in the absence of the nonprofit.<sup>49</sup> In another example, an organization that funded a county's law enforcement agency to police illegal narcotics trafficking lessened the burdens of government because the government saw the funded activities as an integral part of its narcotics trafficking prevention program and the funding reduced the government's need to appropriate additional government funds.<sup>50</sup> Lastly, an organization that provided legal advice and training to guardians

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<sup>44</sup> Legal research provided by former Shute, Mihaly & Weinberger LLP law clerk Kat King.

<sup>45</sup> Internal Revenue Serv., *Exemption Requirements – 501(c)(3) Organizations*, <https://www.irs.gov/charities-non-profits/charitable-organizations/exemption-requirements-501c3-organizations> (last visited Mar. 20, 2024).

<sup>46</sup> 26 U.S.C. § 501(c)(3).

<sup>47</sup> See Susan L. Abbott & Lisa A.H. McChesney, *Disaster Relief: The One Fund Boston Model*, Bos. Bar J. (Apr. 2014), <https://bostonbar.org/journal/disaster-relief-the-one-fund-boston-model> (last visited Mar. 20, 2024).

<sup>48</sup> Robert Louthian and Amy Henchey, Internal Revenue Serv., *B. Lessening the Burdens of Government*, EO Topic B-93, 2-3 (1993), available at <https://www.irs.gov/pub/irs-tege/eotopicb93.pdf>.

<sup>49</sup> Internal Revenue Serv., Rev. Rul. 74-361, 1974-2 C.B. 159 (1974) <https://www.irs.gov/pub/irs-tege/rr74-361.pdf>.

<sup>50</sup> Internal Revenue Serv., Rev. Rul. 85-1, 1985-1 C.B. 177 (1985) <https://www.irs.gov/pub/irs-tege/rr85-001.pdf>.

ad litem lessened the burdens of government because the juvenile court viewed the training as its own burden, and the court could not continue its guardian ad litem program without the organization's training.<sup>51</sup>

In contrast, a nonprofit organization that provided rental housing and related services at cost to a city as temporary housing for families whose homes were destroyed by fire did not lessen the burdens of government because although the government saw the temporary housing as its own burden, it was still providing the housing at cost.<sup>52</sup>

To meet this test, a city should show that it has a burden to support victims from an MCI and to field inquiries for community support and donations. The city should then show that provision of these funds through the victim compensation fund would lessen the burden of the city by outsourcing the administration of relief aid to the charitable organization.

If possible, cities may want to use existing organizations to administer the victim compensation fund so that victims may receive financial assistance more quickly. These organizations must meet certain conditions, such as not earmarking funds for the benefit of a particular individual or family and having full control and authority over the donated funds.<sup>53</sup> Cities should proactively identify local charitable organizations as candidates to administer victim compensation funds in the event of an MCI.

#### B. Qualified Disaster Relief Fund

Per Internal Revenue Code Section 139, qualified disaster relief payments that reimburse or pay individuals' specified expenses in connection with a qualified disaster are not taxable as income and are not subject to employment taxes or withholding.<sup>54</sup> A city must first show that the disaster a) results from terrorist or military actions, b) results from an accident involving a common carrier, c) is a Presidentially declared disaster, d) is an event that the Secretary of the Treasury determines is catastrophic, or e) is an event that a governmental authority determines to require governmental assistance.<sup>55</sup> Qualified disaster relief payments include payments received for reasonable and necessary personal, family, living, or funeral expenses incurred as a result of a qualified disaster.<sup>56</sup> For example, in 2019, after a mass

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<sup>51</sup> Internal Revenue Serv., Rev. Rul. 85-2, 1985-1 C.B. 177 (1985) <https://www.irs.gov/pub/irs-tege/rr85-002.pdf>.

<sup>52</sup> Internal Revenue Serv., Rev. Rul. 77-3, 1977-1 C.B. 140 (1977) <https://www.irs.gov/pub/irs-tege/rr77-3.pdf>.

<sup>53</sup> Internal Revenue Serv., *Disaster Relief – Providing Assistance Through Charitable Organizations*, 3 (Dec. 2014), available at <https://www.irs.gov/pub/irs-pdf/p3833.pdf>.

<sup>54</sup> *Id.* at 14.

<sup>55</sup> *Id.* at 15.

<sup>56</sup> *Id.* at 15.

shooting in El Paso, Texas, the City of El Paso declared a disaster and cited Section 139 as authority to establish a victim compensation fund.<sup>57</sup>

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<sup>57</sup> See City of El Paso, Texas, *Minutes for Regular Council Meeting* (Aug. 20, 2019), at 32-35, [http://legacy.elpasotexas.gov/muni\\_clerk/agenda/09-03-19/1.1.3.pdf](http://legacy.elpasotexas.gov/muni_clerk/agenda/09-03-19/1.1.3.pdf) (resolution establishing the One Fund El Paso and declaring that contributions to it be considered “qualified disaster relief payments pursuant to Section 139 of the U.S. Internal Revenue Code”).

## APPENDIX B: RESOURCES

### Thousand Oaks

[Conejo Valley Victims Fund Final Protocol.](#)

[Conejo Valley Victims Fund Attestation Report.](#)

### Monterey Park<sup>58</sup>

[Ordinance No. 2234: An ordinance adding Chapter 21.55 entitled “Firearm Protection Zone” to the Monterey Park Municipal Code.](#)

[Ordinance No. 2235: An ordinance adding a new Chapter 13.18 to the Monterey Park Municipal Code prohibiting the presence of firearms on City-owned property.](#)

[Ordinance No. 2236: An ordinance adopting safe firearm storage within the City of Monterey Park.](#)

[Ordinance No. 2243: An ordinance incorporating Los Angeles County Code Chapter 7.46 into the Monterey Park Municipal Code by adding Chapter 5.90 governing to gun dealer licenses.](#)

[Resolution No. 2023-R7: A resolution declaring a local emergency resulting from the mass murder on January 21, 2023, and authorizing the City Manager to execute an executive order dated January 31, 2023.](#)

[Resolution No. 2023-R15: A resolution adopted by the City Council supporting certain proposed federal and state legislation regulating the sale and availability of firearms and directing the City Manager and City Attorney to provide options for city regulations needed to protect public health and safety from mass casualty incidents \(as defined\).](#)

[Resolution No. 2023-R41: A resolution of the City Council of the City of Monterey Park declaring June 2, 2023, National Gun Violence Awareness Day, and June 3<sup>rd</sup> and 4<sup>th</sup> as Wear Orange Weekend in Monterey Park.](#)

[Resolution No. 2023-R67: A resolution declaring the City Council’s commitment to lend the City’s support to all reasonable federal, state, and local legislation that is intended to protect public health and safety while maintaining an individual’s constitutional rights as to owning firearms; approving a pledge for all elected officials reflects this intent; approving standard conditions of approval for certain conditional use permits; and authorizing the City Manager to implement this resolution.](#)

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<sup>58</sup> All executed Monterey Park Ordinances and Resolutions are accessible through the City’s online archive at:

[https://grmservices.grmims.com/CityofMonterey/\(S\(xo5hvl4czgzcyncct1mkdr5r\)\)/orc.aspx](https://grmservices.grmims.com/CityofMonterey/(S(xo5hvl4czgzcyncct1mkdr5r))/orc.aspx)

Letter from Monterey Park Mayor Jose Sanchez, *Report regarding violation of the Code of Conduct*, CITY OF MONTEREY PARK (June 29, 2023) [Hardcopy attached].

Letter from Monterey Park City Attorney Karl H. Berger, *Denial of Claims for Damages*, CITY OF MONTEREY PARK (Aug. 3, 2023) [Hardcopy attached].

## **Half Moon Bay**

[Coastside Victims Fund, Mavericks Community Foundation FAQs.](#)

[Coastside Victims Fund Protocol.](#)

[February 7, 2023 Staff Report: Declaration of Local Emergency and Executive Order Establishing a Centralized Coastside Victims and Family Support Fund.](#)

[February 7, 2023 Executive Order establishing the Coastside Victims and Family Support Fund at the SMCU Community Fund and in partnership with the Mavericks Community Foundation.](#)

[Resolution No. C-2023-: Resolution declaring a local emergency related to the January 23, 2023 mass shooting event and authorizing city manager to sign executive order.](#)

**[ATTACHMENT: Letter from Monterey Park Mayor Jose Sanchez (2 pages)]**



**[ATTACHMENT: Letter from Monterey Park City Attorney Karl H. Berger (2 pages)]**

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# CITY OF MONTEREY PARK

320 West Newmark Avenue • Monterey Park • California 91754-2896  
[www.montereypark.ca.gov](http://www.montereypark.ca.gov)



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**City Council**  
Henry Lo  
Vinh Ngo  
Jose Sanchez  
Thomas Wong  
Yvonne Yiu

**City Clerk**  
Maychelle Yee

**City Treasurer**  
Amy Lee

August 3, 2023

## VIA CERTIFIED MAIL RETURN RECEIPT REQUESTED

Jonathan J. Haderlein  
Haderlein and Kouyoumdjian LLP  
19749 Nordhoff Street  
Northridge, California 91324

Re: **Denial of Claims for Damages**

Dear Mr. Haderlein:

I am the City Attorney for Monterey Park. I write in response to the 64 claims submitted by your office related to mass casualty incident in the City (Monterey Park Claims Nos. 2285 and 2286, collectively referred to as the "Claims").

These Claims are not timely filed. Claims related to death or personal injury must be filed not later than six months after the accrual of the cause of action.<sup>1</sup> The mass shooting occurred on January 21, 2023, and the claims were received on July 24, 2023. Accordingly, the Claims are untimely and any potential lawsuit is time barred.

Sanctions for frivolous actions or delaying tactics may be warranted when the opposing party's action or tactic was totally and completely without merit, measured by the objective, "reasonable attorney" standard.<sup>2</sup> Here, filing a lawsuit without compliance with the Government Claims Act cannot objectively meet the "reasonable attorney" standard. Having been duly informed of this fatal and uncorrectable flaw, pursuing a lawsuit is obviously indefensible.

Your clients lack any reasonable cause to maintain an action against the City.<sup>3</sup> Should your clients unwisely choose to maintain an action against the City based on the Claims, this office will recover its defense costs by all available legal means, including, without limitation, under California Code of Civil Procedure § 128.5, Civil Code § 1038, and any other applicable law. Further, the City may also recover significant damages and penalties from your clients for, among other things, violations of the Government False Claims Act.<sup>4</sup> Be assured the City will exercise all available remedies should it be forced to defend against meritless lawsuits.

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<sup>1</sup> Government Code § 911.2

<sup>2</sup> Civil Procedure Code § 128.5; *see also*, *Wallis v. PHL Associates, Inc.* (2008) 168 Cal.App.4th 882.

<sup>3</sup> *See*, *Kobzoff v. Los Angeles County Harbor/UCLA Medical Center* (1998) 19 Cal.4th 851.

<sup>4</sup> *See*, Government Code § 12651

Of course, this is not the route the City prefers taking, and hopefully more reasonable minds will prevail regarding the Claims. In this regard, your clients are encouraged to review the community resources that may be available to them. Among other things, note that the City of Monterey Park partnered with the California Community Foundation to establish the Monterey Park Community Healing Fund, with a clear purpose: To support Monterey Park and its neighbors through aid to community members affected by this tragedy as well as support for programs, initiatives and organizations designed to help Monterey Park heal and rebuild. Additional information about the Community Healing Fund and available resources can be found on the City's website.<sup>5</sup>

If you have questions regarding the denial of the Claims, you may contact Assistant City Attorney Tim Campen at (619) 814-6799 or via email at [tcampen@bwslaw.com](mailto:tcampen@bwslaw.com).

Very truly yours,



Karl H. Berger  
Monterey Park City Attorney

KHB:JAT

c: Inez Alvarez, Interim City Manager  
Christine Tomikawa, Risk Manager  
Scott Wiese, Police Chief

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<sup>5</sup> <https://www.montereypark.ca.gov/1483/Heal-MPK-Resources-for-Victims-and-the-C>

# CITY OF MONTEREY PARK

320 West Newmark Avenue • Monterey Park • California 91754-2896  
[www.montereypark.ca.gov](http://www.montereypark.ca.gov)



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**City Council**  
Jose Sanchez  
Thomas Wong  
Vinh Ngo  
Henry Lo  
Yvonne Yiu

**City Clerk**  
Maychelle Yee

**City Treasurer**  
Amy Lee

June 29, 2023

## THIS IS A PUBLIC DOCUMENT AND MAY BE DISCLOSED IN ACCORDANCE WITH THE CALIFORNIA PUBLIC RECORDS ACT

[REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED]

### Re: Report regarding violations of the Code of Conduct

Dear [REDACTED]:

This is a follow-up to my notice dated April 19, 2023 regarding a complaint filed with me in accordance with the Code of Conduct (Resolution No. 12184, adopted August 5, 2020). Section 8 of the Code of Conduct authorizes the Mayor to take certain action in response to that complaint.

As you are aware, the complaint is that you violated the City's Code of Conduct (the "Complaint") on January 21 and January 22 during the circumstances related to the mass casualty incident that occurred on January 21, 2023 (the "MCI"). On May 5, 2023, the Mayor pro tem and I met with you to discuss these allegations because of your pledge to adhere to a healthy workplace environment (signed March 15, 2023<sup>1</sup>). After that conversation (and at your request), I asked the City's third-party investigator [REDACTED] to interview you regarding the Complaint in accordance with the Code of Conduct. Multiple attempts to interview you were unsuccessful.

Following an investigation (per Section 8(B)(2) of the Code of Conduct), the Mayor may take no action or refer the matter to the City Council with a recommendation as to next steps. I considered this matter and am opting not to present this matter to the City Council.

The enclosed public report from [REDACTED] confirms this statement in my April 19<sup>th</sup> letter to you:

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<sup>1</sup> I am aware of your public statements that you were not informed on March 15, 2023 that the Healthy Work Environment Pledge was voluntary. That assertion, however, cannot be reconciled with either the written staff report or the presentation made during that meeting. It is quite apparent from the staff report (see, p.6 of 367 ["Signing the attached pledge **also demonstrates the officials' voluntarily desire** [sic] to comply with the Code of Conduct. **Such action helps promote a healthy and professional work environment** for all of us serving the City of Monterey Park."] and the comments made by the Assistant City Manager and the Mayor that this pledge was voluntary (see, e.g., video at 1:26:12 ["**If they would like to sign that...**"] and 1:26:22 ["**might** be a good time now **if we wanted** ... if the Councilmembers and elected officials who would were just recently elected to kind of sign this and just turn these over the ACM."]); emphasis added).

City of Monterey Park

June 29, 2023

Page 2

“your interactions with staff on January 21 and 22 violated Sections 2(A) [Conduct of Public Officials]; 2(B) [Respect for Process]; 2(G) [Policy Role of Public Officials]; 5(A)(1) and (2) [Expected Conduct] of the Code of Conduct. Among other things, you engaged in “abusive conduct, personal charges, or verbal attacks” against City employees; attempted to restructure work priorities of City employees; and sought to by-pass the council-manager structure of City government.”

Your public comment<sup>2</sup> on April 5, 2023, included this observation: “we need to cultivate and encourage open dialogue ... our city staff should not feel threatened or fear retaliation when speaking up.” Additionally, you reminded the City Council of its responsibility to “protect and serve ... the employees who work so hard for you.” I agree. Which is exactly why the City investigated the Complaint.

That duty and responsibility, however, is tempered by the events on January 21<sup>st</sup> and 22<sup>nd</sup>. The MCI was unprecedented in the City and was the worst shooting event in Los Angeles County history. A multitude of federal, state, and local agencies responded to the MCI along with various dignitaries including the personal appearance of the President and Vice-President of the United States. Within this context, I believe it is forgivable if stress, anguish, and lack of sleep may have contributed to the conduct leading to filing of the Complaint. Accordingly, I do not believe that it is necessary to bring this to the City Council for consideration.

Note, however, that this letter (and its enclosure) is a public record and may be released in accordance with applicable law including the California Public Records Act. Moreover, the conclusions in the attached report may be considered if there are future complaints against you regarding any alleged violations of the Code of Conduct.

I encourage you to observe to the commitment you made on March 15, 2023:

“to adhere to the Code of Conduct ... and demonstrate professional communications with all Public Officials, employees, residents, businesses and customers of the City of Monterey Park. If at any time it is brought to my attention that my behavior is not professional, I agree to listen to the feedback and commit to work on improving the issue brought to my attention.”

Sincerely,



Jose Sanchez  
Mayor

C: Thomas Wong, Mayor pro tem

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<sup>2</sup> I am aware of your public (and private) allegations that the Complaint is actually an attempt by City Council Members and City officials seeking to retaliate against you for making public comments during City Council meetings. As may be read, the only matters investigated by [REDACTED] were those regarding the Complaint.



# Ascending the Organizational Chart – How to Get and Keep the Public Agency Job You Want

Wednesday, May 8, 2024

**Christina Burrows, Assistant City Attorney, Culver City**

**Valerie Gaeta Phillips, President and Owner, Bob Murray & Associates**

**Scott C. Smith, City Attorney, Aliso Viejo and Laguna Niguel, Parter, Best Best & Krieger LLP**

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# **Ascending the Organizational Chart – How to Get and Keep the Public Agency Job You Want**

**Wednesday, May 8, 2024**

**Attorney Development and Succession Committee  
League of California Cities  
Spring 2024 City Attorneys Department Conference**

**Christina Burrows, Assistant City Attorney  
City of Culver City**

**Scott D. Smith, Partner  
Best Best & Krieger**

**Susana Alcala Wood, City Attorney  
City of Sacramento**

**Valerie Phillips, Partner  
Bob Murray & Associates**

## INTRODUCTION

Do you have a great job in a city attorney office, but want to advance up the organizational chart? Are you a litigator who wishes to transfer to the advisory side, or vice versa? Or have you made it to your dream job, and want to do what you can to keep it?

This panel presentation of the Essential Skills Subcommittee of the Attorney Development and Succession Committee is geared to assist those Department members who wish to advance or laterally transition within the field of municipal law or to retain that dream job. Many city attorneys have a romantic anecdote about how they were suddenly thrown into the “deep end of the swimming pool” in some municipal emergency or vacancy, but really, every city council’s strong preference is to have seasoned, trusted, and familiar lawyers step up to handle city affairs as time goes by.

The program is divided into three components, and these written materials follow the same trajectory:

- Moving-up/moving-over. This segment addresses the needs of attorneys seeking to advance or transition in municipal law. The panelists will discuss the experiences, knowledge, and skills one can acquire in various roles that may be leveraged to advance or transition within or between municipal law practice groups.
- Do you want to be a city attorney? This component will address the needs of attorneys seeking to become city attorney, including the experience and knowledge, as well as the interpersonal and emotional skills, that clients are (or should be) looking for in their city attorneys, and what a city attorney candidate can do to show that they are qualified.
- Keeping the job. Once you secure the job you want, how do you retain it, thrive in it, and succeed at it? The segment will also discuss how the city attorney may translate success in landing the job into keeping it.

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



## TOP TIPS FOR MOVING UP OR MOVING OVER

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What does a municipal law attorney need to know or be able to do to move up and/or over?

What are the core competencies that candidates for a promotion or lateral move need to have under their belts?

1. Core Competencies – Basic Skills. For those seeking to move up in an advisory position, or move from the litigation side to advisory, there are core competencies that the attorney can acquire to ensure they are a strong candidate, irrespective of the size of the office. On research and analytical skills; are you able to locate relevant authority and evaluate its applicability to the facts at hand? Are you able to communicate your conclusions timely, clearly, and effectively to your superiors and/or to client representatives, in written or oral form? The Resources attachments to this paper include materials from Best Best & Krieger that outline core competencies to be achieved for the Municipal Practice Group and General Associates, and expected timelines for achieving them.
2. Core Competencies – Skills to Hone. Have your performance evaluations noted areas for improvement? If so, have you followed up to gain the knowledge or experience suggested? Have you demonstrated an efficient and focused approach to address any areas identified in the performance evaluation? Our Resources attachments include materials from Best Best & Krieger for the evaluation of associates with respect to substantive legal knowledge, communication skills, project management, and professional development, which outline core competencies for evaluation.
3. Core Competencies – Substantive Knowledge Basics. For advisory attorneys, litigators, and special counsel, the Municipal Law Handbook is the premier initial resource for substantive law topics. Although each attorney has a unique set of aptitudes and interests, and establishing depth in some core area is helpful to your client, a general education is essential. Brown Act, check. Elections, check. Public Records Act, check. Public Contracts, check. Public Property, check. In addition to fundamental and basic topics, it covers most of the statutory and legal issues that affect local agencies.

The Substantive Law Subcommittee of the Attorney Development and Succession Committee prepared a color-coded version of the Table of Contents of the Municipal Law Handbook, which identifies “building block” subjects (everyone should know) and more specialized topics (organizational leadership / specialists should know), as a building block for its own work; that document is included with the Resources attachments to this Paper.

The Department has also prepared and continuously updates publications on core subject matters, such as the Public Records Act, the Brown Act, the Political Reform Act, disaster response, and others: The Cal Cities website and City Attorneys Department Resources page also provide search functions that are great starting points for searches into any municipal law topic. The Department-generated resources, such as Open and Public VI, and conference papers, are invaluable.

4. Core Competencies – Active Learning. If your performance evaluations have not identified particular skills and/or subject matter knowledge that would help you grow as a municipal law practitioner, or if you would like even more input and advice, proactively approaching your supervisor or other more experienced and trusted attorneys to ask for their input and assistance may open new avenues of growth.
5. Core Competencies – Advanced Substantive Knowledge. The Department presents topics of current interest to municipal attorneys, as well as substantive law updates. Check out the Department Resources page to see not only what is available, but what is necessary for a successful municipal law practice. Do you know the voting requirements for any given action for a meeting you might be involved in? There is a Department resource for that!
6. Core Competencies – Experiential. Whether you are in-house in a city attorney office or employed by a law firm that serves public agencies, you likely have access to specialized training as well as opportunities for advancing your knowledge and skills. Watch meetings that are available online, such as Council or Planning Commission, to see not only issues of interest to the community that you may serve at some point, but also to experience the joys of parliamentary procedure. Every municipal lawyer

should review council proceedings on individual items for which they prepared documentation or otherwise supported to see how that item played out at the council meeting. You can determine on your own which of your items need follow-up. Junior attorney “ride-alongs” are important, including second-chairing meetings with the city manager or presenting matters in closed or open council session. When new council members are elected (ideally before they are seated), the first and second chair lawyers can meet with them together to make sure their faces are familiar, to cover basic rules, and to assure council members that the interplay between the members of the senior legal team is seamless.

Volunteer to take a public meeting – there may be bodies other than the city council or planning commission that could provide experience, or ask if you can accompany the designated attorney to a meeting – on your own time, if necessary. Volunteer to participate or assist in areas of interest to you, whether it be research, drafting documents, or making appearances. If you are a litigator who wants to work on more/different matters, volunteer to research, draft motions/responses, take depositions, volunteer to participate in court appearances and/or high-profile mediations in a support role of your creation. Volunteer to work on ordinances, especially if they relate to a case you recently worked on. Volunteer to work with the advisors as they train city staff on new procedures. You will learn a great deal, not only about the city attorney role, but about issues that your agency is facing and that may find its way to the city attorney’s office.

These staffing redundancies may seem expensive, whether they occur in-house or at a firm, unless they are viewed as long-term investments. A private firm may not be able to bill the city client for this double-teaming, and in-house departments may feel too stretched to have two lawyers doing the work of one. However, this extra time and short-term expense should really be considered a long-term “capitalization” of the city attorney department, designed to provide continuity and institutional memory as first chairs transition to other jobs or retire.

7. Focused Research on Opportunities. If you are interested in a particular role or area of the law, follow postings for relevant positions and note the skill sets that are specified as necessary or desirable for the position. If you are not familiar with any of the listed areas, research them and seek to gain any substantive skills or experience that are referenced as necessary or desirable for the position.

## TOP TIPS FOR BECOMING A CITY ATTORNEY

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Do you want to be a city attorney? What experience and knowledge will boost your chances of securing the position?

1. Core Competencies – Communication. Communicating effectively, whether orally or in writing, is one of the most important skills for any legal professional, but particularly for a city attorney. These skills can be honed and improved with practice. An attorney who practices writing and making oral presentations and engaging in the give and take of conversation, whether in court, at city hall, or over Zoom will develop better communication skills. An attorney with those experiences will also be better prepared for a job interview. An attorney with oral presentation experience will be comfortable being the focus of attention, and more likely to be able to respond to interview questions in a straightforward manner.
2. Core Competencies – Staffing Meetings. Have you staffed city council meetings, even as an Assistant or Deputy City Attorney? If you have not yet staffed one, you might consider volunteering to cover meetings for which legal representation is necessary or desirable. Even if it is not a Council meeting, experience staffing a public meeting is invaluable and a critical component for a city attorney candidate.
3. Core Competencies – Experience. Has your city been involved in a major effort in which you played a key, if supportive, part? For example, was there a significant and controversial land development project, with meetings that garnered intense public opposition, with respect to which you provided legal support after the planning commission meeting? Did you participate in a key litigation matter that gave you the opportunity to attend closed session and participate in a discussion with the city council? How about a law enforcement incident that gave rise to public condemnation and demonstration at public meetings that required you to advise the city on the legal requirements for running meetings? Have you worked with city staff to develop policies after-the-fact as a future preventative measure? Have you

helped the city surmount the legal hurdles arising from these challenges like these, so the client was able accomplish its goals?

4. Interview – Preparation. When you secure an interview slot for the next opportunity, consider developing talking points for each anticipated topic, including the usual (tell us about yourself, biggest challenges faced and how you overcame it, why are you a good fit for the job). This should help you respond to interview questions without hesitation, and with specific examples or experiences rather than providing generic responses.
5. Interview – What Do You Know About the City? For interviews relating to top positions, review city and department budgets. Agencies seeking to fill those positions will expect you to have the knowledge that the budget may provide. Review at least a few of the more recent public meetings available online or on YouTube, so you can get a sense of the agency’s goals and challenges and become familiar with its elected officials and senior staff. Spend time on the city’s website, and study its content, including the issues and services prominently displayed, the schedule for public meetings, etc. If you are interviewing outside your current job, check the news and social media sources for mentions relating to the jurisdiction, and familiarize yourself with important recent events and/or hot button legal or political issues. If you are interviewing with the city council itself, know who they are, including the mayor and vice mayor.
6. Interview Skills - Review. Developing talking points for the interview as noted above may help your responses to flow more smoothly and make the interview feel more like a natural conversation, which is beneficial. Practicing the responses aloud will help you be more comfortable responding during the interview, and may help you become more succinct and to the point. Additionally, you may wish to reflect your audience in your responses – for example, if you have attorneys from the agency or others on the panel, you might consider delving a bit more into technical legal details than you would if the panel does not include attorneys. If your interview is with non-attorneys, you might speak more about the relationship with staff or the vision of the city attorney role.
7. Core Competencies – Substantive Law. We may be generalists for the most part, but by necessity we often become familiar with subjects as they arise in our cities and we work through them. If you gain valuable insights and knowledge in a subject of topical interest (natural disasters! election disasters! housing disasters!), consider sharing it with your colleagues, and

gain experience in presenting to the Department. If you are more of a joiner, participating in one or more of the City Attorneys Department Committees will allow you to delve deeply into the law in specified subject areas, such as the Public Records Act, Open Meeting Law, or the Political Reform Act. There are also Committees that provide a review of different areas of the law, such as the Municipal Law Handbook, the Legal Advocacy Committee, and the Substantive Law Subcommittee of the Attorney Development and Succession Committee. Taking advantage of these presentation and Committee opportunities will enhance your professional growth, assist you in developing key relationships with colleagues and mentors in other cities, and will also help you win the client's confidence in your knowledge and abilities.

## **TOP TIPS FOR RETAINING THE JOB**

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After you secure the city attorney job of your choice, how do you best position yourself to retain it? What are the skills you need to continue to serve in the role?

1. Effective Onboarding. As noted in the League's Counsel and Council publication, effective onboarding and continuing attention to the city's priorities are key for a new city attorney. This relates to the Council's priorities, of course, but also to those of the city manager and of key department staff. Appendix D of Counsel and Council, prepared in August 2015 by Lynn Tracy Nerland, then San Pablo City Attorney, contains a thorough transition checklist that addresses not only the city council, but also the various city Departments and administrative processes that have risk/exposure implications.
2. Know your City's Goals, Priorities, and Objectives. After ascertaining your Council's priorities as part of the interview and recruitment process, continue to check in with them to ensure that you are not only fully aware of all relevant aspects, but also of any changes or reprioritizations over time. New city attorneys may wish to establish regular monthly or quarterly meetings with each council member if possible. A regular scheduled meeting with the Mayor is recommended.
3. Know/Follow City Attorney Ethical Principles. The Ethical Principles adopted by the City Attorneys Department in 2005 contain several principles and examples that are applicable to the effective performance of city attorney duties. For example, Principle 2 (Client Trust) maintains that "[t]he

city attorney should earn client trust through quality legal advice and the manner in which the attorney represents the city's interests," and Principle 3 (No Politicization) provides that "[t]he city attorney should provide legal advice in a manner that avoids the appearance that the advice is based on political alignment or partisanship, which can undermine client trust."

Principle 5 (Professionalism and Courtesy) states that the attorney's conduct should remain professional and dignified in interactions with electeds, city staff, the public, and the media. Principle 5's Examples suggest that the attorney can raise the client's confidence in the attorney's competence and professionalism by explaining to the client the competing legal considerations raised by the issue at hand, and by keeping communications with the client confidential. Additionally, the Examples show that providing equal access to legal advice to all council members, ensuring that matters that consume significant resources have direction from a council majority, treating everyone with courtesy and respect, and other similar practices help promote and maintain the client's confidence in the attorney.

As noted in the portion of the 2016 League Paper, *City Attorney Relationships: City Manager, City Clerk, Councilmembers* prepared by Michael Jenkins, entitled *The City Attorney/City Manager Survival Guide*, "it is not ethical for the city attorney to push for a desired policy outcome by claiming legal imperatives. The city attorney is a legal advisor, plain and simple; as tempting as it may be on occasion to influence policy, that's not the attorney's job."

4. No Surprises (If You Can Avoid It). As noted in a 2012 presentation on *Stepping Into the Evolving Role of the City Attorney: Executive Management Team Member, Crisis Manager, Legal Adviser and Team Builder – What Roles Can or Should You Play?*, a city attorney should avoid surprising the client at public meetings. Surprises may be avoided by supplementing applicable staff reports, or by providing confidential communications with advice and warnings in advance of meetings. This may have particular application in areas of rapid legislative change, such as housing, where newly enacted legislation may restrict the findings a city may make and actions a city may take. Additionally, meeting with the city manager prior to council meetings may alert you to issues that should be addressed. The city attorney may also avoid surprises by encouraging council members to raise concerns and ask questions on legal issues prior to meetings.

Also noted in the 2016 League Paper, *City Attorney Relationships: City Manager, City Clerk, Councilmembers* prepared by Michael Jenkins, entitled *The City Attorney/City Manager Survival Guide*, city staff should be comfortable seeking legal advice from the city attorney's staff, and should feel that their questions and issues will be given due consideration in a timely fashion. And in the related segment of the paper entitled *Mike and Steve's Ten Tips for Managing the City Attorney/City Councilmember Relationship*, they advise city attorneys to, inter alia, treat every councilmember equally, be consistent in giving each councilmember the same answer, develop a thick skin, and give legal advice in a direct and approachable fashion – make it understandable to a non-lawyer.

5. Effective Evaluations. Do you dread performance evaluations? It is sometimes difficult to structure city attorney evaluations because work tasks are not necessarily susceptible to quantification (some, such as the number of criminal prosecutions, may be easier to quantify) as work tasks undertaken by the city manager. It may help to prepare a summary of the goals adduced during the last evaluation (or the hiring process), any challenges or obstacles, and steps taken toward accomplishment of those goals. The discussion should include the council goals, but it may also identify goals that you may have set, such as updating particular sections of the municipal code or department procedures, or development of your team. This evaluation process may be more fruitful if you engage the council in a conversation about these things.

## FURTHER RESOURCES

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- *Counsel and Council*, a publication of the League of California Cities revised and republished in 2022, contains a description of the various city activities that may require legal assistance, the several ways in which the city attorney may be involved in municipal matters, and information about the city attorney job and minimum qualifications. See, Chapter I, Nature of the Relationship, section B, "What does a City Attorney Do?;" section C, "Who is the City Attorney's Client?;" Chapter II, Defining the Job, Recruitment and Selection Process; and Chapter III, Maintaining an Effective City Council/City Attorney Relationship.

[https://www.calcities.org/docs/default-source/city-attorneys/cc-counsel-council-2022-ver4.pdf?sfvrsn=ffd5aa65\\_3](https://www.calcities.org/docs/default-source/city-attorneys/cc-counsel-council-2022-ver4.pdf?sfvrsn=ffd5aa65_3)

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- *The California Municipal Law Handbook*, League of California Cities and Continuing Education of the Bar.
- Table of contents of *The California Municipal Law Handbook*, color-coded by the Substantive Law Subcommittee of the Attorney Development and Succession Committee.
- *City Attorney Ethical Principles*, Adopted October 6, 2005, by the City Attorneys Department  
<https://www.cacities.org/Resources-Documents/Member-Engagement/Professional-Departments/City-Attorneys/Library/2011/5-2011-Spring-Michele-Beal-Bagneris-Ethical-Princi>
- *Rules of Professional Conduct*, the State Bar of California; Rule 1.6 (Confidential Information of a Client), Rule 1.13 (Organization as Client).  
<https://www.calbar.ca.gov/Portals/0/documents/rules/Rules-of-Professional-Conduct.pdf>
- *Practicing Ethics – A Handbook for Municipal Lawyers* (Chapter 1: Defining the Client & Chapter 7: Duty of Confidentiality)  
[https://www.calcities.org/docs/default-source/city-attorneys/practicing-ethics---a-handbook-for-municipal-lawyers-\(revised-2nd-edition-2020\).pdf?sfvrsn=3c4d92d4\\_1](https://www.calcities.org/docs/default-source/city-attorneys/practicing-ethics---a-handbook-for-municipal-lawyers-(revised-2nd-edition-2020).pdf?sfvrsn=3c4d92d4_1)
- *Essential Skills: Developing the City Attorney and City Council Relationship* (2016)  
<https://www.cacities.org/Resources-Documents/Member-Engagement/Professional-Departments/City-Attorneys/Library/2019/2019-Spring-Conference/5-2019-Spring;-Steiner-Nerland-Essential-Skills-De>

- *City Attorney Relationships: City Manager, City Clerk, Councilmembers, 2016*

[https://www.cacities.org/Resources-Documents/Member-Engagement/Professional-Departments/City-Attorneys/Library/2016/Annual-2016/10-2016-Annual\\_Arevalo\\_Jenkins\\_City-Attorney-Relat.aspx](https://www.cacities.org/Resources-Documents/Member-Engagement/Professional-Departments/City-Attorneys/Library/2016/Annual-2016/10-2016-Annual_Arevalo_Jenkins_City-Attorney-Relat.aspx)

- *Stepping Into the Evolving Role of the City Attorney: Executive Management Team Member, Crisis Manager, Legal Advisor and Team Builder – What Roles Can or Should You Play? (see in particular p. 9: “Opportunities and Challenges with the Community”)*

<https://www.cacities.org/Resources-Documents/Member-Engagement/Professional-Departments/City-Attorneys/Library/2012/Spring-2012/5-2012-Spring-Carvalho-Guinn-Moutrie-Stepping-Into>

- *Best Best & Krieger Municipal Practice Group Summary, Associate Core Competencies [Combines Municipal Practice Group and Firm-Wide Competencies];*
- *Best Best & Krieger General Associates Core Competencies Summary;*
- *Best Best & Krieger L-3 – 7<sup>th</sup> Year + Partnership Track – Associate Performance Evaluation*

A separate Resources Index, presented with these materials, is provided for Department members who may wish to have a summary version.

## ESSENTIAL SKILLS:

### Ascending the Organizational Chart – How to Get and Keep the Public Agency Job You Want

## RESOURCES INDEX

	SOURCE	TITLE
1.	League of California Cities	<u><i>Counsel and Council: A Guide to Building a Productive City Attorney-City Council Relationship (2022)</i></u>
2.	League of California Cities	<u><i>The California Municipal Law Handbook, League of California Cities and Continuing Education of the Bar</i></u>
3.	Attorney Development and Succession Committee, Substantive Law Subcommittee	<i>Outline of Canonical Substantive Law Subjects, Color-Coded Table of Contents to the California Municipal Law Handbook</i>  (Note: not hyperlinked; attached to presentation materials)
4.	City Attorneys Department	<u><i>City Attorney Ethical Principles, Adopted October 6, 2005, by the City Attorneys Department</i></u>
5.	State Bar of California	<u><i>Rules of Professional Conduct, Rule 1.6 (Confidential Information of a Client), Rule 1.13 (Organization as Client).</i></u>
6.	League of California Cities	<u><i>Practicing Ethics – A Handbook for Municipal Lawyers (Chapter 1: Defining the Client, Chapter 7: Duty of Confidentiality), 2023</i></u>
7.	City Attorneys Department, Attorney Development and Succession Committee, Essential Skills Subcommittee	<u><i>Essential Skills: Developing the City Attorney and City Council Relationship (2019)</i></u>
8.	League of California Cities	<u><i>City Attorney Relationships: City Manager, City Clerk, Councilmembers (2016)</i></u>

## ESSENTIAL SKILLS:

### Ascending the Organizational Chart – How to Get and Keep the Public Agency Job You Want

## RESOURCES INDEX

	SOURCE	TITLE
9.	League of California Cities	<u><i>Stepping Into the Evolving Role of the City Attorney: Executive Management Team Member, Crisis Manager, Legal Advisor and Team Builder – What Roles Can or Should You Play?</i></u> (2012)
10.	Best Best & Krieger	<i>Best Best &amp; Krieger Municipal Practice Group Summary, Associate Core Competencies [Combines Municipal Practice Group and Firm-Wide Competencies]</i>  Note: not hyperlinked; attached to presentation materials
11.	Best Best & Krieger	<i>Best Best &amp; Krieger General Associates Core Competencies Summary</i>  Note: not hyperlinked; attached to presentation materials
12.	Best Best & Krieger	<i>Best Best &amp; Krieger L-3 – 7<sup>th</sup> Year + Partnership Track – Associate Performance Evaluation.</i>  Note: not hyperlinked; attached to presentation materials



# The CBRT and Other Hot Topics in Municipal Revenues

Thursday, May 9, 2024

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## **DISCLAIMER**

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SELECTED TOPICS IN THE LAW OF MUNICIPAL FINANCE

May 9, 2024

By

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**INTRODUCTION.** Local government finance law has become a complex specialty since the adoption of Proposition 13 in 1978. It is rapidly developing still. Cal Cities has asked me to provide an update on these developments:

- Assembly Constitutional Amendments 1 and 13, which will appear on the November 2024 statewide ballot;
- Recent litigation involving utility users taxes on water, sewer, and trash service fees;
- Recent and proposed legislation affecting water rates;
- Options to fund Clean Water Act mandates as to stormwater;
- Franchise fees after *Zolly v. City of Oakland*; and,
- Recent litigation involving development impact (“AB 1600”) fees.

**ASSEMBLY CONSTITUTIONAL AMENDMENT 1.** Proposition 13 generally caps property taxes at 1 percent of assessed valuation, but allows supplemental property taxes to fund acquisition and improvement of real property. (Cal. Const., art. XIII A, § 1, subds. (a), b(2).) In 2000, California voters amended Proposition 13 to allow a supplemental property tax to fund school bonds with 55 percent voter approval. Many efforts to broaden that authority have failed in the two decades since. The latest effort succeeded in reaching the November 2024 ballot. It is Assembly Constitutional Amendment 1. Carried by then-Assembly Local Government Committee Chair Cecelia Aguiar-Curry (D-Woodland), it extends the 55 percent approval standard to local governments’ bonds issued for infrastructure and affordable housing. Specifically, it allows the lower threshold for:

Bonded indebtedness incurred by a city, county, city and county, or special district for the construction, reconstruction, rehabilitation, or replacement of public infrastructure, affordable housing, or permanent supportive housing for persons at risk of chronic homelessness, including persons with mental illness, or the acquisition or lease of real property for public infrastructure, affordable housing, or permanent supportive housing for persons at risk of chronic homelessness, including persons with mental illness, approved by 55 percent of the voters of the city, county, city and

county, or special district, as appropriate, voting on the proposition on or after the effective date of the measure adding this paragraph.

(ACA 1, article First [proposed Cal. Const., art. XIII A, § 1, subd. (b)(4)].) A number of strings are attached: funds cannot be used for “salaries and other operating expenses,” projects funded must benefit the jurisdiction issuing the debt, the agency must certify that it has evaluated other funding sources, annual performance and financial audits must be made public and submitted to the State Auditor, a “citizens oversight committee” is required and bidding on construction work is prohibited “by an entity owned or controlled by a local official that votes on whether to put a proposition on the ballot.” (*Id.*, subd. (b)(4)(A)(i)–(ix).) Once a bond is approved, a city may not propose another until all funding from the first issuance has been “committed to programs and projects listed in the proposition’s specific local program or ordinance.” (*Id.*, subd. (b)(4)(B).) The Legislature may impose further “accountability measures” by two-thirds vote. (*Id.*, subd. (b)(4)(C).)

“Affordable housing” shall include housing developments, or portions of housing developments, that provide workforce housing affordable to households earning up to 150 percent of countywide median income, and housing developments, or portions of housing developments, that provide housing affordable to extremely low, very low, low-, or moderate-income households, as those terms are defined in state law. Affordable housing may include capitalized operating reserves, as the term is defined in state law.

(II) “Affordable housing” shall also include downpayment assistance programs.

(ACA 1, article First [proposed Cal. Const., art. XIII A, § 1, subd. (b)(4)(E)].)

The infrastructure which can be funded by such bonds is also defined:

“Public infrastructure” shall include, but is not limited to, projects that provide any of the following:

(I) Water or protection of water quality.

(II) Sanitary sewer.

(III) Treatment of wastewater or reduction of pollution from stormwater runoff.

(IV) Protection of property from impacts of sea level rise.

(V) Parks and recreation facilities.

(VI) Open space.

(VII) Improvements to transit and streets and highways.

(VIII) Flood control.

(IX) Broadband internet access service expansion in underserved areas.

(X) Local hospital construction.

(XI) Public safety buildings or facilities, equipment related to fire suppression, emergency response equipment, or interoperable communications equipment for direct and exclusive use by fire, emergency response, police, or sheriff personnel.

(XII) Public library facilities.

(ACA 1, article First [proposed Cal. Const., art. XIII A, § 1, subd. (b)(4)(E)(iv)].)

ACA 1 would also authorize special sales and use taxes to fund affordable housing and infrastructure, also on a 55 percent vote, with conditions akin to those summarized above. (ACA 1, article Fourth.)

**ASSEMBLY CONSTITUTIONAL AMENDMENT 13.** Sponsored by Assemblyman Chris Ward (D-San Diego), this measure is a reaction to the proposed “Taxpayer Protection and Government Accountability Act,” an initiative constitutional amendment designed to reverse essentially every appellate victory of state and local governments under Propositions 13, 218 and 26. (Initiative No. 21-0042A1.)<sup>1</sup> That measure is also known as the California Business Roundtable measure and, in Cal Cities’ parlance, the Corporate Tax Trick. Perhaps intended as leverage for a bargain in which its proponents, the

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<sup>1</sup> The text of that initiative appears here:

< <https://oag.ca.gov/system/files/initiatives/pdfs/21-0042A1%20%28Taxes%29.pdf> > (as of Apr. 15, 2024).

California Business Roundtable, might trade it for legislation (as occurred with essentially this same measure in 2018), it was originally intended for the 2022 ballot. However, its proponents gathered insufficient valid signatures to qualify it for the ballot on the basis of a random sample (perhaps due to the difficulty of collecting signatures during the pandemic) and the Secretary of State did not certify it as bearing sufficient signatures in time. It is now eligible for the November 2024 ballot. But the Legislature refused to bargain, mounting three defenses to the measure — a “no” campaign, a suit to remove it from the ballot, and ACA 13.

*Legislature of the State of California, et al. v. Weber (Hiltachk)*, Case No. S281977 seeks a writ in the Supreme Court’s original jurisdiction ordering Secretary of State Shirley Weber to withhold the measure from the ballot as an improper attempt to revise (rather than amend) the Constitution by initiative and as impairing essential governmental financial powers. The Supreme Court agreed to entertain the writ and, as of mid-April, the writ is to be set for argument soon. Decision is expected by the June 2024 deadline to print ballots for the Fall election.

ACA 13 will appear on the Fall ballot, too, perhaps along with the Taxpayer Protection Act. Both are retroactive, the latter to January 1, 2022, the former to January 1, 2024. Its concept is simple — an initiative constitutional amendment that imposes a super-majority voting requirement cannot become law without achieving that same super-majority. As it is retroactive, if it is adopted by a simple majority of voters this Fall, the Taxpayer Protection Act will require two-thirds voter approval. Given the scope of opposition from employee unions, contractors, and others with a stake in state and local government services, that may not be achievable. ACA 13’s core provision states:

Notwithstanding Section 4 of Article XVIII [“Amending and Revising the Constitution”] or any other provision of the Constitution, an initiative measure that includes one or more provisions that amend the Constitution to increase the voter approval requirement to adopt any state or local measure is approved by the voters only if the proportion of votes cast in favor of the initiative measure is equal to or greater than the highest voter approval requirement that the initiative measure would impose for the adoption of any state or local measure.

(ACA 13, article Second [proposed Cal. Const., art. II, § 10.5, subd. (b)].)

**UTILITY USERS TAXES.** A number of recent cases have disputed whether cities and counties may transfer funds from utility enterprise funds to their general funds under a

range of theories — payments in lieu of taxes (PILOTs), franchise fees, or taxes approved by voters but paid by the utility rather than shown on bills. Published opinions have taken different approaches to this issue, creating uncertainty and inviting more litigation.

First is *Wyatt v. City of Sacramento* (2021) 60 Cal.App.5th 373. When Proposition 218 was approved in 1996, Sacramento placed a matter before voters to readopt — as a tax — an ordinance authorizing the City Council to allocate up to 11 percent of gross utility revenues to general fund purposes. Voters approved it, and the City maintained its annual transfers. Years later, a challenger attacked the transfer, arguing it amounted to using the proceeds of utility rates for non-utility purposes in violation of Proposition 218 — California Constitution, article XIII D, section 6, subdivision (b)(2). The trial court granted the writ, invalidating the City’s fee. The Court of Appeal reversed, concluding that voter approval was sufficient to justify the transfer, which it found was “at least akin to a tax.”

By contrast is *Lejins v. City of Long Beach* (2021) 72 Cal.App.5th 303. The case has facts similar to *Wyatt*’s except that the voter approval of the transfer did not come immediately after Proposition 218’s 1996 adoption, but following settlement of litigation over another version of the transfer years later. The trial court invalidated the transfer as violating article XIII D, section 6, subdivision (b)(2)<sup>2</sup> and the Court of Appeal affirmed. It purported to distinguish *Wyatt*, rather than disagree with it, but the distinction is hard to grasp:

In this regard, the matter before us is distinguishable from *Wyatt v. City of Sacramento* (2021) 60 Cal.App.5th 373, 274 Cal.Rptr.3d 710, a recent Third District Court of Appeal case on which the City relies in support of its contention a city’s voter-approved general tax on utility services, to fund transfers to the city’s general fund, does not violate article XIII D. In *Wyatt*, Sacramento argued—and the Court of Appeal concluded Sacramento proved—a voter-approved mandatory 11 percent tax Sacramento imposed on utilities’ revenues was a cost of providing services that the utilities could pass on to ratepayers without violating article XIII D, section 6, subdivision (b). (*Wyatt*, at pp. 378, 380, 383, 274 Cal.Rptr.3d 710.) We express no opinion on whether *Wyatt* was correctly decided. We note only that *Wyatt*’s analysis is inapplicable to the case before us because the City here never argued, and there is nothing in the record indicating, the Measure M transfers and/or

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<sup>2</sup> Unspecified references to “articles” are to the California Constitution.



surcharge were in any way related to the costs of providing water and sewer services.

(*Lejins, supra*, 72 Cal.App.5th at pp. 323–324.) But *Wyatt* reasoned the transfer was a cost of utility services because voters had approved it and was “at least akin to a tax,” like the sales and use taxes public utilities pay.

Also relevant is *Palmer v. City of Anaheim* (2023) 90 Cal.App.5th 718, which upheld a voter-approved fund transfer from the City’s electric utility to its general fund. Electric rates are not subject to Proposition 218 (Cal. Const., art. XIII D, § 3, subd. (b)), but are subject to Proposition 26. (Cal. Const., art. XIII C, § 1, subd. (e)(2); *Citizens for Fair REU Rates v. City of Redding* (2018) 6 Cal.5th 1.) *Palmer* concluded that Anaheim voters’ approval of a charter amendment reauthorizing the general fund transfer was sufficient to satisfy Proposition 26 and the fact of the transfer did not make rates taxes because they exceeded the cost of service. (90 Cal.App.5th at pp. 726–727.) Thus, *Palmer* seems to share *Wyatt*’s view that voters may approve taxes on utilities collected wholesale (i.e., paid by the utility from rate proceeds rather than collected on utility bills) without violating Propositions 218 and 26’s rule that rates may not exceed cost of service.

The Supreme Court denied review in *Wyatt* and *Lejins* and the tension between them remains. Pending cases may give the Fourth District an opportunity to weigh in. *Simpson v. City of Riverside*, Riverside Superior Court case number RIC 1906168 followed *Lejins*, not *Wyatt*, and is pending in a remedies phase of trial as this paper is written. Appeal is likely.

*Beck v. City of Canyon Lake*, Fourth District Court of Appeal case number D083322 is the City’s appeal from a judgment invalidating its voter-approved utility users tax on water and sewer services. The trial court concluded that taxing these services — provided by a special district — violated Proposition 218’s requirement that utility rate proceeds not be used for non-utility purposes. But, of course a tax collected by a special district from utility customers is a revenue stream legally distinct from the special district’s rate proceeds, just as sales taxes are. If the trial court’s conclusion were the law, no utility users tax could apply to fees for a property-related service, like water, sewer and trash removal. There are more than 100 such taxes in California. As the proponents of Proposition 218 assured voters in ballot arguments that voters could continue to approve utility taxes if Proposition 218 passed, this ought not to be the meaning of that measure. The Fourth District will have opportunity to decide later this year or in 2025.

**WATER RATE LEGISLATION.** Water rate litigation has generated water rate legislation. First is **2023's AB 755** (Papan, D-San Mateo), which adopts Water Code sections 390 and 390.1 to require a cost-of-service analysis (COSA) for water rates prepared after January 1, 2024 to identify the top 10 percent of customers by demand and identify any costs associated with serving them. Sponsored by environmental interests, it is intended to nudge water retailers to adopt tiered water rates, which get more expensive per unit of water as consumption increases, after *Capistrano Taxpayers Assn., Inc. v. City of San Juan Capistrano* (2015) 235 Cal.App.4th 1493 led some to believe such rates are too risky. Identifying a cost caused by a customer class and not isolating that cost to that class in rate design implies an improper cross-subsidy of rates — i.e., cost-shifting from those customers to others. However, the statute refers to the top 10 percent of all **customers**, not the top 10 percent of any customer **class**. In many agencies, the largest users will be non-residential and a COSA can easily explain that costs associated with serving those users are not best allocated to them, but to customer classes such as commercial, industrial, single-family, etc. as is industry-standard practice. Thus, the bill will require a little thought about these issues when preparing a COSA and adopting new rates, but may not unduly control rate design.

Assemblywoman Papan has also proposed **2024's AB 1827** to facilitate tiered water rates by stating that a COSA can consider any or all of: higher water demand, maximum potential water use, and projected peak water use in allocating costs to customers who use more water than others. Pending in the Assembly Local Government Committee as this paper is written, it is a response to trial court rulings involving the City of San Diego and the Otay Water District which adopted the plaintiffs' draft statement of decision declaring that tiered rates and use of peaking factors more generally (i.e., measures of the extent to which a water user class's peak use exceeds its average use) are necessarily unreasonable and violate Proposition 218 (Cal. Const., art. XIII D, § 6, subd. (b)(3) unless the agency has time-of-use data. (*Coziahr v. Otay Water Dist.* (4<sup>th</sup> DCA No. D081099) [fully briefed Apr. 12, 2024]; *Patz v. City of San Diego* (4<sup>th</sup> DCA No. E083543) [fully briefed Aug. 28, 2023]). That reasoning is absurd. Water ratemakers have been using peaking factors for decades and time-of-use data is a novelty available only to the largest and best-funded utilities. Nothing in Proposition 218 suggests that maintaining long-standing, industry-standard ratemaking practices is unreasonable.

**STORMWATER FEES.** City Attorneys know that the cost of complying with Regional Water Quality Control Board mandates under the federal Clean Water Act's National Pollutant Discharge Elimination System (NPDES) has become unsustainably expensive. Proposition 218, as interpreted in *Howard Jarvis Taxpayers Ass'n v. City of Salinas* (2002) 98

Cal.App.4th 1351 requires majority property-owner approval, or two-thirds registered-voter approval, of fees for water quality and flood control programs. (Cal. Const., art. XIII D, § 6, subd. (c).) *Salinas* read Proposition 218's exception from that rule for fees for "sewer, water, and refuse collection services" (*ibid.*) to limit "sewer" to sanitary sewer fees.

Environmental advocates who persuaded the regional boards to impose the expensive water quality mandates have recognized the need to help local governments finance compliance. This led to 2017's SB 231 (Hertzberg, D-San Fernando Valley) which amended Government Code section 53750, subdivision (k) to define the "sewer" services fees which are partially exempt from Proposition 218 to include storm, as well as sanitary, sewers. It also adopts Government Code section 53751 to explain the Legislature's disagreement with *Salinas*. One trial court has accepted that reasoning and refused to follow *Salinas*. (*Gluck v. City and County of San Francisco*, 1<sup>st</sup> DCA Case No. A170087 [Mar. 29, 2024 appeal from Feb. 26, 2024 order sustaining demurrer without leave to amend].)

However, the Third District Court of Appeal, while noting that SB 231 postdated the dispute before it, nevertheless disagreed with it and provided a more intellectually rigorous justification for *Salinas*' interpretation of Proposition 218. (*Department of Finance v. Commission on State Mandates* (2022) 85 Cal.App.5th 535.) The decision concluded that, because of the voter-approval requirement, local governments do not have the power to adopt stormwater fees. Accordingly, many of the provisions of the 2007 NPDES permit for the County of San Diego and the cities within it are unfunded state mandates requiring the Legislature to fund their costs or to suspend the mandate. Interestingly, the Court of Appeal noted that many stormwater permit programs amount to removing waste from waterways and might therefore be funded by a fee for "refuse collection services" exempt from Proposition 218's election requirement, and subject only to its 45-day noticed majority-protest proceeding, with which we have become familiar.

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

1. use general funds;
2. charge appropriate portions of the stormwater budget to other city programs which burden the system — like water, sewer and trash services;

3. recover a portion of the stormwater budget from a fee for “refuse collection services” in the form of efforts to prevent trash from entering receiving waters or removing it from them;
4. seek property-owner or voter approval of a stormwater fee under article XIII D, section 6, subdivision (c); or
5. seek voter approval of a general or special tax under article XIII C, section 2.

**FRANCHISE FEES.** Proposition 26 makes all government revenues taxes subject to voter approval unless one of seven express and one or two implied exceptions apply. The express exceptions appear in California Constitution, article XIII C, section 1, subdivision (e). The implied exceptions are for fees that do not fund government (*Schmeer v. County of Los Angeles* (2013) 213 Cal.App.4th 1310 [fee for bags at grocery stores under plastic bag ban ordinance not subject to Prop. 26 because grocers retained it] and, perhaps, those which government does not “impose” by force or authority so as to come within the language of article XIII C, section 1. (But, see *Zolly v. City of Oakland* (2022) 13 Cal.5th 780, 791 [rejecting this argument as to trash franchise fees].) Relevant here is the fourth exception for a “charge imposed for entrance to or use of local government property, or the purchase, rental, or lease of local government property.” (Cal. Const., art. XIII C, § 1, subd. (e)(4). Many franchise fees imposed by government are for the use of property, such as the use of rights-of-way in providing electric service.

*Zolly* and other cases have made the legal basis for such fees more complex. *Jacks v. City of Santa Barbara* (2017) 3 Cal.5th 248 determined that city’s fee on Southern California Edison for use of city rights-of-way to provide electric service was not a tax, even though the PUC required it to appear on residents’ utility bills as a separate line item, if the fee was at least roughly proportionate to the value of the rights in real estate the franchise confers. That relationship could be proven by bona fide negotiations or “other indicia of value,” a phrase to be defined by subsequent case law. The City proved that relationship on remand, and prevailed on a further appeal in an unpublished decision.

*Zolly* is more problematic. There, Oakland renewed its solid waste and refuse franchises in a messy process that led to controversy and a scathing grand jury report. Landlords sued to challenge substantial franchise fees paid by the haulers to the City’s general fund, alleging they bore the economic burden of the fees via rates they paid on behalf of their tenants for refuse collection services. The trial court sustained the City’s

demurrer on the basis that the fee was not imposed on the landlords and that the haulers paid it voluntarily. The Court of Appeal affirmed in part, rejecting the City's argument that the landlords lacked standing to challenge a fee they did not pay directly, and the Supreme Court granted review.

Justice Liu's opinion is broad, drawing a concurrence from Justices Corrigan and Jenkins arguing for a narrower rationale. First, he found standing — at the demurrer stage — from the landlords' allegations they bore the burden of the fee. This creates unresolved tension with such cases as *Chiatello v. City and County of San Francisco* (2010) 189 Cal.App.4th 472 and *County Inmate Telephone Service Cases* (2020) 48 Cal.App.5th 354, which held plaintiffs must be directly obligated to pay a fee to have standing to challenge it. *Zolly* distinguishes, rather than disagrees with, those cases, noting statutory bases for their standing requirement not applicable to *Zolly's* writ claim.

Second, *Zolly* concludes that Proposition 26's fourth exception for fees for the use of government property is limited to tangible property (real and personal property) and excludes intangible property like the right to provide waste-hauling services in Oakland.

Third, the franchise fee was "imposed" so as to trigger Proposition 26 even if voluntarily paid because it was established by a legislative act of government — approval of the franchise.

The Court remanded for trial of *Zolly's* petition, leaving Oakland to raise below its argument that haulers received valuable rights in City rights-of-way — i.e., the right to place trash cans there on a weekly basis. As Oakland had not briefed the point, but raised it only at oral argument, the Supreme Court did not reach the claim.

Another recent case of note is *City of Lancaster v. Netflix, Inc.* (2014) 99 Cal.App.5th 1093. Given changes in the television industry, Lancaster sought to enforce a franchise fee under the Digital Infrastructure and Video Competition Act (DIVCA), not just against the legacy cable franchisee, but also against Netflix and other streaming services, which typically use cable and telephone lines in rights-of-way to deliver their services. The Second District affirmed the trial court's order sustaining the streaming services' demurrer, concluding DIVCA did not grant cities a private right of action against non-franchise holders.

In light of these cases, cities should consider these steps to maintain franchise fees on trash haulers and others who make economic use of rights-of-way:

- Make a record that the franchise grants franchisees rights in rights-of-way that others do not enjoy (like the right to place bins in street weekly);
- Make a record that the value of those rights is at least roughly proportionate to the franchise fee, perhaps using a ratemaking consultant or real estate appraiser;
- Include a cost-of-service study in the record on which the fee is approved; consider hiring a consultant to prepare it, and have a lawyer review it; and
- Separately cost regulatory fees (like AB 939 fees compliance to fund compliance with the Integrated Waste Management Act) and fees for encroachment permits, as well as impact fees for road degradation. Such fees more easily defended than franchise fees for use of rights-of-way.

**DEVELOPMENT IMPACT FEES.** Fees on development to fund facilities and services necessary for that development, often called AB 1600 fees for the 1987 statute which regulates them, have been controversial of late. That statute, Government Code section 66000 et seq., requires detailed findings to impose such a fee, typically supported by what is known as a “nexus study,” and annual and five-year reports intended to show that the money is being promptly spent to deliver the facilities or that there is good reason for local government to continue holding the funds. Those reports are demanding, best prepared by consultants, worthy of legal review before they are submitted to a city council, and often overlooked. A series of recent cases have made them riskier.

First is *Walker v. City of San Clemente* (2015) 239 Cal.App.4th 1350, which found that City had failed to timely spend, or to properly justify not spending, fees imposed for beach parking and ordered the City to refund \$10.5 million in fees collected over many years. This got the attention of cities — and the plaintiffs’ bar.

Next came *County of El Dorado v. Superior Court* (2019) 42 Cal.App.5th 620 which lowered the temperature a bit by holding that the statute of limitations for refund claim under AB 1600 was one year, as the duty to refund fees is a penalty, triggering the statute of Code of Civil Procedure section 340, subdivision (a).

Then came *Hamilton & High, LLC v. City of Palo Alto* (2023) 89 Cal.App.5th 528 which held that a fee a developer voluntarily paid in lieu of providing all the parking its project required was also subject to AB 1600. It ordered the city to refund the fees because it had not spent them in the allowed time without adequate justification. This was an

unwelcome surprise because the public law community had understood that in-lieu fees are not subject to AB 1600 (because they are voluntary), but analyzed under the regulatory takings standard of *Ehrlich v. City of Culver City* (1996) 12 Cal.4th 854, which had upheld as not a taking a fee in lieu of public art included in a project. *Ehrlich* analysis requires much the same justification as AB 1600 to **establish** a fee, but does not require the money to be spent by a deadline nor require annual and five-year reports. This is vital because in-lieu fees generally do not fund projects identified in advance and are frequently held awaiting an opportunity to spend them efficiently. Unless the Legislature provides a remedy by statute, cities may wish to reconsider whether to accept fees in lieu of complying with development standards — providing the parking or the public art. Developers would be worse off in that case (they would lose options) but cities would reduce their risk. *Hamilton & High* also appears to criticize the holding of *El Dorado*, although it does not formally disagree with it.

The property rights bar continues to seek ways to reduce or eliminate development impact fees — while retaining the benefits of Proposition 13's cap on property taxes, which makes local governments unable to subsidize development by providing infrastructure to facilitate it. A recent example is *Sheetz v. County of El Dorado* (2022) 84 Cal.App.5th 394 which upheld a \$23,420 traffic impact fee on a modest pre-fabricated house in a rural area to fund countywide transportation improvements, like improving Interstate 50. The county won in the trial court and the Court of Appeal affirmed, concluding that the regulatory takings analysis of *Nollan v. California Coastal Com'n* (1987) 483 U.S. 825 and *Dolan v. City of Tigard* (1994) 512 U.S. 374 did not apply to a fee imposed legislatively, but only to ad hoc conditions of approval which exact property or money from developers. It also concluded that AB 1600 does not require tract-specific analysis of development, allowing County-wide fees, and that the fees were reasonably related to traffic impacts of development.

The U.S. Supreme Court reversed in *Sheetz v. County of El Dorado* (Apr. 12, 2024) \_\_\_ U.S. \_\_\_, 2024 WL 1588707. While the petitioners had hoped to invalidate fees of this sort entirely as regulatory takings, the Justices unanimously agreed that *Nollan / Dolan* analysis **does** apply to legislatively adopted fees, and decided nothing further. The California Court of Appeal will decide on remand whether the traffic impact fees bear nexus to the traffic impacts of Sheetz's development (they almost certainly do) and whether they are shown to be at least roughly proportionate to the extent of impacts from his development. It seems that the legislative / adjudicative distinction will survive on that second point, however. Proportionality is necessarily shown differently for a class of future projects than for a single project subject to quasi-judicial review. Indeed, three

Justices wrote separately to generally approve of legislative fees intended to mitigate the impacts of classes of development.

Also worth following is *Barajas v. City of Petaluma*, First District Court of Appeal Case No. A165258 (fully brief as of Jan. 3, 2024) which may further develop state law on this issue. It is awaiting argument as this paper is written. Cal Cities provided an amicus brief in support of the City.

One statute is worth noting here, too. 2023's AB 516 (Ramos, D-San Bernardino) effective January 1, 2024, raises the bar for annual and five-year reports on AB 1600 fees, requiring updates on project construction and on refunds of fees. It imposes additional requirements for audits, including review of construction schedules; requires cities to inform fee payors of their right to request audits, and to post audits and reports to the City's website.

**CONCLUSION.** Further developments are, of course, inevitable and city attorneys will do well to continue to monitor these trends for new developments in the courts, the Legislature, and in the communities we serve.



**2024 Spring  
HOT TOPICS  
IN MUNICIPAL REVENUES: THE CBRT MEASURE**

**Prepared By  
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March 2024**

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## INTRODUCTION

On February 1, 2023, the Taxpayer Protection and Government Accountability Act, which is sometimes referred to as the CBRT Measure (“the Measure”), qualified to appear on the November 5, 2024 ballot.<sup>1</sup> According to the Measure’s proponent, it would combat “overtax[ation]” in California by giving the people a vote on all taxes and requiring all charges and fees to be passed by elected governing bodies rather than unelected “bureaucrats.” According to the Measure’s opponents, it is an unprecedented reordering of California’s fundamental government structures which would gravely undermine the ability of state and local governments to generate revenue of any kind.

On September 26, 2023, the Legislature of the State of California, Governor Gavin Newsom, and John Burton (the “Weber Petitioners”) filed an Emergency Petition for Writ of Mandate in the California Supreme Court, asking the Court to accept the case as an original matter and remove the Measure from the ballot on the ground that it is beyond the power of the voters to enact. (*Legislature v. Weber*, Cal. Supr. Court Case No. S281977.) Specifically, the *Weber* Petitioners assert that the Measure is an unlawful attempt to revise, rather than amend, the California Constitution and that its passage would endanger the ability of state and local governments to provide essential government services. Thomas W. Hiltachk, the proponent of the Measure and Real Party in Interest in the case (the “Proponent”), opposes the petition on the grounds that the Measure merely amends rather than revises the Constitution and that any alleged effect on state or local government’s ability to provide essential services is speculative.

On November 29, 2023, the Supreme Court issued an order to show cause, mandating additional briefing. Briefing closed on February 14, 2024, and oral argument will be held on XX X, 2024.

The League of California Cities joined both an amicus curiae letter brief to the California Supreme Court in support of review of the merits, and an amicus brief on the merits on behalf of various local government amici urging the Court to withhold the Measure from the ballot. Separately, the Mayors of the cities of San Diego, Los Angeles, San Jose, San Francisco, Sacramento, Long Beach, Oakland, and Irvine sent an amicus letter brief urging the Court to accept review of the Measure. No local governments have filed any amicus briefs opposing the *Weber* petition, although taxpayer advocates did so.

### I. THE MEASURE’S PROVISIONS

The Measure seeks to restrict the ability of the government and the people to raise revenue of all kinds in a variety of ways. The Petitioners in *Legislature v. Weber*, however, address only the following four key aspects of the Measure from their perspective as present and former State

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<sup>1</sup> The Measure’s text is here: <https://oag.ca.gov/system/files/initiatives/pdfs/21-0042A1%20%28Taxes%29.pdf> (as of Mar. 20, 2024).

officials.<sup>2</sup> Local government amici elaborated on these arguments from local governments' perspective.

*First*, the Measure targets the Legislature's taxing and spending powers. Most significantly, it revokes the Legislature's power to impose state taxes. Today, the Legislature can enact taxes with a two-thirds vote. (Cal. Const., art. XIII A, § 3, subd. (a).) Under the Measure, the Legislature could only propose state taxes to the voters, who would then have authority to approve those taxes. (Measure, Sec. 4, proposed art. XIII A, § 3, subd. (b)(1).)

The Measure would also require the Legislature, when proposing special taxes to the voters, to relinquish its spending power over the revenues generated by those taxes. Today, the Legislature has broad authority to appropriate funds, including the authority to generally change how funds from a particular revenue source are appropriated from one year to the next. The Measure, however, would require that each new state tax measure either impose binding limitations on how the revenue could be spent – which could only be changed by the voters – or contain a statement that the tax revenue could be spent for “unrestricted general revenue purposes.” (Measure, Sec. 4, proposed art. XIII A, § 3, subd. (b)(1)(B).) Because voters are more likely to reject taxes that can be used for unrestricted purposes than special taxes that are earmarked for specific purposes, like schools or public safety,<sup>3</sup> the Legislature may feel compelled to propose special taxes at the cost of relinquishing a portion of its spending authority with each new tax.

*Second*, the Measure revokes from the executive branch of government the power to impose charges of any kind. Under the Measure, the State executive branch would lose the ability to impose any charges, regardless of whether defined as a tax or a non-tax “exempt charge.” The Measure accomplishes this goal through two steps. First, the Measure changes article XIII A's<sup>4</sup> scope to include not only changes to state statutes, but also executive actions. Today, article XIII A (adopted by Proposition 13 in 1978) applies to changes in “state statute” (Cal. Const., art. XIII A, § 3), but the Measure would apply more broadly to any change in “state law” – a term that would be defined to include all executive branch actions, from regulations to opinion letters to legal interpretations and enforcement actions. (Measure, Sec. 4, proposed

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<sup>2</sup> To cite one of the many other changes the Measure would make, the Measure would establish new limits on the ability of the State to assess property taxes by expanding the scope of restrictions on the collection of property taxes by local government agencies to any entity of government. (Measure, Sec. 7, proposed art. XIII D, § 3, subd. (a).)

<sup>3</sup> See *Coleman v. Cty. of Santa Clara* (1998) 64 Cal.App.4th 662, 673 (allowing general tax to be accompanied by an advisory measure stating voters' views on how general tax proceeds should be spent).

<sup>4</sup> References to “articles” are to the California Constitution.

art. XIII A, § 3, subds. (a), (h)(4).) Similar changes are made at the local level. (*Id.*, Sec. 6, proposed art. XIII C, § 2, subd. (a) & Sec. 5, proposed art. XIII C, § 1, subd. (f).)<sup>5</sup>

Then, the Measure requires that any change in “state law” that results in a higher tax or non-tax “exempt charge” must be enacted by the Legislature: by a two-thirds vote, and subject to voter approval, for an increased charge that is deemed a “tax” (Measure, Sec. 4, proposed art. XIII A, § 3, subd. (b)(1)), and by majority vote for any “exempt charge.” (*Id.*, Sec. 4, proposed art. XIII A, § 3, subd. (c) [“Any change in a state law which results in any taxpayer paying a new or higher exempt charge must be imposed by an act passed by each of the two houses of the Legislature.”].) Put otherwise, the Measure revokes the power of the Governor and state administrative agencies to impose or increase any charge, even those that are not “taxes.”

Similarly, with respect to virtually all local charges,<sup>6</sup> “[o]nly the governing body of a local government” or the voters exercising their power of initiative “shall have the authority to impose any exempt charge.” (Measure, Sec. 6, proposed art. XIII C, § 2, subd. (e).) This means, for example, that if a state or local administrative agency promulgates a regulation or interprets an ordinance in a manner that would result in even a single individual paying a new or higher fee that is labeled a “tax” under the Measure, that regulation or interpretation would be deemed a tax that only the legislative branches could propose and the voters could enact. Likewise, even for non-tax administrative fees, the administrative agency could no longer act alone under delegated authority, but rather would have to submit any fee change to the Legislature or local legislative body. How this would affect charter city agencies, like elected and appointed rent boards, remains to be seen.

As a consequence of these two changes, administrative agencies would lose the power to do much of the work they do today under legislatively-delegated authority, such as assessing fees for the disposal of hazardous waste (at the state level) and adjusting service fees for inflation or charges for health care at public hospitals (at the local level).

Viewed from a different perspective, these changes also mean that the Legislature and local legislative bodies would lose the power to delegate these administrative tasks to the agencies with the expertise to best perform them.

*Third*, the Measure expands the definition of taxes to place many additional charges beyond the power of the Legislature and local legislative bodies to enact. Under today’s Constitution,

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<sup>5</sup> Actions by the judicial branch, the University of California, the California State University, and California Community Colleges are excluded from this definition of “state law,” but not from the Measure entirely. (Measure, Sec. 4, proposed art. XIII A, § 3, subd. (h)(4).)

<sup>6</sup> There is an exception for certain charges related to health care services. (Measure, Sec. 4, proposed art. XIII A, § 3, subd. (e)(3); Sec. 6, proposed art. XIII C, § 2, subd. (e); Sec. 5, proposed art. XIII C, § 1, subd. (j)(7).)

charges imposed by state or local government are defined as “taxes” unless they fall into enumerated categories of non-tax “charges” — a narrowing of the seven exemptions in Proposition 26’s definition of “tax.” (Cal. Const., art. XIII A, § 3, subd. (b) [state charges]; art. XIII C, § 1, subd. (e) [local charges].) The Measure would transform many of these charges — which would be renamed “exempt charges” — into taxes that require voter approval.

To cite just three examples:

- The Measure would eliminate the category of charges imposed for “a specific benefit conferred or privilege granted directly to the payor . . . .” (Measure, Sec. 4, proposed art. XIII A [deleting Cal. Const., art. XIII A, § 3, subd. (b)(1)]; Sec. 5, proposed art. XIII C [deleting Cal. Const., art. XIII C, § 1, subd. (e)(1)].) Consequently, some franchise fees,<sup>7</sup> professional licensing fees, and regulatory fees, like fees on manufacturers of consumer products with adverse environmental impacts<sup>8</sup> — all of which are deemed non-tax fees under current law — might become taxes under the Measure unless the parallel exemption for services or products (or another exemption) is deemed to include them.
- Charges for “a specific government service or product” would have to reflect the government’s “actual cost” for providing the service or product. (Measure, Sec. 4, proposed art. XIII A, § 3, subds. (e)(1), (h)(1); Sec. 5, proposed art. XIII C, § 1, subds. (a), (j)(1).) Moreover, the enacting body would have to prove these elements by clear and convincing evidence. (*Id.*, Sec. 4, proposed art. XIII A, § 3, subd. (g)(1); Sec. 6, proposed art. XIII C, § 2, subd. (h)(1).) This could transform many charges like court filing fees<sup>9</sup> and utility service charges<sup>10</sup> into taxes.
- The Measure would limit charges that could be imposed by the judicial branch or the State for violations of the law to include only fines imposed “to punish” a violation of law after undefined “adjudicatory due process.” (Measure, Sec. 4, proposed art. XIII A, § 3, subd. (e)(5); Sec. 5, proposed art. XIII C, § 1, subd. (j)(4).) This would affect punitive portions of drought rates for water and might affect such things as parking tickets and library fines.

By transforming these charges into taxes, the Measure would make it more difficult to modify or enact them. For example, the State and local governments can currently enact certain charges directly, after a majority-protest hearing for water, sewer, and trash service rates. (Cal. Const., art. XIII A, § 3, subd. (a); art. XIII C, § 1, subd. (e); art. XIII D, § 6, subds. (a) & (c).) Under

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<sup>7</sup> *Jacks v. City of Santa Barbara* (2017) 3 Cal.5th 248, 270-271.

<sup>8</sup> *Am. Coatings Assn., Inc. v. State Air Res. Bd.* (2021) 62 Cal.App.5th 1111, 1125-1129.

<sup>9</sup> *Townzen v. Cty. of El Dorado* (1998) 64 Cal.App.4th 1350, 1359.

<sup>10</sup> *Humphreville v. City of L.A.* (2020) 58 Cal.App.5th 115, 124.

the Measure, many such charges would become taxes requiring approval by both a legislative body and the voters.

*Fourth*, the Measure restructures the voters' fiscal powers. As an initial matter, it extends the power of referendum to taxes and charges that have long been beyond its reach. Since 1911, the voters' power of referendum has not extended to "statutes providing for tax levies." (Cal. Const., art. II, § 9, subd. (a).) The California Supreme Court has held that "tax" has a broader meaning under article II, section 9 than it does under articles XIII C and D, placing many charges that are "taxes" under the latter provisions beyond the voters' power of referendum. (*Wilde v. City of Dunsmuir* (2020) 9 Cal.5th 1105, 1116-1118.) The Measure would reverse that decision by declaring that the word "tax" has the same meaning under article II, section 9 as it does under articles XIII A and XIII C. (Measure, Sec. 4, proposed art. XIII A, § 3, subd. (d); Sec. 5, proposed art. XIII C, § 1, subd. (i).) This means that some exactions that are now considered exempt from the referendum would become subject to the referendum. This may complicate issuance of revenue bonds backed by utility rate proceeds, for example.

In conjunction with the revocation of the Legislature's taxation power, these changes ensure that *every single revenue-raising measure enacted at the state or local level would be subject to voter approval, either because it is a tax that the voters must enact in the first instance, or because it is an exempt charge that can only be enacted by the legislative branch, subject to the voters' power of referendum.*<sup>11</sup>

The Measure also reduces the power of local voters to increase their own taxes. Under today's Constitution, local voters can propose initiatives to amend their city or county charters in many ways, including by increasing their taxes. (See Cal. Const., art. XI, § 3, subd. (a).) The Measure would revoke the voters' power to amend their charters to increase their own taxes. (Measure, Sec. 6, proposed art. XIII C, § 2, subd. (f).)

Also, under today's Constitution, voters can enact and increase their own special taxes by a simple majority vote. (See, e.g., *City of Fresno v. Fresno Bldg. Healthy Communities* (2020) 59 Cal.App.5th 220, 235, 238.) The Measure would increase that requirement to a two-thirds supermajority vote. (Measure, Sec. 6, proposed art. XIII C, § 2, subd. (c).)

Still further, the Measure would prohibit advisory measures to accompany special taxes, allowing voters to express their views as to how tax proceeds should be spent. (Measure, Sec. 6, proposed art. XIII C, § 2, subd. (d)(3).)

Finally, the Measure includes a retroactivity provision requiring that any state or local "tax" or "exempt charge" that is adopted between January 1, 2022 and the effective date of the

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<sup>11</sup> Courts would have to determine whether the Measure changes the law providing that the voters' referendum power does not extend to administrative acts. (*City of San Diego v. Dunkl* (2001) 86 Cal.App.4th 384, 399-400.) If that rule survives, some charges might remain exempt from the referendum.

Measure thirty-four months later, and which does not comply with the Measure – including every tax enacted in that time and every state and local administrative change – would become void within twelve months unless reenacted to comply with the Measure. (Measure, Sec. 4, proposed art. XIII A, § 3, subd. (f); Sec. 6, proposed art. XIII C, § 2, subd. (g).) Thus a flurry of elections in 2025 could be expected. This is especially problematic for general taxes, which must appear on general election ballots, as few cities contest council seats in odd-numbered years. (Cal. Const., art. XIII C, § 2, subd. (b).)

## II. THE LEGAL CHALLENGE

The Petitioners in *Legislature v. Weber* advance three legal theories.

### A. The Court Must Decide Whether To Resolve The Challenge Before The Election

The first issue in the case involves the threshold effort to secure pre-election review of the Measure. Courts will generally delay the consideration of challenges to a ballot measure's validity until after the election. (*Brosnahan v. Eu* (1982) 31 Cal.3d 1, 4.) Nevertheless, preelection review is appropriate when a measure is challenged on the ground that it "cannot lawfully be enacted through the initiative process," including when the measure is challenged as a constitutional revision. (*Independent Energy Producers Assn. v. McPherson* (2006) 38 Cal.4th 1020, 1029-1030.)

Because the *Weber* Petitioners have challenged the Measure as a revision that is beyond the power of the voters to enact, they have argued that pre-election is appropriate. They have additionally argued that preelection review is particularly appropriate in this case because the retroactivity provision is already affecting how state and local officials craft their budgets and plan for the fiscal future.

As described above, under that retroactivity provision, governments would have only twelve months from the effective date of the Measure in December 2024 in which to conform any taxes or fees adopted over the previous thirty-four months to the Measure's requirements.<sup>12</sup> For every tax and many fees, the Measure would require voter approval, forcing a plethora of state and local special elections. The cost of those elections alone would be substantial, but policymakers must also consider the possibility that the measures would fail because voters could be overwhelmed by so many tax and fee measures on the ballot at once. Faced with this, affected cities, counties and special districts are being forced to plan for potential revenue loss by reducing expenditures.

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<sup>12</sup> By contrast, Proposition 218, which added article XIII C in November 1996, gave local governments two years to reenact nonconforming taxes, which meant they did not have to call special elections. (Cal. Const., art. XIII C, § 2, subd. (c).)



The parties in *Weber* dispute exactly how many taxes would be implicated by this retroactivity clause, but they agree that at least 26 local measures throughout the state would have to be reenacted, putting at least \$830 million in annual local tax revenues at risk.

The scope and reach of the retroactivity provision is unclear, however, because several of the substantive provisions of the Measure are unclear, requiring policymakers to guess at its meaning. For example, the Measure proposes to amend articles XIII A and XIII C to require that the ballot materials for any state or local tax include “the duration of the tax,” whereas only the amendment to article XIII A requires that a statewide tax “Act” – but not the ballot materials – include “[a] specific duration of time that the tax will be imposed . . . .” (Measure, Sec. 6, proposed art. XIII C, § 2, subd. (d)(2); Sec. 4, proposed art. XIII A, § 3, subd. (b)(1)(A), (b)(2)(B).) Notwithstanding the difference in language, some local officials have interpreted the Measure to require that local taxes passed without a sunset date be resubmitted to the voters.<sup>13</sup> If the Measure passes, voters and local officials would have to wait until the courts resolve the duration issue. Because that could occur after the one year the Measure permits for taxes to be resubmitted for voter approval, some local officials will feel compelled to submit all affected taxes that were passed without sunset clauses with new sunset dates for voter approval. This could result in numerous unnecessary ballot measures and elections if the courts rule that sunset dates are not required.

Depending on how these ambiguities are resolved, Petitioners estimate that there could be as many as 102 local taxes in 90 jurisdictions at risk, implicating \$1.3 - \$1.9 billion in annual local revenue. Petitioners have also identified 87 bond measures in 81 jurisdictions that might have to be reenacted, and 15 state taxes.<sup>14</sup>

In addition to these many measures, state and local officials will have to examine every administratively enacted fee increase made in the nearly three years implicated by the retroactivity clause – from local library overdue fines to state-imposed penalties for oil spills – to determine whether it is an “exempt charge” that must be reenacted legislatively. If there is doubt about whether a charge is an “exempt charge” or a “tax,” the jurisdiction may have to hold an election on that charge too.

The fact that the Supreme Court issued an order to show cause in the *Weber* matter suggests that the Court has determined that preelection review is appropriate in this case. Neither party has taken that possibility for granted, however, and merits briefs by all parties address the propriety of reviewing the Measure now as opposed to after the election.

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<sup>13</sup> See, e.g., City of Sebastopol City Council Meeting, March 7, 2023, Agenda Item #5 at pp. 1-7, <https://ci.sebastopol.ca.us/wp-content/uploads/2023/04/Agenda-Item-Number-5-Opposition-of-CA-Business-Roundtable-Ballot-Measure-Relating-to-City-UUT.pdf>.

<sup>14</sup> The Declaration of Inez Kaminski in Support of Emergency Petition for Writ of Mandate, which is included in the materials accompanying this paper, identifies these measures.

## B. Petitioners Have Challenged The Measure As An Unlawful Revision

The voters' initiative power is substantial but not unlimited. The Constitution only allows voters to amend the Constitution; they cannot revise it. (Cal. Const., art. II, § 8(a).) A ballot initiative constitutes an unlawful qualitative revision of the Constitution if it would “*make a far-reaching change in the fundamental governmental structure or the foundational power of its branches as set forth in the Constitution.*” (*Strauss v. Horton* (2009) 46 Cal.4th 364, 444 (*Strauss*), emphasis added; *Raven v. Deukmejian* (1990) 52 Cal.3d 336, 341 (*Raven*).) Petitioners argue that the Measure would do both.<sup>15</sup>

Significantly, the difference between an amendment and a revision “does not turn on the relative importance of the measure but rather upon the measure’s scope . . . .” (*Strauss, supra*, 46 Cal.4th 364, 447.) Consequently, deeply significant changes have been deemed to be amendments rather than revisions because, however significant the changes might be to substantive rights or governmental processes, the changes would not broadly impact the fundamental structure of government or the foundational powers of its branches. (See, e.g., *id.* at pp. 442-443, 457 [Proposition 8, which provided that only marriages between a man and a woman are valid, was not a revision]; *Amador Valley Joint Union High School Dist. v. State Bd. of Equalization* (1978) 22 Cal.3d 208, 228 (*Amador Valley*) [Proposition 13, which imposed significant changes to the state and local tax systems, was not a revision].)

Yet in *Raven v. Deukmejian, supra*, 52 Cal.3d 336, 352, described further below, the Supreme Court invalidated an initiative that sought to vest certain state judicial powers in the United States Supreme Court. This is the only time in the 112-year history of the initiative in California that a measure has been struck down as an unlawful qualitative revision. The *Weber* Petitioners argue that the Measure is so sweeping and unprecedented that it must be the second. The Measure’s Proponent argues that the Measure is nothing more than an amendment that merely builds upon past initiative measures like Propositions 13 and 218.

### 1. The Measure Changes Core Legislative Powers

“[T]he core functions of the legislative branch include passing laws, levying taxes, and making appropriations.” (*Carmel Valley Fire Prot. Dist. v. California* (2001) 25 Cal.4th 287, 299 (*Carmel Valley*).) The Measure targets two of these core powers by revoking the Legislature’s power to levy new or increased taxes, and revoking the Legislature’s power to appropriate the revenue from special taxes for purposes that differ from those originally articulated by the Legislature.

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<sup>15</sup> A ballot measure might also be an unlawful *quantitative* revision. A quantitative revision is an “enactment which is so extensive in its provisions as to change directly the ‘substantial entirety’ of the Constitution by the deletion or alteration of numerous existing provisions.” (*Strauss, supra*, 46 Cal.4th 364, 427.) The Measure has not been challenged as a quantitative revision.

The *Weber* Petitioners argue that these changes – standing alone – constitute a revision under *Raven v. Deukmejian, supra*, 52 Cal.3d 336.<sup>16</sup> At issue in *Raven* was a challenge to a provision of Proposition 115 providing that California courts would have to construe the state constitutional rights of criminal defendants consistently with the federal courts’ construction of parallel rights under the United States Constitution. In other words, it “would vest all judicial interpretive power, as to fundamental criminal rights, in the United States Supreme Court.” (*Id.* at p. 352, emphasis omitted.)

The *Raven* Court described this change as “devastating” because it ensured that criminal defendants in California could have no greater constitutional rights under the California Constitution than afforded by the federal Constitution. (*Raven, supra*, 52 Cal.3d 336, 352.) In doing so, the initiative implicated both fundamental constitutional rights and the independence of the California Constitution and its judiciary. The Court acknowledged that California courts already defer to United States Supreme Court interpretations when construing language in the state Constitution that is similar to language in the federal Constitution unless there are “cogent reasons” to depart from federal precedent. (*Id.* at p. 353.) Nevertheless, the California judiciary retains the ability to construe the California Constitution differently and had done so at least eight times in the previous sixteen years. (*Id.* at pp. 353-354.)

The *Raven* Court declared that Proposition 115 would require deference to the federal courts “for the first time in California’s history.” (*Raven, supra*, 52 Cal.3d 336, 354.) It would “substantially alter[ ] the preexisting constitutional scheme” the courts used to enforce state constitutional protections and contradict the principle that the judiciary “must possess the right to construe the Constitution in the last resort.” (*Id.*, quoting *Nogues v. Douglass* (1857) 7 Cal. 65, 70.) The Supreme Court therefore concluded that Proposition 115 was an invalid constitutional revision. (*Raven*, at pp. 354-355.)

The *Weber* Petitioners argue that the same analysis applies to the CBRT Measure. The changes it would make to the Legislature’s core powers would also be imposed “for the first time in California’s history,” would “substantially alter[ ] the preexisting constitutional scheme” the Legislature uses to fund the entire state government, and would contradict the principle that the Legislature’s power over taxes is “supreme.” (See *Raven, supra*, 52 Cal.3d 336, 354.) However, while Proposition 115 would have revoked one aspect of one core judicial power – the interpretive power relating to the constitutional rights of criminal defendants – the Measure would revoke one of the Legislature’s core powers in its entirety, by transforming the power to impose taxes into the ability merely to propose taxes, and revoke aspects of two other core legislative powers – the powers to appropriate and make laws. (See *Carmel Valley, supra*, 25 Cal.4th 287, 299.) Thus, the changes the Measure would make to the Legislature’s powers are at least as sweeping as the changes Proposition 115 would have made to the judiciary’s power. The fact that there is no emergency exception in the Measure to allow the

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<sup>16</sup> These changes are made more sweeping by the fact that the Measure expands the definition of taxes, placing many additional charges beyond the power of the Legislature.

Legislature to respond to something like the Northridge Earthquake or the Great Recession makes this especially troubling.

The Measure's Proponent argues that the Measure merely amends the Constitution, and that any alleged revisionary affects are based on the *Weber* Petitioners' speculation about circumstances that may never come to pass. In particular, the Proponent relies on *Amador Valley, supra*, 22 Cal.3d 208, in which the Supreme Court rejected a challenge to Proposition 13 on the grounds that the measure revised the Constitution by, among other things, requiring local voters to approve special taxes. The Proponent argues that since the Court determined that Proposition 13 did not constitute a revision despite imposing a voter approval requirement for local special taxes and property taxes exceeding the one percent tax Proposition 13 allows, then the less-far reaching Measure cannot be a revision. The Measure's Proponent bolsters this argument by citing Proposition 13's other provisions, including its requirement that the Legislature approve taxes with a two-thirds majority and its changes to property tax assessments and tax rates.

The *Weber* Petitioners respond that the *Amador Valley* Court's revision analysis is narrower than suggested by the Proponent's argument because the Court only considered the arguments presented by the *Amador Valley* petitioners, which centered on home rule and republican form of government issues not raised in *Weber*. Furthermore, the *Weber* Petitioners argue that the Measure, considered in its entirety, goes far beyond Proposition 13, as further described below. It affects **all** state taxes, not just some of them, and defines tax so broadly as to include nearly all government revenues.

## **2. The Measure Shifts Substantial Powers Between The Legislative And Executive Branches**

The courts have declared in past cases the central importance of the executive branch's role in modern governance. The Supreme Court declared nearly a century ago that "the ever-increasing multiplicity and complexity of administrative affairs" had made it "imperative" to allow the legislative branch to entrust "many quasi-legislative and quasi-judicial functions . . . to departments, boards, commissions, and agents." (*Gaylord v. Pasadena* (1917) 175 Cal. 433, 436 (*Gaylord*)).) The Court therefore refused to deprive a local legislative branch of the ability to delegate power to its executive branch, declaring that doing so would "stop the wheels of government and bring about confusion, if not paralysis, in the conduct of the public business." (*Id.* at p. 437, quoting *Union Bridge Co. v. United States* (1906) 204 U.S. 364, 383; *E. Bay Mun. Util. Dist. v. Dept. of Pub. Works* (1934) 1 Cal.2d 476, 479 [same].) A court of appeal has more recently affirmed the "imperative" role administrative agencies play. (*Schabarum v. Cal. Legislature* (1998) 60 Cal.App.4th 1205, 1223.) Indeed, the *Schabarum* court proclaimed that any effort to return to a form of government in which the Legislature and courts are forced to perform legislative and judicial functions without the aid of administrative agencies "may well be impossible, without risking paralysis in the conduct of the public business . . . . *But it is certainly too late in the day to return to such a form of government without effecting a constitutional revision.*" (*Id.* at p. 1224, emphasis added.)

The *Weber* Petitioners argue that the Measure risks the kind of “paralysis in the public business” that the *Gaylord* and *Schabarum* courts disallowed. It would reorder the balance of powers by effectively (1) prohibiting the Legislature from delegating certain powers to the executive branch; (2) prohibiting the executive branch from exercising certain delegated powers; and (3) compelling the Legislature to perform administrative acts. Specifically, the Legislature would lose the power to delegate, and the executive branch would lose the authority to perform, virtually any task resulting in “any taxpayer” paying any new or increased amount of money – whether those funds are deemed a “tax” or an “exempt charge.” Again, this means that the executive branch would lose the power to do much that it does today.

For example, state and local legislative branches would lose the power to delegate to the executive branches the duty to establish regulatory and other fees that are not deemed “taxes” under current law or the Measure, like the rent-registration fees set by many rent boards. Because the Measure sweeps broadly, the Measure would also revoke the power for executive agencies to increase any payment, including agency rules, regulations, rulings, executive orders, opinion letters, and even acts of enforcement and interpreting laws. The *Weber* Petitioners therefore argue that these provisions of the Measure – standing alone – constitute a revision.

This would drastically reduce the power of the executive branch – and correspondingly impose substantial new duties on the legislative branch and the electorate. The Department of Tax and Fee Administration could lose the authority to adjust taxes to account for changes in the cost of living. (See Rev. & Tax Code, § 60050.) The California Public Utilities Commission could lose its authority to approve the rates that each electric utility charges its customers. (See Pub. Util. Code, § 451.) Municipal utilities could lose the authority to impose late charges when customers fail to pay their trash collection or water service bills. (See *id.*, § 12811.) Local agency staff would no longer be able to adjust or impose fees, presumably including fees for trash collection and water service, sewer connections, permits and licenses, cemeteries, and parks and recreation. The Measure would transform day-to-day governmental activities in California, requiring that the legislative body and (for charges deemed “taxes”) the voters to perform work that administrative agencies have done for decades.

The Measure’s Proponent emphasizes that the Measure does nothing more than “extend” legislative decisions that have already been made. That is, the Proponent points out that state and local legislative bodies regularly set certain fees themselves (as by annual master-fee resolutions) rather than delegating that authority to executive agencies. Furthermore, the Proponent argues that the Court’s pronouncement in *Schabarum* that it would require a constitutional revision to prevent the delegation of legislative authority does not apply to the Measure since *Schabarum* was referring to the revocation of all legislative delegations of power, while the Measure only addresses delegations relating to taxes and fees. In short, the Proponent argues that these provisions are not sufficiently far-reaching to constitute a revision rather than an amendment.

The *Weber* Petitioners have responded by pointing out that *Raven* rejected similar arguments when it found that Proposition 115 was a revision. That is, the *Raven* Court acknowledged that

California courts sometimes voluntarily defer to federal courts when interpreting the scope of the state constitutional rights of criminal defendants, but nevertheless concluded that mandating such deference constituted a far-reaching change in the judicial power. Similarly, the *Raven* Court found that Proposition 115 revised the Constitution even though that measure only targeted one aspect of the judicial power rather than all judicial power. The *Weber* Petitioners argue that, under *Raven*, a revision occurs when a measure revokes part of a core government power, even if it leaves other similar powers intact.

### **3. The Measure Restructures The Voters' Fiscal Powers**

The *Weber* Petitioners further argue that the Measure also makes far-reaching changes to the voters' foundational powers and, in doing so, to the fundamental governmental structure in this State.

On the one hand, the Measure reduces the power of local voters to increase their own taxes by (1) revoking their power to amend local charters to increase taxes, (2) requiring supermajority rather than simple majority votes to approve voter-initiated increases in special taxes, and (3) forbidding advisory measures to accompany general tax proposals. On the other hand, the Measure increases the voters' power to reject new or increased taxes and charges as described above. It would also newly subject large categories of state and local charges to referendum. In these ways, the initiative power would favor some voters over others.

Considered with other changes described above, these changes mean that *nearly every state and local revenue-raising measure would be subject to voter approval*, either as a tax that requires voter approval, or an exempt charge subject to the voters' power of referendum.

Finally, by compelling voters to assume a more active role in state government, the Measure would have implications for the future of governance. Taxation is both highly complex and essential to the adequate functioning of the State. Developing sound tax policy therefore requires time and expertise. California's full-time Legislature and other elected bodies have the capacity to implement tax policy because legislators can spend time reviewing a law and debating its impact, all while being advised by professional legislative staff and robust public input. Not so with voters. As it is, voters have neither the time nor resources at their disposal to comprehensively study their crowded ballots, as the courts have acknowledged. Indeed, the courts have observed that "even the most conscientious voters may lack the time to study ballot measures with [a high] degree of thoroughness." (*Taxpayers to Limit Campaign Spending v. Fair Pol. Practices Comm'n* (1990) 51 Cal.3d 744, 770; accord, *Schmitz v. Younger* (1978) 21 Cal.3d 90, 99 (dis. opn. of Manuel, J.); *B.M. v. Superior Court* (2019) 40 Cal.App.5th 742, 768, fn. 4 (dis. opn. of McKinster, J.) [expressing doubt "that initiative voters read the actual text of the proposed laws" based on cited authorities].) The Measure would amplify these concerns.

Moreover, under the Measure, the work of democracy would demand more from voters than it does today, both in terms of the number of decisions to be made and their complexity. Future

ballots would include more ballot measures presenting technical questions like what formulas to use to ensure local property taxes are sufficient to pay local bond obligations and whether to increase sewage fees to prevent the deterioration of a local wastewater treatment plant. Such added burdens create the risk of rising voter fatigue and frustration, with corresponding declines in voter engagement and turnout.

The Measure's Proponent argues that many of the Measure's changes have precedents in past measures, including the voter approval requirements in Propositions 13 and 218. The Proponent also asserts the Court should reject any effort to withhold this Measure from the voters based on the courts' well-established duty to safeguard the voters' "precious" right of initiative. (*Associated Home Builders etc., Inc. v. City of Livermore* (1976) 18 Cal.3d 582, 591.) The *Weber* Petitioners argue that no past measure has proposed anything this sweeping, and honoring the power of the initiative means respecting its constitutional limits. In *Weber*, that requires the Court to safeguard the limits on the voters' power by preventing them from having to vote on a Measure that would only have to be struck down later.

### **C. The *Weber* Petitioners Contend The Measure Would Gravely Interfere With Essential Government Services**

California courts have held that the initiative or referendum process cannot be used if it would seriously impair essential government functions. (*Rossi v. Brown* (1995) 9 Cal.4th 688, 703, citing *Geiger v. Bd. of Supervisors* (1957) 48 Cal.2d 832, 839-840.) Only recently, in *Wilde v. City of Dunsmuir, supra*, 9 Cal.5th 1105, the Supreme Court held that a city's increase in water rates was not subject to referendum because it was exempt as a tax within the meaning of the referendum provision of the state Constitution, at article II, section 9. In doing so, the Court declared: "[I]f essential governmental functions would be seriously impaired by the referendum process, the courts, in construing the applicable constitutional and statutory provisions, will assume that no such result was intended." (*Id.* at p. 1123, quoting *Geiger*, at p. 839.)

*Wilde* acknowledges that a government's ability to manage its fiscal affairs is arguably the most essential government function, because without it, government services could not be provided at all. The *Weber* Petitioners argue that the Measure endangers those essential functions because it makes their funding hinge on voter approval, either expressly for new or increased taxes or indirectly by making new fees subject to referendum because they must be passed by a legislative body. In either case, even if the voters ultimately approve a tax or fee increase, the delay inherent in obtaining voter approval itself endangers essential government functions.

According to the *Weber* Petitioners, this risk can be understood in the historical context of the initiative process, including earlier amendments that narrowed the ability of state and local government to raise and spend funds. The initiative was not meant to interfere with a legislative body's overall ability to manage the government's fiscal affairs. When California voters adopted the initiative process in 1911, they expressly stated that "[t]he legislative power of this state shall be vested in a senate and assembly which shall be designated 'The legislature

of the State of California,' but the people reserve to themselves the power to propose laws and amendments to the constitution . . . ."<sup>17</sup> As this language indicates, "[t]he original concept of the initiative was to provide a check on elected officials, not to replace representative government."<sup>18</sup>

This was especially true with respect to matters involving taxation and fiscal affairs. The 1911 amendments left intact former article XIII of the Constitution, which was titled "Taxation" and which ended with the requirement that "[t]he Legislature shall pass all laws necessary to carry out the provisions of this article."<sup>19</sup> The Legislature also retained authority to authorize taxation by local governments. (Cal. Const., former art. XI, § 12, now art. XIII, § 24, subd. (a).) Moreover, the 1911 amendments not only declared taxation beyond the reach of the referendum power, but they provided that tax levies and appropriations for the usual current expenses of the State go into effect immediately. This safeguard ensures that legislative bodies can respond to a crisis by raising the money necessary to deal with it. Yet the Measure would eliminate these protections for many revenue-raising mechanisms — without an emergency exception.

Moreover, the *Weber* Petitioners argue that the Measure's effects must be understood in the context of existing restrictions on the revenue-raising ability of state and local government. The Supreme Court has described the power to collect and appropriate state revenue as "one peculiarly within the discretion of the Legislature,"<sup>20</sup> and for nearly 100 years, that authority was largely unrestricted. The passage of Proposition 13 in 1978 marked a shift, followed by Proposition 62 in 1986, Proposition 218 in 1996, and Proposition 26 in 2010.

In roughly the same time period, these revenue-raising restrictions were accompanied by limits on legislative spending. In 1990, the voters added "the Gann limit" to the Constitution to limit state and local appropriations from the proceeds of taxes and require the Legislature to provide funding whenever the State "mandates a new program or higher level of service on any local government . . . ." (Cal. Const., art. XIII B, § 6, subd. (a).) The pressure on state revenues therefore increased as the Legislature attempted to fill in gaps in local services caused by the loss of revenues under Proposition 13.

Further amendments limited how the Legislature could spend state revenues. The most significant was Proposition 98, which sets a minimum annual funding level for public education.

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<sup>17</sup> Cal. Const., former art. IV, § 1, added by Sen. Const. Amend. No. 22, approved by voters, Special Elec. (Oct. 10, 1911), [https://repository.uclawsf.edu/cgi/viewcontent.cgi?article=1006&context=ca\\_ballot\\_props#page=3](https://repository.uclawsf.edu/cgi/viewcontent.cgi?article=1006&context=ca_ballot_props#page=3) [measure placed on the ballot by the Legislature].

<sup>18</sup> Cain & Noll, *Constitutional Reform in California* (1995) at pp. 288-289.

<sup>19</sup> Cal. Const., former art. XIII, § 13, now art. XIII, § 33, available at <https://archives.cdn.sos.ca.gov/collections/1879/archive/1879-constitution.pdf#page=18>.

<sup>20</sup> *Carmel Valley*, *supra*, 25 Cal.4th 287, 299, internal quotation marks omitted.



(Cal. Const., art. XVI, §§ 8, 8.5.) Because of restrictions on local taxes imposed by Propositions 13, 62, 218, and 26, much of the minimum guarantee must be supplied by the State. Additional initiatives placed more restrictions in the Constitution.

Although these constitutional amendments passed in the last forty-five years have altered the Legislature's authority over taxing and spending, the Legislature has retained its plenary power to tax and to authorize state and local agencies to raise fees. The Measure would change that, making it different in kind from those prior measures in its impacts on the State's ability to provide essential governmental functions at all levels of government.

The Proponent of the Measure disagrees that the Measure would imperil government services, pointing out that voters routinely approve new state and local taxes, and that state and local governments have weathered many crises in the past without imposing new taxes.

The *Weber* Petitioners respond by noting that voters also routinely disapprove new state and local taxes, and the State has never had to weather a crisis with these particular far-reaching restrictions in place. Specifically, the State has become a backstop for local governments since past measures have curbed their taxing abilities, but that safety net would disappear with the Measure's passage. It would then be only a matter of time until state and local governments confront circumstances in which new revenues would not be available to address an immediate crisis or long-term changes.

### **III. PREPARING FOR THE POSSIBILITY THAT VOTERS WILL APPROVE THE MEASURE**

If they have not done so already, cities may wish to begin preparing for the Measure's possible passage given the broad sweep of the Measure's retroactivity provision – all taxes or fees enacted since January 1, 2022 – and the short amount of time that state and local governments would have to re-enact such measures to ensure compliance with the Measure – only 12 months after the effective date of the Measure.

The *Weber* case will likely be resolved by June 27, 2024. That is the date identified by the Petitioners as the final day for the Secretary of State to formally place the Measure on the ballot in time to print ballots for the Fall election. Neither the respondent Secretary of State nor the Proponent have objected to or disagreed with that date. Nevertheless, it remains possible that the Supreme Court could choose to decide the case later in the summer or choose to delay its decision until after the November election.

Cities should consider taking the following steps:

- Identify all tax ordinances enacted from January 1, 2022 through the present in the city, and any tax ordinances that might be enacted before the Measure's anticipated effective date.

- Identify all actions taken by agencies in the jurisdiction from January 1, 2022 through the present that could be considered a change in “local law” under the Measure and any such actions that might be taken before the Measure’s anticipated effective date. Note that the Measure defines “local law” broadly to include without limitation “any ordinance, resolution, ruling, opinion letter, or other legal authority or interpretation adopted, enacted, enforced, issued, or implemented by a local government.” This might be understood as akin to a “change of methodology” for the implementation of a tax under Proposition 218. (Gov. Code, § 53750, subd. (h)(2)(B)).
- Analyze whether the identified taxes and changes in local law would be considered a tax or an exempt charge under the Measure to determine which procedures the Measure requires to enact that tax or exempt charge.
- Consider whether and to what extent the city wishes to conform future tax ordinances or changes in local law to the Measure’s requirements. In particular, exempt charges should be adopted by ordinance (Measure, Sec. 6, proposed art. XIII C, § 2, subd. (e)) and ballot labels for general taxes must include the words “for general government use.” (*Id.*, subd. (d)(3).)
- Analyze whether the identified taxes and changes in local law that have already been adopted or taken were done so in compliance with the Measure.
- Consider what steps the city will take, if necessary, to ensure any non-compliant taxes or changes in local law are made to comply with the Measure. Such steps could include determining whether to seek any clarification from the courts if it is unclear how the Measure would apply; deciding whether to call a special election; and making budget cuts or adjustments to prepare for the potential loss of revenue.

### CONCLUSION

In the event that *Legislature v. Weber* does not succeed in removing the Measure from the November 2024 ballot, the voters will decide whether the Measure becomes law. Whether that happens will depend in part on whether the voters approve Assembly Constitutional Amendment 13. As described further in “Selected Topics In The Law Of Municipal Finance” by Michael G. Colantuono (Spring 2024), the Legislature has placed ACA 13 on the November ballot to mandate that any measure imposing a super-majority voting requirement must win the approval of that same super-majority of voters in order to become law. Accordingly, if the voters approve ACA 13, the Measure would require the approval of at least two-thirds of the voters. City Attorneys are advised to continue monitoring these developments to ensure that they are prepared to conform past and future enactments with the Measure’s requirements.



# Ethics Complaints against a Council Member

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## **Difficult Conversations: Complaints Against a Councilmember**

**By Steven Miller**

Few issues can be as sensitive and disruptive as a complaint lodged against a councilmember. Complaints against councilmembers often differ from more common employment-related complaints against a staff member in that they usually raise issues of ethics, such as conflict of interest violations, violation of California open meeting laws, election law violations, misuse of public resources, and/or interfering with staff functions and related bad behavior towards staff or members of the public.

These complaints, and their resolutions, are often shrouded in secrecy, without the transparency that may be necessary to learn any meaningful lessons that could help a city chart a course in the aftermath of a complaint. A complaint, of course, presents legal challenges for a City. But even if a complaint does not allege significant fraud or other criminal behavior, a complaint alleging councilmember ethical misconduct, or even just plain poor behavior, presents political and practical challenges that, at a minimum, may cause an enormous distraction from the administration of the city and its important mission. In the worst case scenario, the fallout from a complaint can underscore failures of a city's ethical culture and can fray the public trust that is essential to any city government—once lost, the public trust is very difficult to regain.

This paper suggests a framework for how a city attorney might help a city respond to a complaint lodged against a councilmember. Because the substance of each complaint is unique, this paper focuses on procedural hurdles and challenges, both legal and practical, that are common and applicable to most situations. Even though I am a lawyer, I suggest an approach that is guided not only by a traditional legal risk assessment, but that focuses on maintaining and rebuilding public trust.

I suggest that the crucial question to ask yourself at the outset of the process—and then to check in again and again—is how to define success. What is the best or desired outcome from this complaint? This is often not an easy question to answer. But in addition to the immediate need to protect the city from legal risk, how a city attorney advises a city to respond to a complaint could reflect, and impact, the city's culture, perhaps for years to come.

### **A. Legal Framework**

First, of course, you must protect the city legally and comply with all legal requirements. Putting aside for the moment the substance of the complaint, any complaint raises a number of legal procedural issues that a city attorney must always keep in mind in order to comply with foundational statutory municipal laws. While city attorneys are fluent in these municipal laws, a complaint presents sophisticated and challenging applications that can test even the most expert practitioner. It is almost certain that a complaint will raise issues requiring careful consideration and application of three foundational

municipal laws: the Brown Act, the Public Records Act, and conflict of interest laws (for example, the Political Reform Act).

1. Brown Act. After a complaint has been lodged, a City Attorney will inevitably be faced with pressures to allow the city council to consider the complaint privately in closed session. The Brown Act, codified at Government Code section 54950 et seq., requires that a city council deliberate and conduct its business in meetings that are open to the public, unless an exception exists that allows for consideration in closed session. (Gov. Code §§ 54953(a), 54954.5.) If a particular topic is not listed in the Brown Act as a reason for a closed session, then the legislative body must discuss the matter in public, even if the topic is controversial, sensitive, or embarrassing. (Id.) Two closed session exceptions are frequently raised as possible avenues to a private discussion of a complaint.

The Brown Act provides a closed session exception “to consider the appointment, employment, evaluation of performance, discipline, or dismissal of a public employee or to hear complaints or charges brought against the employee.” (Id. § 54957(b).) The purpose of this personnel exception is to allow the legislative body to engage in a full and candid discussion about an employee or potential employee. (63 Ops.Cal.Atty.Gen. 153 (1980).) In order to hold a closed session to discuss an employee, the legislative body must have the power “to appoint, employ, evaluate the performance of, discipline, or dismiss” that employee. (*Gillespie v. San Francisco Public Library Commission* (1998) 67 Cal.App.4th 1165; 85 Ops.Cal.Atty.Gen. 77 (2002).) City councilmembers are not included as “employees” for purposes of the personnel exception, so this exception does not allow the city council to discuss a complaint in closed session solely regarding a member of the legislative body. (Gov. Code § 54957(b)(4).)

Another closed session exception is to discuss matters related to litigation. A complaint by itself will not ordinarily meet the Brown Act definition of “litigation,” namely “any adjudicatory proceeding, including eminent domain, before a court, administrative body exercising its adjudicatory authority, hearing officer, or arbitrator.” (Id. § 54956.9.) But the Brown Act includes an exception to confer with legal counsel regarding “pending litigation” even if “litigation” has not been initiated formally. (Id. § 54956.9(e).) The pending litigation exception is narrowly construed and authorizes legal counsel to meet in closed session with the legislative body to inform them of the “existing facts and circumstances,” as defined in Government Code section 54956.9(e), that lead to a significant exposure to litigation against the local agency. (Id.) Generally, the “existing facts and circumstances” must be publicly disclosed, unless they are privileged written communications or not yet known to a potential plaintiff. (Id.) If a complaint includes a threat of litigation that rises to a level eligible for a closed session, a city attorney should be aware of reporting requirements under the Brown Act, as well as the complex issue of whether to allow the accused councilmember to participate in any closed session discussion. The details of the pending litigation exception is beyond the scope of this paper. But in my experience, it is unusual for a complaint to include the kind of threat of litigation that meets the requirements of the Government Code.

If a council may not meet in closed session, councilmembers will nevertheless often want to discuss a complaint amongst themselves privately. This raises the common Brown Act issue of avoiding a serial meeting. Again, this paper is not a guide to the Brown Act, and it is enough to caution practitioners that serial meeting issues will inevitably arise while managing a complaint against a councilmember. Outside of a proper Brown Act meeting, “[a] majority of the members of a legislative body shall not . . . use a series of communications of any kind, directly or through intermediaries, to discuss, deliberate, or take action on any item of business that is within the subject matter jurisdiction of the legislative body.” (Id. § 54952.2(b)(1).) These types of meetings are known as “serial meetings.” Serial meetings may occur by either a “daisy chain” or a “hub-and-spoke.”

Notwithstanding the difficulty of justifying a closed session and the prohibition against serial meetings, a city attorney will need to communicate with the council in some fashion. A city attorney may communicate with the council through confidential and privileged written memoranda. But it is important to keep in mind the narrowly drawn permission, authorized by Government Code section 54952.2, to conduct separate briefings of individual councilmembers, so long as the city attorney does not communicate to one councilmember the comments or position of any other councilmember. (Id. § 54952.2.)

In sum, depending on the specifics of a complaint, it may be difficult to justify a closed meeting discussion of a complaint. Part of the city attorney’s job will be to explain to councilmembers seeking private disposition of a complaint that such confidentiality may not be possible. A city attorney will also have to manage the complaint process so as to avoid serial meetings between councilmembers.

2. Public Records Act. Responding to a complaint will inevitably result in the creation of a number of documents and a city attorney should, at the outset of the complaint process, keep in mind the requirements of the California Public Records Act (PRA). The PRA, codified at Government Code section 7920.000 et seq., is a key part of California’s commitment to open government. The PRA requires that public records be disclosed to the public upon request unless there are statutory exemptions that would prevent doing so. (Gov. Code § 7922.530.)

Public records means “any writing containing information relating to the conduct of the public’s business prepared, owned, used, or retained by any . . . local agency regardless of physical form or characteristics.” (Id. § 7920.530(a).) Communications that consist primarily of personal information generally are not considered to be public records. (*City of San Jose v. Superior Court* (2017) 2 Cal.5th 608, 618-619.) However, records on an employee or public official’s personal device or account, such as emails and text messages related to public business, will be considered to be public records, and thus subject to disclosure under the PRA. (Id.) A related difficulty arises with the limitations on a public agency’s ability to search or compel the production of materials

from private devices where the owner official is unwilling to voluntarily comply with requests.

A majority of the PRA's exemptions to disclosure protect individual privacy interests (see e.g., Gov. Code §§ 7927.700, 7925.000, 7928.300, etc.). Some exemptions relevant to an ethics investigation, such as the deliberative process privilege, are based on the public interest exemption, which is a balancing test in which the public agency must demonstrate that "on the facts of a particular case the public interest served by not disclosing the record clearly outweighs the public interest served by disclosure of the record." (Id. § 7922.000.)

As part of any response to a complaint against a councilmember, it is close to certainty that a city will receive a request for records under the PRA for documents concerning the complaint. In advising on how best to respond to such a records request, the city attorney will want to evaluate the following exceptions to disclosure—depending of course on the specific record(s) requested:

- Attorney-client communications. The attorney-client privilege preserves the confidential relationship between attorney and client and protects all confidential communications between attorney and client, including attorneys within a firm or in-house legal department, from being disclosed. (Id. § 7927.705; *Costco Wholesale Corporation v. Superior Court* (2009) 47 Cal.4th 725, 733; *Fireman's Fund Insurance Company v. Superior Court* (2011) 196 Cal.App.4th 1263, 1272-1275; *Clark v. Superior Court* (2011) 196 Cal.App.4th 37, 49-52.) In the context of a complaint, there are sometimes blurred lines as to who is the "client"—in particular with regard to communications between the city attorney and an accused councilmember.
- Deliberative process privilege. The deliberative process privilege protects concerns that communications and other documents may be withheld if the public agency can demonstrate that the public interest served by withholding the record clearly outweighs the public interest served by disclosing the record. (Gov. Code § 7922.000; *Times Mirror Co. v. Superior Court* (1991) 53 Cal.3d 1325, 1338.) The purpose of the deliberative process privilege is to protect decisionmakers' candid communications. While always fact specific, the deliberative process privilege is an important one to consider in responding to a records request under the PRA.
- Drafts. Preliminary drafts, notes, or interagency or intra-agency memoranda that are not retained by the public agency in the ordinary course of business, if the public interest in withholding those records clearly outweighs the public interest in disclosure. (Gov. Code § 7927.500.) This exemption provides privacy for certain documents pending local agency action, but the materials must be discarded; preliminary materials that are not regularly discarded must be disclosed. (*Citizens for a Better Environment v. Department of Food and Agriculture* (1985) 171 Cal.App.3d 704, 714.) Unless a city routinely destroys records under its

records retention policy, it may be difficult to consider a document a draft under the PRA.

- Public interest exemption. The “public interest” or “catchall” exemption is a balancing test that allows local agencies to withhold a record if the agency can demonstrate that on the facts of the particular case, the public interest served by withholding the record outweighs the public interest served by disclosing the record. (Gov. Code § 7922.000.) Like any balancing test, this one is heavily fact specific. But responding to a records request relating to a complaint may implicate this exception in very narrow circumstances.

3. Conflicts of Interest. A question that routinely arises in response to a complaint is whether the accused councilmember is allowed to participate in any council discussions and deliberations on the matter (whether in closed or open session). Put another way, does an accused councilmember have a disqualifying conflict of interest that prohibits the councilmember’s participation in council discussions and deliberations? This issue is particularly sensitive if a city council meets in closed session to discuss a complaint. But it also arises if a city attorney is communicating with the council by way of confidential memoranda. Like any issue involving conflicts of interest, certain aspects to this question have easy answers, but there are complexities that a city attorney should expect to arise.

The Political Reform Act, codified at Government Code section 81000 et seq., prohibits public officials from making, participating in making, or influencing any governmental decision in which the public official has a financial interest. (Gov. Code § 87100.) The regulations implementing the Political Reform Act define “participating in a decision” broadly to mean “provid[ing] information, an opinion, or a recommendation for the purpose of affecting the decision without significant intervening substantive review.” (Cal. Code Regs., tit. 2 § 18704(c).) Assuming that there is no formal litigation associated with the complaint to which the accused councilmember is a party, and assuming that there are no facts involving a councilmember’s compensation, it is extremely unlikely that an accused councilmember will have the kind of financial interest that raises issues under the Political Reform Act. But that is not the end of the conflict of interest analysis.

The common law conflict of interest doctrine “prohibits public officials from placing themselves in a position where their private, personal interests may conflict with their official duties.” (92 Ops.Cal.Atty.Gen. 19, 7 (2009).) “A public officer is impliedly bound to exercise the powers conferred on him with disinterested skill, zeal, and diligence and primarily for the benefit of the public.” (Id. at 8.) These common law principles require a public official to exercise the powers and authority of her position free from personal bias. There are no implementing regulations or clear guidelines regarding this common law doctrine. But a city attorney will want to advise an accused councilmember about this doctrine. As discussed later in this paper, an accused councilmember has certain due process rights that require an opportunity to be heard in any enforcement proceeding that a council may undertake. Therefore, a city attorney



will have to carefully balance the accused councilmember's rights with potential conflicts of interest that may require exclusion from a particular proceeding. In my experience, limiting a councilmember's ability to participate in discussions about a complaint presents more legal and practical risks than allowing the councilmember to participate.

Finally, as with any conflict of interest issue, it is important for a city attorney to remember that the city is the client, not any individual councilmember. This is especially the case if it appears from a particular complaint that a councilmember may genuinely have interests that are not aligned with the city's. A city attorney should consider advising the accused councilmember that they may want to consult their own lawyer.

4. Local Rules and Code of Conduct. In addition to the state-wide foundational municipal laws discussed above, a city may have adopted a local substantive ordinance applicable to the specifics of a particular complaint. A city may also have adopted procedures to follow when a complaint is filed, which procedures may specifically define who is responsible for investigating a complaint and/or include specific enforcement mechanisms. In some cases, city personnel rules may have been drafted to include councilmembers and a City Attorney may have to navigate HR rules that were not designed for a complaint against a councilmember.

Many cities have adopted codes of conduct that govern council behavior at meetings, which set forth useful boundaries regarding communications between council and city staff. In the absence of a statute or ordinance that is on point to the facts of a particular complaint, the city's code of conduct will often be the basis for any findings and/or enforcement actions taken in response to a complaint.

## **B. Managing the Response to a Complaint**

Keeping in mind the legal requirements set forth in Part A of this paper, there are a number of ways a city may want to manage the process of responding to a complaint against a councilmember. The best path depends on a variety of specific facts: who the parties are, what is the nature of the complaint, how severe is the alleged conduct, and what is the political background/context of a complaint. In my experience, two key decisions should be made early in the process.

First, we attorneys like to be in control. But a complaint against a councilmember may ultimately be better managed by the council itself. A complaint will inevitably raise governance questions beyond the city attorney's control. It is best to accept and understand that limitation and help the council make decisions rather than influence every step of the process. Unless the complaint alleges facts that place the city in legal peril—and many complaints are focused on individual conduct that may not implicate the city, the best thing a city attorney can sometimes do is empower the council to take responsibility for managing a complaint against one of its members. In the long run, how a council manages its response to a complaint may actually improve its ability to govern and promote its standing in the community. Taking responsibility for

councilmember conduct in a transparent manner will reflect a commitment to a culture of high ethical behavior.

Second, a city attorney should help the council decide how to investigate the allegations of a complaint. There are essentially three options:

- A council may want to conduct an investigation itself. I often hear from mayors or councilmembers who say “let me talk to my fellow councilmember and find out what happened and we can work this out quickly and informally.” My response to such a desire is not primarily to explain the legal risks of such an approach. Rather, I emphasize that how a complaint is managed will send an important message to the public that could have lingering ripple effects for years. The city should try hard to avoid the perception (and, of course, the reality) that councilmembers are protecting each other and minimizing the importance of a complaint. To the contrary, a complaint presents an opportunity to promote and emphasize a culture of ethical transparency that could pay dividends for years. While it might save time, a quiet resolution among councilmembers may lack credibility with the public.
- A council may want the city attorney, or other staff, to conduct an investigation—and to do it quickly and cheaply. This option presents many of the same perils as a council-led investigation. In addition, it is challenging for anyone to investigate a complaint against one’s supervisor. Unless a city attorney or city manager is an elected official, it will be difficult for either of them to investigate a councilmember. And, as noted above, a local code or adopted rule may require certain staff (e.g., the City Clerk and/or City Attorney for local campaign regulations violations) to investigate and act upon certain complaints, which can further complicate efforts ensure the appearance of impartiality, as noted above.
- Generally, the best option is to hire an independent investigator to evaluate a complaint. An independent investigation will be more expensive and take more time than the two other options. But the time and money may be worth it. If a city defines success not only as resolving the specific complaint, but also promoting a culture of ethical transparency, then an independent investigation presents the most likely path to success.

Hiring an investigator may be a familiar process for a city that engages investigators in the employment context. There may be similarities between an employment investigation and an investigation into councilmember misconduct, such as interviewing witnesses and evaluating credibility for example. But an investigator of a complaint against a councilmember should have different sensitivities and a legal background beyond employment law that appreciates the ethical standards to which councilmembers are held. The role of the city attorney in hiring an investigator should be to define the scope of the investigation, be the administrative point of contact to the investigator, and then transmit the investigation report to the council.

The investigator's report may be subject to disclosure under the PRA. The analysis as to whether an investigation report is subject to disclosure is dependent on whether the disclosure would constitute an unwarranted invasion of personal privacy, which is unlikely to be the case if a complaint alleges ethical misconduct by a public official. Even if an investigation is conducted by a lawyer, the lawyer's report may not be protected under the attorney-client privilege. California's attorney-client privilege is set forth in Evidence Code section 954, which states that a client "has a privilege to refuse to disclose, and to prevent another from disclosing, a confidential communication between client and lawyer." (Evid. Code § 954.) The purpose of this privilege is to "safeguard confidential relationship between clients and their attorneys so as to promote full and open discussion of the facts and tactics surrounding legal matters." (*Costco Wholesale Corp. v. Superior Court* (2009) 47 Cal.4th 725, 732.) "Confidential communication" means "information transmitted between a client and his or her lawyer in the course of that relationship and in confidence," by confidential means. (Evid. Code § 952.) Whether an investigation report meets this definition may depend on certain facts and circumstances and is beyond the scope of this paper. However, absent clear legal exposure to the City related to the alleged councilmember misconduct, it is safer to assume an investigatory report is likely to become public and direct the investigation accordingly.

At the end of an investigation into a councilmember's alleged misconduct, a city attorney will need to advise the council as to how best to take any action resulting from any investigatory findings.

### **C. Taking Action**

At the end of an investigation, a city attorney will want to present options to the council for actions it might consider. Those options may include: referring the complaint to another entity, adopting a statement of disapproval, limiting or eliminating certain rights and responsibilities, adopting a formal censure resolution, or removing from office.

1. Referral. If an investigation discovers councilmember behavior that implicates state law, a city attorney may want to advise that the city refer the matter to another appropriate entity. For example, if a complaint implicates Government Code section 8314, which makes it unlawful for a councilmember to "use or permit others to use public resources for a campaign activity, or personal or other purposes which are not authorized by law," then it may be appropriate and applicable for the city to refer the matter to the district attorney or the Attorney General. However, the substantive law governing specific councilmember behavior is beyond the scope of this paper.

2. Council Action Short of Censure. It is often the case that an investigation confirms unethical behavior that may not rise to the level that the city wants to refer out. Or for other reasons, a city council may want to take action on its own. The first level of action a council might take involves adopting a statement, short of formal disapproval,

that distances the council from the behavior of an individual councilmember. The council might also seek to limit the powers of a councilmember, for instance, removing a councilmember from committees, restricting the councilmember's ability to communicate with staff, or refusing reimbursement for attendance at conferences. Such council actions may implicate some of the due process requirements discussed below associated with a formal censure, though the law on this point is not absolutely clear. (See *Blair v. Bethel School Dist.* (9th Cir. 2010) 608 F.3d 540, 542 [removal of board member from titular position of vice president of board did not violate the board member's rights, since he retained his full range of rights and prerogatives that came with his elected position]; see also *Westfall v. City of Crescent City*, 2011 WL 2110306 (N.D. Cal. 2011) [the city council's action removing a councilmember from committee appointments, and prohibiting her from placing items on the agenda without authorization of the full council did not violate her constitutional rights and did not prevent her from performing her official duties].)

3. Censure. Censure is the formal public disapproval of a councilmember. (See *Braun v. City of Taft* (1984) 154 Cal.App.3d 332, 339.) Censure is a legislative act and not an adjudicatory act. (*Page v. Tri-City Healthcare Dist.* (S.D. Cal. 2012) 860 F.Supp.2d 1154, 1170; see also *Whitener v. McWatters* (4th Cir. 1997) 112 F.3d 740, 744 [holding that county board of supervisors acted in its legislative capacity when it voted to discipline a member, and thus his action against the board was barred by absolute legislative immunity, citing the "well-established principle that legislatures may discipline members for speech" without executive or judicial reprisal for doing so].) A city council, under its common law power to make rules for itself, may invoke the censure of one or more councilmembers. A censure may take many different forms, including public distancing of the council from a specific councilmember's statement or action. Censure is often accompanied by the disciplinary measures discussed above, such as removing a councilmember from a standing committee, leadership position, or restricting the councilmember from making public statements in their official capacity.

A formal censure implicates an elected councilmember's due process rights. (See *Ryan v. Commission on Judicial Performance* (1988) 45 Cal.3d 518, 526–30.) A city attorney must therefore ensure that the accused councilmember be provided notice and an opportunity to be heard before the council takes action. There must be notice of a prohibition against specific behavior. Of course, behavior that violates the law will meet this standard. But I recommend that a city must have already adopted a code of conduct or ethics policy that will provide the basis for any censure resolution. The code of conduct should specify the types of behavior that are prohibited and should explicitly allow for a censure resolution as a means of enforcing non-compliant behavior. In many cases, the code of conduct will also allow for other steps a council may take, such as those outlined in this paper. In addition to a pre-existing code of conduct to provide councilmembers with notice of the consequences for bad behavior, the city should also provide prompt notice to the accused councilmember of the specific complaint. The city should similarly provide notice to the accused councilmember of every meeting at which the council is scheduled to consider the matter.

To satisfy due process, the city must also afford the accused councilmember an opportunity to appear. The councilmember should be afforded the right to participate in an investigation. I recommend providing a copy of the entire investigation report to the accused councilmember, but at a minimum, the city should provide to the councilmember whatever portion or summary of the investigatory report is made public. (This paper recommends making the entire investigatory report public.) Finally, the councilmember should be heard during the presentation of the agenda item at which the council might adopt a censure resolution.

4. Removal. In the most serious of situations, a council may want to explore removal of a councilmember. The California Constitution authorizes the recall of councilmembers (Cal. Const. art 2, § 19). Consistent with that constitutional authorization, Government Code section 3001 calls for forfeiture of office if a councilmember is convicted of “intoxication while in discharge of the duties of office.” The Penal Code and the Government Code also allow for removal of office upon conviction of specified crimes. (See, e.g., Pen. Code § 98 calls for the forfeiture of office upon conviction of bribery, obstruction of justice, threats to a juror, and other crimes.) The procedure for such removal is a judicial process, which is beyond the scope of this paper. (See *People v. Hawes* (1982) 129 Cal.App.3d 930.)

Absent criminal conviction, there is one additional path to remove a sitting councilmember. Government Code section 3060 et seq. (“Section 3060”) authorizes removal of a councilmember for “willful or corrupt misconduct in office.” (Gov. Code § 3074.) The removal process under Section 3060 is as follows:

- A complaint/accusation against a public official for willful or corrupt misconduct occurring in office is submitted to the county grand jury.
- The grand jury, upon concurrence of at least 12 grand jurors, submits the complaint to the county district attorney.
- The district attorney then serves notice of the accusation on the public official and demands the public official’s appearance at a hearing, which commences the prosecution of the public official.
- A proceeding is held and the accused public official is entitled to a jury in the same manner as a criminal indictment.
- Upon a conviction under Section 3060, the court will enter a judgment against the public official that removes him or her from office.

California courts interpreting Section 3060 have consistently held that “willful misconduct” only requires a “volitional act or failure to act,” and misconduct in office is broad enough to include any willful malfeasance, misfeasance, or nonfeasance in office even if it is not accompanied by any “criminal intention.” (*Steiner v. Superior Court* (1996) 50 Cal.App.4th 1771, 1778, quoting *Coffey v. Superior Court* (1905) 147 Cal. 525.) Although it is not stated in Section 3060, several courts have held that there must be a violation of some criminal statute, thus requiring some criminal intent by the public official. (*Steiner*, supra, 50 Cal.App.4th at 1789 [internal citations omitted].)

Notably, under the California Constitution, charter cities have plenary authority to provide for their own removal procedures for their public officials. (Cal. Const. art. XI, § 5(b).) Therefore, unless a city's charter incorporates state law provisions or is otherwise silent, a charter city's charter will dictate the removal of charter city councilmembers.

#### **D. Conclusion**

This paper has outlined many of the legal principles about which a city attorney must be aware in the event a complaint is filed against a councilmember. A city attorney must of course comply with, and manage risk arising from legal principles. But from my almost 20 years of ethics practice, the most common risks I see from situations like this are not strictly legal. Rather, an often ignored risk is the impacts to a city's culture. A mishandled complaint could foster a culture of secrecy and mistrust, not only among staff, but critically among the public. If not handled properly, a complaint will lead to increased Public Records Act requests and increased hostility at public meetings. This can create a vicious cycle, which only leads to more tension between the city and the public and between the council and staff, more dissension among the council, and less staff cohesion. What once might have been a model of a well-run city now demonstrates, with increasing frequency, examples of dysfunctional governance. Once the public's trust is lost, it is very difficult to regain.

Avoiding this pitfall is not always easy. City leaders should be guided by transparency and a well-tuned ethical compass. Some practice pointers from my experience:

- Closed session discussions should not be the default response. Even when allowed by the Brown Act (and this paper argues that a closed session may not be a legal option for council discussions of many complaints), holding difficult conversations in public will promote a culture of transparency and may prevent public charges of cover-ups and conspiracy that risk embroiling the whole Council in the misdeeds of one, or at least creating that public perception.
- Err on the side of independence. When a councilmember is the subject of a complaint, it may be very difficult to conduct an internal investigation that will have credibility with the public. Engaging an outside investigator is usually a prudent course of action. Consider affirmatively making the investigator's written report public—you may be forced to do so even if you seek to protect it.
- Support city staff. Pay attention to the impacts of a complaint on staff. They may need protection from angry members of the public and even from intrusive councilmembers. Take precautions that a complaint against a councilmember does not result in a follow-on harassment complaint by an aggrieved staff member.
- Use a complaint as an opportunity to refresh city policies. Does your city have a code of conduct for councilmembers? When was it last updated? Does it include a section on process that will help navigate the response to a complaint?

In particular, does it describe options for a council that wants to enforce a finding that a councilmember has violated the code of conduct? Does your city have censure procedures that ensure legal due process?

- Use this as an opportunity to improve your city's ethical hygiene. Think of the general AB 1234 training as the minimum requirement. Training programs specific to your city and your councilmembers may also be helpful. Consider including a standing 5 minute "Good Governance Hot Topics" item on all council meeting agendas to help impart useful information and promote (and, if necessary, restore) the city's ethical reputation. Develop a curriculum of bespoke training that works for your council and your city.

A successful outcome to a complaint against a councilmember does not necessarily depend on whether the city avoids litigation. Rather, this paper suggests that success depends on whether a city handles a complaint in a manner that avoids the decay of public trust and confidence in city government. In a perfect world, a successful outcome to a complaint can actually engender public confidence and support a city culture of accountability and the highest ethical standards.

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# Segmentation, Participation, and Complications

Thursday, May 9, 2024

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**League of California Cities  
2024 City Attorneys Spring Conference**

**Segmentation, Participation, and Complications:  
A Guide for Segmenting Decisions in Compliance  
with the Political Reform Act  
and its Implementing Regulations**

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**Segmentation, Participation, and Complications:  
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**I. Introduction.**

A fundamental question when applying the Political Reform Act's<sup>1</sup> conflict of interest provisions to public officials, is what is the governmental decision? The term "governmental decision" is defined by the Fair Political Practices Commission ("FPPC") as meaning "any action taken by a government agency that has a financial effect on any person other than the governmental agency making the decision."<sup>2</sup>

Some governmental decisions are, by their very nature, limited in scope such as a decision to approve a particular contract, make a specific expenditure, or approve a project applying to one parcel of land. Other decisions are broad and expansive such as decisions to approve an entire general plan update, a comprehensive zoning code update, or an annual budget. Many other governmental decisions may fall somewhere in between these two extremes but can include a collection of individual actions bundled into one larger plan, policy, program, or action item. When cities<sup>3</sup> make decisions that contain several actions, either because the city is statutorily required to do so or because such action is convenient or necessary to carry out basic operations of a city, there arises the possibility that some component of that decision will affect a public official's financial interests. This can give rise to a conflict of interest in the entire decision while the other components of the decision will not have any foreseeable and material impact on an official's financial interests.

The principle and practice of "segmentation" is, at its most basic, a division of a governmental decision into separate and distinct component parts arranged to allow the public official to be excluded from those components of the decisions in which the public official has a conflict of interest while allowing the same official to participate in other component parts in which the public official does not have a conflict of interest. Segmentation is therefore a logical and necessary tool to accomplish two competing goals: (i) the need to ensure that governmental decisions will not be made by public officials with financial interests in those decisions; and (ii) the need to ensure that public officials can represent the public's interest in matters that do not affect their financial interests by minimizing the scope of required recusal from important and sometimes multi-faceted decisions. Segmentation, as a tool, can help accomplish both of these important goals.

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<sup>1</sup> The Political Reform Act is found in Gov. Code §§ 81000 - 91014. The principal provisions in that Act that set forth the prohibitions related to public official conflicts of interest are found in Sections 87100 - 87105.

<sup>2</sup> 2 Cal. Code of Regs. § 18700 (c)(3). Hereafter, regulations adopted by the FPPC are referred to in this Paper as "Regulation § \_\_\_\_\_."

<sup>3</sup> While this Paper refers to cities and their officials, the Political Reform Act and its implementing regulations, and specifically the tool of segmentation, discussed herein apply to other public agencies and their officials as well, along with subordinate bodies of a city or other agency, including a city's planning commission.

But the implementation of the principles of segmentation can give rise to a series of issues, questions, and predicaments that are not always easy to address. This Paper seeks to assist in your efforts to use the tool of segmentation and to answer some of those questions.

## **II. Applicable Context - Where Segmentation Fits into the Conflict of Interest Analysis.**

The Political Reform Act of 1974<sup>4</sup> (“PRA”) provides this basic conflict of interest requirement: “A public official at any level of state or local government shall not make, participate in making, or in any way attempt to use the public official’s official position to influence a governmental decision in which the official knows or has reason to know the official has a financial interest.”<sup>5</sup>

The FPPC suggests using a four-step test<sup>6</sup> to determine whether a public official has a prohibited conflict of interest in a governmental decision:

**Step One:** “Is it reasonably foreseeable that the governmental decision will have a financial effect on any of the public official’s financial interests?”

**Step Two:** “Will the reasonably foreseeable financial effect be material?”

**Step Three:** “Can the public official demonstrate that the material financial effect on the public official’s financial interest is indistinguishable from its effect on the public generally?”

**Step Four:** “If after applying the three step analysis and determining the public official has a conflict of interest, absent an exception, the official may not make, participate in making, or in any way attempt to use the official’s position to influence the governmental decision.”

For most governmental decisions that may have an effect on a public official’s financial interests, the conflict of interest analysis can be resolved through a careful application of the standards regarding “foreseeability” and “materiality.” (Steps 1 and 2). Under the applicable standards, the effect of a decision on a public official’s financial interests, when those interests are not explicitly involved, may be more hypothetical or theoretical than a realistic possibility. Similarly, when the financial interest is not explicitly involved, the impact of a decision on a financial interest, such as a source of income or interest in a business entity, may not foreseeably exceed the applicable materiality threshold. Still, other remaining conflict of interest questions are often resolved through the “public generally exception” if one is able to determine that a significant segment of the public will be affected by the decision, and the effect on the official’s financial interest is not unique compared to the decision’s effect on the significant segment.<sup>7</sup> (Step 3).

Segmentation is a “last resort” type of tool after the other steps have been applied. But it should be considered and applied before determining that there is no possibility of the involvement by an

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<sup>4</sup> Gov. Code § 81000 et seq.

<sup>5</sup> Gov. Code § 87100.

<sup>6</sup> Regulation § 18700(d).

<sup>7</sup> The “Public Generally Exception” is an element of Gov. Code § 87103, but it is more fully interpreted and implemented in Regulation § 18703.

official in any component parts of a decision. It should also be considered before resorting, if necessary, to the Rule of Legally Required Participation whereby a determination is reached that an insufficient number of the members of the decision-making body without a disqualifying conflict of interest exist to make a governmental decision, and that one or more of the disqualified members need to be selected at random to create the minimum number required to make the governmental decision.<sup>8</sup> Jumping past the possibility of using “segmentation” and just concluding that multiple members have a conflict of interest, but then getting to the quorum necessary for the decision-making body to take the action through the Rule of Legally Required Participation, means that governmental decisions are made by the fewest members necessary. This poses the possibility that important and complex decisions of a city are made by a bare minimum quorum of a decision-making body rather than with the possibility of a higher number (and potentially just one member less than the full decision-making body, depending on how a segment is defined). By not attempting to use segmentation and just relying on the Rule of Legally Required Participation, is likely to result in a potentially smaller and narrower representative body making what are often some of the most important and consequential decisions for a city.

Knowing when and how to use the tool of segmentation serves to protect officials from violations of conflict of interest laws and maximizes the potential that officials without financial interests in certain aspects of the decision may participate in those aspects. At the same time, it protects the city’s decisions from the improper involvement in the parts of the decision in which the official has a conflict of interest.

It is noteworthy that the concept and elements of “segmentation” are not contained in the PRA or even referred to in the PRA. Segmentation is a tool created by the FPPC, initially through early advice letters, but then formalized in an FPPC regulation.<sup>9</sup> Understanding the history of the creation and development of the tool of segmentation will help in understanding how it works and when it can and cannot be applied to various types of decisions.

### **III. Historical Creation and Evolution of the Principle of Segmentation.**

Soon after the voters adopted the PRA in June 1974, the FPPC was faced with interpreting the scope of the term “decision.” The FPPC began to generally conclude that decisions are analyzed independently to determine if there will be a reasonably foreseeable material financial effect on an official’s financial interests<sup>10</sup> unless the decisions are effectively “linked” because one decision will effectively decide the other.<sup>11</sup> This led to the inevitable question of whether a decision affecting a large physical area or affecting an entire public entity budget could be divided up into two or more decisions to permit a disqualified public official to participate in the portions of the area or budget under consideration in which he or she did not have a conflict of interest. It also led to the development of an understanding of when decisions cannot be segmented into separate

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<sup>8</sup> See Regulation § 18705.

<sup>9</sup> Regulation § 18706.

<sup>10</sup> *Ball Advice Letter*, A-98-124 (1998), citing to *In re Owen*, 2 FPPC Op. 77 (1976).

<sup>11</sup> *Boogaard Advice Letter*, I-90-347 (1990) (a decision to designate a specific area of the City for an “autopark” (an auto mall) was essentially a decision against another potential site for the autopark).

decisions because they are “inextricably interrelated,”<sup>12</sup> as explained below in the historical evolution of the concept of segmentation.

#### **A. 1982 - Splitting up a Rezoning Decision.**

An early test of this idea of decisions being “inextricably interrelated” was presented in 1982. In the *Nord Advice Letter*<sup>13</sup>, the City Attorney’s Office in Merced asked the FPPC if the city could take actions to rezone approximately 15 lots in two separate ordinances. The first ordinance was to rezone a lot owned by a hospital which was the source of a councilmember’s conflict of interest, and then a separate ordinance would rezone the other 14 lots. The FPPC began to establish the “inextricably interrelated” test. The FPPC stated:

“The officials must disqualify themselves as to both decisions if the result on one decision will effectively determine the result of the other decision. This would be true, for example, if the same policies and interest are at stake in both decisions. They must also disqualify themselves on both decisions if the decision is of a type that cannot be legally divided. For example, if there were different results on the two ordinances, a legal challenge could successfully compel the city council to arrive at a consistent result. On the other hand, if the policies and equities involved in the two decisions differ significantly, dividing the decision into two separate ordinances would be an appropriate manner to deal with the conflicts of interest.”<sup>14</sup>

#### **B. 1982 - Considering Components of a Regulatory Ordinance Separately.**

Later that same year, the City Attorney’s Office in Newport Beach asked in the *Miller Advice Letter*<sup>15</sup> if elements of an ordinance to amend the city’s condominium conversion ordinance could be separated into different decisions so as to allow some councilmembers who were disqualified due to certain elements of the ordinance (prioritization of newer, more conforming structures for conversion over older units, for example) could vote on other aspects of the ordinance (whether to lift or modify a restriction that conversions would only be allowed if the rental dwelling unit vacancy rate in the City is equal to or less than 5%). The FPPC left that option open but cautioned that “... if the amendments are considered to be interrelated (i.e., the vacancy rate change won’t be adopted unless the priority package is also adopted, or the 5,000 square foot limitation is lifted, then such a separation would not be possible.)[sic]”<sup>16</sup>

#### **C. 1985 - Segmenting a County Budget.**

In 1985 in the *Olson Advice Letter*<sup>17</sup> the FPPC considered applying the concept of segmentation to an entire county budget. There, the spouse of the Director of the Mental Health Services

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<sup>12</sup> The term has evolved since its first apparent use in 1994 in the *Ennis Advice Letter*, A-94-203 (1994) and then incorporated into the FPPC’s Segmentation Regulation (Regulation § 18706) in 2002, in which it is now defined to mean “when the result of one decision will effectively determine, affirm, nullify, or alter the result of another decision.”

<sup>13</sup> A-82-038 (1982).

<sup>14</sup> *Id.* at p. 1-2.

<sup>15</sup> A-82-119 (1982).

<sup>16</sup> *Id.* at p. 8.

<sup>17</sup> A-85-242 (1985).

Division of the Yolo County's Department of Health was considering running for election to a seat on the County's Board of Supervisors. She sought advice on whether her election could result in her having conflicts of interest in budgeting decisions affecting her spouse's division in the Health Department. The FPPC concluded that the prospective supervisor could have a conflict of interest in certain budgetary decisions that would affect her spouse, but not in other decisions. The FPPC then stated:

“Generally, when a public official is required to disqualify herself from participating in specific decisions which are a part of an overall plan, the Commission has advised the public official that she may participate in the final vote to approve the plan so long as the matters in which she has a conflict have been decided and are no longer subject to modification. (citations omitted)”<sup>18</sup>

The FPPC then concluded that the prospective supervisor would need to recuse herself from certain decisions, but she would be allowed to participate in the decision on the overall budget for the Health Department when that item later comes before the Board.

#### **D. 1987 - Carving out a Segment from a General Plan.**

The first time the FPPC considered the concept of segmentation in the context of an community general plan appeared in 1987 in the *Huffaker Advice Letter*.<sup>19</sup> Prior to the incorporation of the City of Oakley, Contra Costa County had prepared the Oakley General Plan encompassing approximately 9,000 acres in and around the community of Oakley. A county planning commissioner had an interest in about 19 acres in that plan area that, under the proposed new general plan, would be changed from an agricultural designation to a medium-density, single family residential designation. The FPPC determined that the general plan would have a reasonably foreseeable material financial effect on his real property interest, that the impact on his interest would be distinguishable from the impact of the decision on the general public, and that the commissioner had a conflict of interest in decisions regarding the general plan. The FPPC then articulated a procedure that could be used to separate the general plan decisions into two segments. This is the first articulation of the core elements that have become part of the modern segmentation requirements:

- “(1) The area including and surrounding [the commissioner's] properties must be severed so that the hearing can be bifurcated.
- (2) The area must be considered first, and a final decision reached by the Commission without [the commissioner] participating in any way.
- (3) Once a final decision has been made on that area, [the commissioner] may participate in the deliberations regarding other areas within the general plan, so long as those deliberations do not result in a reopening of deliberations for his area.”

Interestingly, the area that the FPPC defined as the segment appears to be approximately 600 acres. Thus, the segment was more than 30 times the size of the commissioner's property interests in the

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<sup>18</sup> *Id.* at p. 4.

<sup>19</sup> A-86-343 (1987).



segment. This contrasts with a segment that would be approximately 80 acres for the land area located within 1,000 feet of a 10,000 square foot lot.

**E. 1989 - Multiple Infrastructure Projects Under One Financing Mechanism.**

Financing, funding, and infrastructure construction decisions became the subject of a County of El Dorado Board of Supervisor's decision and a request for advice to the FPPC as to the permissibility of addressing the approval of the infrastructure projects separately from how those projects would be jointly financed. In the *Sweeney Advice Letter*,<sup>20</sup> a supervisor likely had a conflict of interest arising from an interest in real property near two of seven proposed projects. One of those projects involved a county jail project which would also become part of a sale and lease back financing arrangement to raise revenue for the seven projects. There, the FPPC concluded that if the project decisions could be separated from and segmented from the financing decision in accordance with the procedures explained in the *Huffaker Advice Letter*, the supervisor could participate in those financing and funding decisions that involved the five projects not in proximity to his property interests. However, if the financing decision (sale and lease back arrangement) could not be separated into components, then the supervisor would need to recuse himself from both the decision on what projects to build and the decision as to how to finance those projects (the sale and lease back arrangement).<sup>21</sup>

**F. 1989 - Freeway Design Decisions - Grade Elevation Decisions that Affect Other Areas.**

In 1989, the City of Cupertino worked with Caltrans to design the Highway 85 Freeway through the City, including alternatives to elevating the freeway over its intersection with Sunnyvale-Saratoga Road. In the *Kilian Advice Letter*,<sup>22</sup> the FPPC explained that the tentative design, as proposed by Caltrans, provided that the apex of the elevation at that intersection would be approximately 25 feet above grade with a possible sound wall extending ten feet higher. The plans called for the freeway elevation to taper down to grade level approximately 2,500 feet north of Sunnyvale-Saratoga Road. Two councilmembers owned condominium units adjacent to the Highway 85 right-of-way about 1,200 feet from the intersection of the Sunnyvale-Saratoga Road. At the freeway's closest point to their units, the "tapering down" of the freeway would place the freeway at about ten feet above the grade. The FPPC concluded that the decisions involving the freeway intersection at Sunnyvale-Saratoga Road would have an effect on the councilmembers' properties because each alternative design of that overpass could affect the elevation of the freeway adjacent to their units. But other decisions regarding the freeway through the City aside from the Sunnyvale-Saratoga overpass decision could be segmented pursuant to the standards in the

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<sup>20</sup> A-89-639 (1989).

<sup>21</sup> Even though the *Sweeney Advice Letter* did not provide the ultimate answer to the supervisor on the segmentation question, the FPPC later construed that *Letter* as an example of when a financing decision (the second decision) was too interrelated to decisions about the construction of the projects (first decisions) to permit a supervisor who had a conflict of interest in two of the projects, one of which would be the source of the financing decision, to then vote on the financing decision because that latter decision would provide the funding for all the projects, including the two in which the supervisor had a conflict of interest. *Ball Advice Letter*, A-98-124 (1998), p. 5.

<sup>22</sup> A-89-522 (1989).

*Huffaker Advice Letter*, if those decisions which would not affect the elevation of the freeway adjacent to the councilmembers' units.

#### **G. 1992 - Street Widening Project - "Alignment Integrity."**

In the *Connors Advice Letter*,<sup>23</sup> the City of Monterey was considering the realignment and widening of Del Monte Avenue, a planned 1.5 mile long roadway in the City. The so-called "plan line" was presented to the City Council as a single project, labeled in three segments: east, west, and center. The staff had proposed the project as a single project in order to "maintain alignment integrity and proper planning." The roadway would be constructed in stages due to financial constraints. A councilmember was a part owner and operator of a bed and breakfast inn located within 300 feet of the west segment of the roadway project. The City Attorney asked the FPPC if the plan line project could be segmented to allow the councilmember to participate in decisions that would not affect the councilmember's property in the west segment. The FPPC stated that the plan line decision was not suitable for segmentation because the segments were necessarily interrelated to maintain proper road alignment and planning and thus a decision on one segment was essentially "linked"<sup>24</sup> with decisions on the other segments. The FPPC concluded that the councilmember could not participate in any of the plan line decisions.

#### **H. 1994 - "Inextricably Interrelated" Decisions Involving a Lease of City Property.**

In 1994, a councilmember in the City of Hermosa Beach owned his home that was located 185 feet away from a City-owned property that was used for a city maintenance yard. The City was considering a proposal to extend and amend a lease of the property for oil exploration and development that would effectively allow oil drilling and extraction on the property at a location on the site more than 300 feet from the official's home. The City Council was to consider five groups of decisions: (1) an extension of an existing lease agreement to allow the operator to commence the project; (2) an exchange of one listed partner for another on the lease agreement with the City; (3) a change in the Coastal Commission application to designate the operators rather than city as the applicant for the project; (4) decisions on an initiative ballot measure, which if adopted, would prohibit oil exploration within the city limits; and (5) various technical spill, emergency response, subsidence, geotechnical and other plans and reports. In the *Ennis Advice Letter*,<sup>25</sup> the FPPC concluded that the underlying oil drilling project would have noise, traffic, and intensity of use impacts to the councilmember's property that would materially affect his real property interest and that the public generally exception did not apply. The FPPC then concluded that all of the five groups of decisions were inextricably interrelated to the underlying use of the land for oil drilling and that the decisions could not be segmented to permit the councilmember to participate in some of the decisions but not others. In so doing, the FPPC defined the term "inextricably interrelated" as where, among other things, one decision is a necessary condition precedent or condition subsequent to another. Thus a public official would have to disqualify himself or herself if the result of one decision would effectively determine or nullify the result of

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<sup>23</sup> A-92-587 (1992).

<sup>24</sup> See *Boogaard Advice Letter*, I-90-347 (1990) (involving the selection of one "autopark" site over another meant the two decisions were "linked" and a councilmember who had a conflict of interest because of ownership of property in proximity to one of the two sites had a conflict of interest in selecting either site for a future autopark (auto mall)).

<sup>25</sup> A-94-203 (1994).

another. The FPPC noted that this principle is reflected in the legal maxim “QUI ADIMIT MEDIUM DIRIMIT FENEM” (he who takes away the mean destroys the end).<sup>26</sup>

#### **I. 1998 - “Inextricably Interrelated” Decisions Involving Uses of a 690 Acre Site.**

The City of Carlsbad was considering San Diego Gas & Electric Company’s (SDG&E’s) proposed uses of multiple parcels of land that comprised 690 acres but was bisected by the Interstate 5 Freeway. One of SDG&E’s parcels was located across the street from (60 feet from) a councilmember’s residence. One of the questions posed to the FPPC in the *Ball Advice Letter*<sup>27</sup> was whether some of the zoning decisions for SDG&E’s parcels located more than 2,500 feet from the councilmember’s home could be separated into separate decisions so as to allow the councilmember’s participation in those other decisions. The FPPC concluded that the “major decisions” regarding the use of the property are interrelated, and that the decisions about the future operation of the utility located west of Interstate 5 would strongly affect decisions about whether and how to develop property located east of the Freeway. On this basis, the FPPC concluded that the decisions were not amenable to segmentation.

#### **J. 2003 - Adoption of Segmentation Regulation.**

By September 2003, the FPPC had developed enough standard principles involving segmentation to warrant a regulatory articulation of its requirements and procedure. The three procedural steps outlined in the *Huffaker Advice Letter*<sup>28</sup> had been articulated and cited in multiple Advice Letters over the course of more than 15 years. Similarly, the examples and general standards for when segmentation is not appropriate for use in connection with “linked” decisions (*Boogaard Advice Letter*), or decisions that “effectively determine the result of the other decision” (*Nord Advice Letter*), to the concept of when decisions are “inextricably interrelated” with other decisions (*Ennis Advice Letter*) and then summarized well in the *Ball Advice Letter*, provided the FPPC with enough collective guidance to formulate a regulatory segmentation standard for general use.

The FPPC’s regulation on segmentation was adopted on September 4, 2003, took effect on October 2, 2003 and was codified in Regulation § 18709. It set forth the three procedural steps in the *Huffaker Advice Letter* and added a fourth element at the start of the analysis that segmentation can only be used to break down a decision into separate decisions if the separate decisions are not inextricably interrelated to the decision in which the official has a disqualifying financial interest. The FPPC’s prior approval of the use of segmentation in city-wide general plan and annual budget decisions, and the permission to allow for a single vote and a single approving document for the final action on those type of decisions was provided in subsection (c). In 2015, the Segmentation Regulation was moved to its current location as Regulation § 18706.

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<sup>26</sup> *Id.* at fn. 8.

<sup>27</sup> A-98-124 (1998).

<sup>28</sup> A-86-343 (1987).

## **K. Text of Segmentation Regulation.**

In its current form, the FPPC Regulation entitled “Government Decision: Segmentation” is found as Regulation § 18706 (hereinafter referred to as “Segmentation Regulation”) and provides as follows:

“(a) An agency may segment a decision in which a public official has a financial interest, to allow participation by the official, provided all of the following conditions apply:

(1) The decision in which the official has a financial interest can be broken down into separate decisions that are not inextricably interrelated to the decision in which the official has a disqualifying financial interest;

(2) The decision in which the official has a financial interest is segmented from the other decisions;

(3) The decision in which the official has a financial interest is considered first and a final decision is reached by the agency without the disqualified official’s participation in any way; and

(4) Once the decision in which the official has a financial interest has been made, the disqualified public official’s participation does not result in a reopening of, or otherwise financially affect, the decision from which the official was disqualified.

(b) For purposes of this regulation, decisions are ‘inextricably interrelated’ when the result of one decision will effectively determine, affirm, nullify, or alter the result of another decision.

(c) Budget Decisions and General Plan Adoption or Amendment Decisions Affecting an Entire Jurisdiction: Once all the separate decisions related to a budget or general plan affecting the entire jurisdiction have been finalized, the public official may participate in the final vote to adopt or reject the agency’s budget or to adopt, reject, or amend the general plan.”

The three requirements first articulated in the *Huffaker Advice Letter* are restated and found in paragraphs (2) through (4) of subsection (a). The preclusion on using segmentation if the collection of decisions are “inextricably interrelated” as developed between the *Boogaard Advice Letter* in 1990 through the *Ball Advice Letter* in 1998 is found in paragraph (1) of subsection (a) and is then defined in subsection (b). Finally, the permission to use one approving document for budget and general plan decisions that was initially allowed in the *Olson Advice Letter* and *Huffaker Advice Letter* is found in subsection (c). In this way, the Segmentation Regulation is very much the collective articulation of standards developed through Advice Letters issued during that time.

But since its adoption in 2003, a series of other questions about how to use segmentation have developed over the succeeding 21 years. The next section of this Paper summarizes those questions and how they have been addressed by the FPPC in more recent Advice Letters.

#### **IV. Continuing Uncertainties in How to Use Segmentation.**

Using the process of segmentation raises several issues not addressed in the text of the Segmentation Regulation. One of those questions is how to structure a public hearing involving decisions that are segmented if one or more public officials may be disqualified from certain segments but are allowed to vote on other segments. Another question involves deciding which one of several segments involving different disqualified public officials should be selected to go first versus second. Still another question involves whether separate approval documents, such as separate ordinances or resolutions need to be created for each of the separate decisions or whether initial motions can be adopted on the segments which then get bundled into one resolution or ordinance. The text of the Segmentation Regulation and certain Advice Letters provide some direction on how these issues should be resolved.

One of the scenarios in which segmentation is most likely to be utilized is in decisions to approve an entire land use map as part of an update to the land use element of a general plan. These decisions often involve many changes from existing designations. Some of the questions noted above often arise in the context of these general plan land use updates.

##### **A. Scope of Existing Exceptions in the Materiality Regulation Pertaining to General Plan Policy Decisions.**

Before addressing segmentation in the context of a general plan update, we need to explore and consider whether land use element decisions will materially affect the councilmember's property and whether any available exceptions may apply to avoid having to address the councilmember's interests through segmentation. Two potentially applicable exceptions to the determination of materiality apply to these general plan decisions.

The first exception is embedded into the FPPC's materiality regulation applicable to financial interests in real property.<sup>29</sup> There, the FPPC provides that a decision's impact on a parcel of real property is material whenever the decision "[d]etermines the parcel's zoning or rezoning, *other than a zoning decision applicable to all properties designated in that category. . . .*" (Emphasis added.) By its own terms, if the decision is a zoning decision and the decision is applicable to all properties designated in that category, the decision is not deemed to materially affect the official's real property interest. This acts like a sort of simplistic "public generally exception." However, it appears to only apply to "zoning" decisions and only if it applies to "all properties designated in that category." As worded, the exception only applies to decisions to apply a zoning provision to all properties already in that same designation. More to the point, it does not explicitly apply to decisions to place a property into a particular land use designation of a general plan. Based on the fact that there is a specific exception pertaining to general plan policies, as discussed below, the use of the term "zoning" in this first exception appears intentional and limited to just zoning

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<sup>29</sup> Regulation § 18702.2 (a)(2).

decisions. For these reasons, this first exception is not reasonably applied to general plan land use designation changes to particular properties.

A second possible “materiality” exception in the context of a land use element update is listed in the subsection on “exceptions” in the FPPC’s materiality regulation applicable to a financial interest in real property.<sup>30</sup> The financial effect of a decision on an official’s real property interest is not material if:

“The decision solely concerns the adoption or amendment of a general plan and all of the following apply:

(A) The decision only identifies planning objectives or is otherwise exclusively one of policy. A decision will not qualify under this subdivision if the decision is initiated by the public official, by a person that is a financial interest to the public official, or by a person representing either the public official or a financial interest to the public official.

(B) The decision requires a further decision or decisions by the public official’s agency before implementing the planning or policy objectives, such as permitting, licensing, rezoning, or the approval of or change to a zoning variance, land use ordinance, or specific plan or its equivalent.

(C) The decision does not concern an identifiable parcel or parcels or development project. A decision does not ‘concern an identifiable parcel or parcels’ solely because, in the proceeding before the agency in which the decision is made, the parcel or parcels are merely included in an area depicted on a map or diagram offered in connection with the decision, provided that the map or diagram depicts all parcels located within the agency’s jurisdiction and economic interests of the official are not singled out.

(D) The decision does not concern the agency’s prior, concurrent, or subsequent approval of, or change to, a permit, license, zoning designation, zoning variance, land use ordinance, or specific plan or its equivalent.” (Emphasis added.)

This second “exception” provides a good basis for considering the impacts from general plan policy provisions contained in a land use element of a general plan update. However, by its terms, if the decision includes not only policy changes but changes to the land use designations that are proposed to be assigned to properties, the update will affect the allowable density of development. This broader action appears to fall outside of the category of “planning objectives” and not be “exclusively one of policy.” Rather, these land use element designation decisions would appear to eventually “determine the parcel’s zoning or rezoning”<sup>31</sup> since zoning designations of property are required to be consistent with the general plan designations, or “involves the adoption of or amendment to a development plan or criteria applying to the parcel.”<sup>32</sup> Furthermore, these

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<sup>30</sup> Regulation § 18702.2 (d)(2).

<sup>31</sup> Regulation § 18702.2 (a)(2).

<sup>32</sup> Regulation § 18702.2 (a)(1).

decisions also involve “identifiable” parcels and thereby are excluded from the exception pursuant to text of subparagraph (C).

The question of the scope and potential application of the general policy exception noted above was considered in the *Hull Advice Letter*.<sup>33</sup> There, the FPPC considered a city’s general plan update that included a mix of policy changes but also changes to the land use designations of properties wherein a mix of uses (residential, office, and retail at different percentages) would be allowed on certain properties pursuant to the update. The FPPC concluded that because the general plan update included a map which designated specific areas of the city where the newly created mix of uses would be allowed, the amendment did concern “identifiable” parcels. This meant that the requirement in subparagraph (C) for its use (“the decision does not concern an identifiable parcel or parcels”) was not satisfied, and the exception did not apply.<sup>34</sup>

For these reasons, neither of these potentially applicable exceptions in the real property materiality standards are satisfied when the decision involves changing the land use designation of a general plan for specific properties.

## **B. Potential Difficulties in Exempting the Official’s Interest Under the Public Generally Exception.**

If one or both of the exceptions noted above do not apply, and the official’s property is deemed to be materially affected by the land use element update, there is a good chance that the public generally exception will apply to some of the public official’s property interests. But if the update involves the creation of many new land use designations, and each of those new designations and the properties proposed to be included with them apply only to a relatively small percentage of properties (for example, less than 15%) in a councilmember’s district, then the possibility that the “public generally exception” will resolve the potential conflict of interest is lessened. It is also possible that the exception will not apply because, even if the decision will affect a significant segment, the impact of the decision will be unique compared to the significant segment. For example, if the public official has “multiple” real property interests proposed to be in the same designation or the public official’s property interest is “substantially greater in size” than others in the segment, the criteria of the exception will not be satisfied.<sup>35</sup>

Another interesting consideration in the applicability of the public generally exception is when councilmembers are elected through a district-based election system in contrast to an at-large election system. There can also be a distinction between how councilmembers are elected and the qualifications of planning commissioners who may be appointed to fill seats on the commission, with many cities not requiring commissioners to reside in particular councilmember districts to hold a seat on that city’s planning commission. These distinctions determine the “jurisdiction” from which the number of properties that are affected by a decision are necessary to qualify as a “significant segment of the public.”<sup>36</sup> With respect to real property interests, the number of

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<sup>33</sup> A-05-057 (2005).

<sup>34</sup> See also, *Barker Advice Letter*, I-08-170 (2008); superseded on other grounds by *Holland Advice Letter*, I-12-161 (2012).

<sup>35</sup> Regulation § 18703 (c)(3) and (4).

<sup>36</sup> The use of the term “significant segment” in the context of the Public Generally Exception (Regulation § 18703) is not the same as, the “segment” (elsewhere referred to as recusal segment or abstention area) that is created for

properties in the segment that are similarly affected will most likely be smaller in a district than when that measurement is made city-wide. Similarly, the number of individual properties that are similarly affected in that jurisdiction and which equal the required 15% or 25% threshold will also be smaller in a district. Depending on the facts, the outcome of the public generally exception analysis may differ depending on which jurisdictional boundary is used in the analysis.

Many potential conflict of interest questions with respect to city-wide general plan decisions are likely to be resolved through the “public generally exception.” However, because of some of the factors and issues noted above, it is entirely possible that not all potential conflicts will be resolved through that exception, and it is important to turn to segmentation as the next available option.

### **C. Real Property Interests Geographically Defined Segment - How Large or Small?**

In the absence of an applicable exception, a city can be faced with the land use map update ripe for segmentation so as to permit the public official to participate in the vast majority of the map’s decisions but not the portion or portions that apply to their property interests.

But then how is the segment defined? Does it need to include just the councilmember’s own property or does it need to be defined to include the surrounding area as well?

We know from Step 2 of the FPPC’s suggested four-step analysis of conflict of interest questions, that a councilmember’s property is deemed to be materially affected if the decision “involves property located 500 feet or less from the property line of the parcel unless there is clear and convincing evidence that the decision will not have any measurable impact on the official’s property.”<sup>37</sup> But the official’s real property is also materially affected if the decision involves property located more than 500 feet but less than 1,000 feet from the property line of the parcel and the decision would change the parcel’s: “(A) *Development potential*; (B) Income producing potential; (C) Highest and best use; (D) Character by substantially altering traffic levels, *intensity of use*, parking, view, privacy, noise levels, or air quality; or (E) *Market value*.”<sup>38</sup> (Emphasis added.) Conversely, the financial effect of a governmental decision on an official’s real property interest when the decision involves property 1,000 feet or more from the property line of the official’s property is presumed not to be material unless rebutted with clear and convincing evidence that the decision would have a substantial effect on the official’s property.<sup>39</sup>

Based on these materiality standards, it is prudent to carve out a segment from the general plan land use update that involves property within 1,000 feet of the councilmember’s property. In this way, the boundaries of the segment are created to ensure that the councilmember is not involved in the land use update decisions affecting property within a proximity that could be deemed to affect the councilmember’s property interest. If, however, sufficient facts exist to conclude that the land use element designation changes to property within 500 to 1,000 feet of the public

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purposes of applying the Segmentation. Regulation. They are two different types of “segments” and the dual use of the same word in the analysis of a conflict of interest question can create confusion unless they are understood to be different from each other.

<sup>37</sup> Regulation § 18702.2 (a)(7).

<sup>38</sup> Regulation § 18702.2 (a)(8).

<sup>39</sup> Regulation § 18702.2 (b).



official's property will not change the official's parcel in a manner that satisfies the materiality standards, then a smaller 500 foot radius circle distance could be utilized. The ultimate decision on how large or small the segment needs to be defined geographically will depend on the particular facts, including the extent of the land use designation changes, and then applying those facts to the applicable materiality standards. In making that determination, there are some Advice Letters that implicitly embraced the 500 foot radius segment.<sup>40</sup> But in the absence of compelling facts to conclude that the segment only needs to be defined to include properties less than 500 feet from the public official's property, it would be prudent to use the 1,000 foot standard.

As noted earlier, in the *Huffaker Advice Letter*<sup>41</sup>, the county planning commissioner's property interests comprised 19 acres but the geographic segment that was created to address that commissioner's conflict of interest was defined to include a relatively large 600 acre area. This contrasts with an approximate 80 acre area that would typically be created when a 1,000 foot radius area around a 10,000 square foot lot is created as a defined geographic segment. This disparity in the geographic size of the segment demonstrates not only the evolving precedent with respect to the designation of geographic segments but also the fact-dependent analysis that goes into creating a segment that is appropriate to address the particular facts of the official's property and the impacts of land use designation changes in the vicinity of the official's property.

Aside from areas in close proximity to the public official's financial interests, the creation of an appropriate segment also needs to take into account other areas of the city that involve decisions that are inextricably interrelated to the decisions in proximity to the public official's interests. For example, if a city is making decisions on where to place a particular use that is appropriate for only one location in the city, and one of those locations is in proximity to the public official's financial interests, the appropriate segment may also include the other location or locations that are provided as potential alternative locations for that use even if those other locations are not in proximity to the public official's financial interests. This is because selection of the other location for the use is likely to affect whether that use will be located in proximity to the official's financial interest. This type of scenario was addressed in the *Boogaard Advice Letter*, I-90-347 (1990) wherein it was determined that a decision to designate a specific area of the City for an "autopark" (an auto mall) was essentially a decision against another potential site for the autopark. If similar facts exist, and those other geographic areas are sufficiently distinct and limited in number, the segment should be crafted to include the selection of the site for that use, including a decision to place that use on one of those other alternative sites. It will be important for staff to become aware of these issues as staff develops the draft general plan and any alternatives that are presented to the decision-makers because those alternatives, when presented to the decision-making body, may affect what is included in the segments that are crafted for each decision-maker.

#### **D. Structuring the Staff Presentation and Public Hearing When the Decisions are to be Made in Segments.**

Another question that arises is how to structure the public hearing when the decision is divided into one or more segments and the public officials who have a conflict of interest in a segment is required to recuse him- or herself from decisions on that segment. Does this mean that you need

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<sup>40</sup> See, e.g. *Pierik Advice Letter*, A-20-060 (2020).

<sup>41</sup> A-86-343 (1987)

to have two separate public hearings and two separate staff reports for the two segments? What if there are more than just two segments? Does that mean you have to have as many separate public hearings as there are segments?

Under traditional recusal standards, the public official with a conflict of interest in a decision is required to recuse him- or herself at the beginning of the agenda item which normally occurs immediately after the title of the agenda item is announced by the chair but before the staff presentation of the item. The FPPC provides that: “Public identification of the financial interest must be made immediately prior to consideration of the agenda item.”<sup>42</sup> In addition: “The official must follow the recusal procedure, leave the room after the identification required by this regulation is made, and refrain from any participation in the decision.”<sup>43</sup>

This early recusal requirement is in tension with the appropriateness of allowing the public official to hear the staff report presentation on the portions of the action that do not affect his or her interests as well as to hear the public testimony on those allowed portions. Accordingly, the FPPC has provided some practical latitude in these situations by allowing the public officials with a conflict of interest in particular segments to remain in the chambers up to the point that the segment is started to be considered by the body. In this way, the recusal is made immediately before the *consideration* of the segment rather than at the very beginning of the entire agenda item, thereby relying on the recusal standard’s use of the term “consideration” as being the point in time that the body begins to discuss and deliberate on the particular segment and not at an earlier point in the presentation of the agenda item.

The point in time when the public official’s recusal must occur in a segmented decision was addressed in procedures proposed by Tehama County in the *Murphy Advice Letter*<sup>44</sup> and in a “protocol” proposed by the City of Riverbank in the *White Advice Letter*.<sup>45</sup>

In the *Murphy Advice Letter*, the Tehama County proposed the following procedures:

“Once the public portion of the hearing is over, County staff will present any closing comments and will answer any final questions for commission or board members. At this point, the actual deliberations will begin. First, the abstention areas for each member of the commission or board will be identified. The members will be asked if any of them would like to propose any change to any land use designation set forth in the draft general plan within any of the abstention areas (other than their own). If so, the affected member will step off the dais and leave the room. The proposed change will then be discussed, deliberated, and voted upon by the remaining members. Once this process is complete, the affected member will return to the dais.

When there are no more proposed changes to any abstention area, the members will be asked if they would like to propose any change to any land use designation set forth in the draft general plan outside the abstention areas. Any such proposals will

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<sup>42</sup> Regulation § 18707 (a)(2).

<sup>43</sup> Regulation § 18707 (a)(3).

<sup>44</sup> A-07-031 (2007); A-07-050 (2007).

<sup>45</sup> A-09-079 (2009).

be discussed, deliberated, and voted upon by all members. The commissioners and board members will be asked if they would like to propose any change to the text of the goals, policies, and implementation measures set forth in the draft general plan document. Any such proposals will be discussed, deliberated, and voted upon by all members. Once all votes are complete, the public hearing will be formally closed.

After the public hearing is closed, all members will vote first upon the approval or disapproval of the entire Final Environmental Impact Report, with any amendments necessitated by changes to the land use designations and goals, policies, and implementation measures. All members will then vote upon the approval or disapproval of the entire proposed general plan, as possibly amended by the various changes described above.”

In the *White Advice Letter*, the City of Riverbank proposed, and the FPPC approved, a decision making “protocol” that consisted of nine steps as follows:

“(1) Identification of Abstention Areas. The City would create and implement a procedure to separately manage City Council decisions affecting specific ‘abstention areas,’ defined as properties within 500 feet of real property in which a given councilmember has an economic interest.

(2) Staff Presentation. When the general plan update agenda item is called, the public hearing will be opened. Staff (including the City’s consultants) will give a presentation, at which time councilmembers may ask questions, but will not be expected or encouraged to express any opinions.

(3) Public Testimony. After the staff presentation, public testimony will be heard, presenting evidence, argument and opinion on the proposal. Councilmembers may ask questions, but will not be expected or encouraged to offer opinions.

(4) Staff final comments. After the public testimony has been heard, staff will present closing comments and answer any final questions by councilmembers. At this point, deliberations on the proposed update will begin.

(5) Identification of Abstention Areas. ‘Abstention areas’ for each councilmember will first be identified.

(6) Matters within the Abstention Area. Assuming at least one councilmember has identified an abstention area, the other members will be asked if any of them would propose any change to any proposed land use designation, including zoning designations and minimum building densities, within any of the abstention areas (other than their own). If one or more members indicate a wish to propose changes within an abstention area, the affected member will step off the dais and leave the room. The proposed change will then be discussed and the matter decided by the remaining members, after which the affected member will return to the dais.

(7) Matters outside Abstention Areas. When there are no more proposed changes to any abstention area, the councilmembers will be asked if any of them would propose any change to any land use designation not within an abstention area. If so, these changes will be discussed and decided by all members.

(8) Changes to Goals, Policies and Implementation Measures. The members will next be asked if they would propose any change to the text of the goals, policies and implementation measures contained in the general plan update. Any such proposal will be discussed and decided by all members, after which the public hearing will be closed.

(9) After the public hearing is closed, all members will vote first on approval or disapproval of the entire Final Environmental Impact Report, including any amendments necessitated by changes to the land use designations and goals, policies and implementation measures. All members will then vote on the entire proposed general plan update.”

In each of these two sample procedures, the member with the defined recusal segment (i.e., the “abstention area” in the language used in the *Murphy* and *White Advice Letters*) is permitted to remain on the dais during the staff presentation and public testimony portion of the public hearing. Only when the point has been reached when “consideration” of the document and its changes to land use designations is reached, does the recusal process take place.

This answers the first of two important questions in the structuring of a segmented decision. Namely, two or more separate public hearings, with separate public hearing notices, agenda items and public testimony, were not required. The notice, agenda item, and public testimony on a segmented decision can occur in one combined and traditional public hearing.

This can, however, lead to unusual situations, where a community member speaks during the public comment portion of the public hearing about the very segment in which one of the public body members has a conflict of interest. This may appear inconsistent with the traditional recusal process where the disqualified official leaves the dais and the room at the beginning of the agenda item and is not present on the dais during the public testimony portion of the item. But this deviation from standard practice permits the official to hear the testimony about all the other components and avoids confusion from, or a burden on, public community speakers to divide up their testimony into the same segments that align with the conflict of interest segments. It is also not inconsistent with the Political Reform Act’s recusal requirement that provides that the official’s recusal statement must be made “immediately prior to the consideration of the matter . . . .” (Emphasis added.)<sup>46</sup> and does not require that recusal immediately after the announcement of the agenda item.

The second issue addressed is when the public official with the conflict of interest in a segment must leave the dais and the room during the segmentation process. In both of the two procedures, the affected member only steps off the dais and leaves the room if another member wants to ask questions about, discuss or propose additional changes to the recusal segment or “abstention area”

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<sup>46</sup> Gov. Code § 87105 (a). See also Regulation § 18707(a)(2), providing: “Timing. Public identification of the financial interest must be made immediately prior to consideration of the agenda item.”

from what is proposed by staff. In these examples, the removal of the disqualified member from the agenda item only occurs if members want to consider the item. Otherwise, the recusal segment is deemed to be approved by consensus (and with the noted recusal of the affected councilmember) and the consideration of the other segments proceeds until complete.<sup>47</sup> However, this part of the process is no longer consistent with more recent FPPC Advice Letters. For example in the *Barrow Advice Letter*,<sup>48</sup> the FPPC advised that the public official with a conflict of interest in a segment must recuse himself and leave the room for the duration of the discussion and decision on that segment. The point at which other members are deciding to pose questions, bring up points or make potential changes to the recusal segment, can be viewed as part of the process of the “consideration of the matter.”<sup>49</sup> Thus, following the traditional recusal process of having the conflicted public official leave the dais and the room before and during any aspect of the consideration of the recusal segment (including during the chair’s inquiry to other members as to whether they have questions or want to discuss the recusal segment) is more consistent with common practice, is compliant with recent FPPC advice, is most likely to avoid controversy, and is therefore recommended. This means, the more lenient approach of allowing the disqualified member to stay on the dais unless and until questions are posed or discussion ensues is no longer compliant and should not be part of the segmentation process.

By following this stricter and modern recusal requirement process, it poses the possibility that there could be two times during the consideration of the larger decision that the disqualified member would be required to announce his or her recusal and leave the room: (i) immediately prior to any discussion of the segment; and (ii) again when there is a final vote of the segment (if that segment cannot be bundled into one document and one vote at the end). This awkwardness of having the official recuse and leave the room twice during the same agenda item can be avoided by having final action taken on the approving document (the ordinance or resolution), if necessary,<sup>50</sup> immediately after the decision-making body concludes its discussion, if any, of the recusal segment and before the recused official comes back into the room and onto the dais for the consideration of the remaining segments. This also more formally ends any further consideration of that segment before the other segments are considered, which is compliant with the Segmentation Regulation’s requirement that “[t]he decision in which the official has a financial decision is considered first and a *final decision* is reached by the agency without the disqualified official’s participation in any way.”<sup>51</sup> (Emphasis added.) Accordingly, introduction of the ordinance or approval of the resolution for segmented decisions that are not city-wide general plan or budget decisions, should occur before the subsequent segment is considered.

A third issue presented by the *Murphy* and *White Advice Letters*, is whether one or more of the recused officials can participate in the decision to approve, reject or modify the environmental document that is required to be acted upon prior to the underlying discretionary decision. In the

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<sup>47</sup> This is not unlike the process where, for an agenda item on consent calendar (uncontested item), an official may remain in the room during the action on the consent calendar. Regulation § 18707(a)(3)(A).

<sup>48</sup> A-23-135 (2023) at p. 5, fn. 5.

<sup>49</sup> Gov. Code § 87105 (a).

<sup>50</sup> Recall, that for projects involving a general plan or budget affecting an entire jurisdiction, the official may participate in the final vote to adopt or reject the general plan or budget after all the separate decisions are finalized, and thus there would not be a need to have the body approve separate documents for each segment. Regulation §18706(c).

<sup>51</sup> Regulation § 18707 (a)(3).

*Murphy* and *White Advice Letters*, the consideration of each segment occurred prior to the certification of the environmental impact report that was prepared for the general plan. This is in tension with the requirement of the California Environmental Quality Act (“CEQA”) that prior to a decision-making body making a discretionary decision, the decision-making body must consider the environmental effects of the decision and approve an appropriate environmental document that discloses and, as necessary, mitigates the impacts of that governmental action. The process that those *Letters* suggested contrasts with the FPPC’s approach in the *Savaree Advice Letter*.<sup>52</sup> There, the FPPC considered whether a councilmember had a conflict of interest in a city’s decision to designate a site for additional housing production. The FPPC advised that unless and until the one site that caused the councilmember to have a conflict of interest was removed from the list of sites to be rezoned, the councilmember had a conflict of interest in discussions and actions related to environmental review of the housing element under CEQA.

This raises a few questions. First, is a decision to remove a site from a list of affordable housing sites a decision that could have environmental impacts by shifting impacts onto other sites, and if so, should it be made prior to the preparation of the environmental document? Alternatively, is the decision to remove a site from the list a decision to be made only once an environmental document is prepared? If the decision is to remove a site from consideration prior to the preparation of the environmental document, then a two-step approach could be used to have the decision-making body make an initial decision on whether to include or exclude a segment or segments prior to the preparation of the environmental document, and then once that decision is made, to wait to take final action on the modified list until the environmental document is prepared with that final list. Under that scenario, by the time the environmental document is completed, the site or sites that caused the recusal of one or more officials was already excluded, and the formerly recused officials could take action to approve the environmental document. An additional question occurs if the latter approach is used (removing a site from the list after the environmental document has been prepared) and when there are more than two recusal or abstention segments, whether the Rule of Legally Required Participation is required to be utilized to create the minimum quorum to approve the environmental document prior to making any final decision on any of the segments. Under this latter scenario, the environmental document should be approved immediately prior to the decision on the first segment and by the three-member quorum that was created to act on the first segment.

There may not be an approach that applies in all instances. It is therefore important to consider these issues as you develop your plan as to when to present the segmented decisions to the decision-making body, whether they are done at separate times and in separate meetings or taken all at the same meeting, when to have the decision-making body take action on the environmental document or determination in relation to taking “final action” on the identified segments, and which councilmembers should be included in the decision on the environmental document or determination.

A sample script is attached as **Attachment A** to this Paper that explains how this can be accomplished when there is a segmented decision, such as a zoning ordinance update that is broken down into recusal segments, but in situations (other than a general plan or budget decision) in

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<sup>52</sup> A-23-049 (2023).

which the action taken cannot be bundled up and taken in one approving document. This script is just a suggestion and may not be the only approach to address all the issues covered in this Paper.

**E. Who’s Up First? Decisions as to which Segment of Multiple Segments Created Around the Interests of More than One Public Official is Acted upon First.**

When a decision is broken down into multiple segments, the question arises as to which segment should be considered first and which segment or segments should be considered thereafter. The Segmentation Regulation provides that the decision in which an official has a financial interest be considered “first.” However, the FPPC recognizes that when there are multiple segments, not all of these segmented decisions can be considered “first” in the ordinary sense.

Fortunately, the FPPC has developed informal guidance in this area through the *Galante Advice Letter*<sup>53</sup> and the *Dietrick Advice Letter*<sup>54</sup>. In the *Galante Advice Letter*, the FPPC stated in relevant part:

“In this case, more than one councilmember has a conflict of interest with respect to different segmented decisions. Under Regulation 18709 (a)(3) [since renumbered 18706], the decision in which each official has a conflict of interest must be decided first, before that official can participate in any of the remaining segmented decisions. [Footnote: For example, if Smith has a conflict in project A, and Jones has a conflict in project B, before either may vote on project C, both A and B must be decided without their participation. If A is considered first, Smith cannot vote because of his financial interest in A. Similarly, Jones cannot vote on Project A since the decision for which he had the conflict (project B) has yet to be decided. Once A is complete and B is presented for decision, Smith can participate using the segmentation rule. Jones cannot participate by virtue of his financial interest.]”

In the *Dietrick Advice Letter*, the FPPC established a random selection method for deciding which recusal segment was considered first. The FPPC stated in relevant part:

“[I]f you determine that the rules under Regulation 18709 [since renumbered 18706] allowing segmentation of the decisions apply, the two decisions, in which either Councilmember Carpenter or Councilmember Ashbaugh has a conflict of interest, must be considered before the remaining decisions in which neither have a conflict of interest. Neither official may participate in any of the segmented decisions until the decision in which he has a conflict of interest is reached, with each member leaving the room and not participating in any discussion or decision affecting the designated area for which he has a conflict of interest. Therefore, the official who has a conflict in the first decision considered may participate in the remaining decisions while the official with a conflict in the second decision considered may not participate until after the third decision.

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<sup>53</sup> A-14-063 (2014).

<sup>54</sup> A-13-160 (2014).

If neither decision determines or alters the result of the other segmented decision, you may use any means of random selection that is impartial and equitable in order to determine which official will have the matter in which he has a conflict considered first, thereby allowing him to participate in all remaining decisions. Whatever method is used, both matters in which one of the two officials has a conflict must be considered in the random selection process and each must have an equal likelihood of being chosen first. (Heisinger Advice Letter, No. A-95-333; Thorson Advice Letter, No. A-04-238.)” (Emphasis added.)

What is not addressed in either the *Galante* or *Dietrick Advice Letters* is what happens if a majority of the decision-making body is disqualified because of the existence of three or more recusal segments. Let’s say, for example, that the decision is required to be segmented into four segments with one segment created for each of the three public officials with a conflict of interest and then a fourth segment is created for the balance of the decisions. In this example, Smith has a conflict in Segment 1, Jones has a conflict in Segment 2, and Brown has a conflict in Segment 3. Before the first segment is acted upon, all three disqualified public officials (Smith, Jones, and Brown) must recuse themselves from the decision on the first segment. Once that first segment is acted upon, the disqualified member from the first segment decision (Smith) along with the other two public officials who were not disqualified can then act on the second segment. Once the second segment is acted upon, that previously disqualified member for the second segment decision (Jones) can be brought back to participate in the third segment decision with just the one remaining public official still disqualified (Brown). But to start this process, at the point of making the decision on the first of the segments, the three members with conflicts of interest in segments (Smith, Jones, and Brown) are all disqualified. In that scenario, how do you qualify a quorum to act on that first segment?

This predicament was not addressed in early considerations of general plan decisions. For example, in the *Merkuloff Advice Letter*,<sup>55</sup> the FPPC addressed and authorized the use of segmentation of a city-wide general plan update when the mayor and two other councilmembers (a majority of the five-member city council) had disqualifying financial interests in certain geographical areas that would be affected by the general plan update. The *Merkuloff Advice Letter* did not address the process of determining which segment would be selected to be acted upon first or how a quorum of the council would be selected to make the decision on that first segment.

However, both the *Dietrick* and *Galante Advice Letters* are reasonably interpreted to allow for the use of a random selection method consistent with the Rule of Legally Required Participation<sup>56</sup> for the selection of one of the disqualified members to achieve the minimum three-member quorum to act on the first segment. In our example, this would mean that the “pool” from which one of the three disqualified members would be selected would include Smith, Jones and Brown. This is consistent with the general rule that all officials with a conflict of interest have to be in the random selection “pool.” But to conform that random selection process to the requirements of the Segmentation Regulation, the decision on the first segment must be reached “without the disqualified official’s participation in any way.”<sup>57</sup> This logically means that the pool of potential

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<sup>55</sup> I-90-542 (1990).

<sup>56</sup> Regulation § 18705.

<sup>57</sup> Regulation § 18706 (a)(3).



participants should only include the other two members (Jones and Brown) with the conflicts of interest in the other remaining segments and not all three disqualified members. Otherwise, the member with the conflict of interest in that first segment (Smith) could potentially be selected at random to participate in that first segment decision, and if that were to occur, the requirement that the disqualified official not participate in any way in that segment decision would not be satisfied resulting in a violation of the Segmentation Regulation. We note that unless and until the FPPC formally advises on this question pertaining to the use of the Rule of Legally Required Participation to achieve quorum in a segmented decision, the exclusions of the official conflicted from the first segment (Smith) from the pool of those to be randomly selected to participate in the first segment is not yet authorized. Therefore, if this predicament is likely to arise in your upcoming segmented decision, it is advisable to seek formal advice whether it is appropriate to use the Rule of Legally Required Participation to satisfy quorum requirements for the first segmented decision, and if so, whether it is appropriate to keep all three disqualified members in the “pool” of potentially selected members rather than just the two members who do not have a conflict of interest in that first segment when selecting the member to participate in the decisions regarding the first segment.

Once the decisions on the first segment are acted upon, the member who has the conflict of interest in the first segment (Smith) should be brought back to then participate in the decisions involving the second segment and thereby create the minimum number of three members to participate in the decision on that second segment. By the time the third segment is acted upon, four members would be available to participate in decisions on that third segment (Smith, Jones and the other two members who were not disqualified). Finally, all five members would be allowed to participate in the final fourth segment that involves the balance of the decisions and ones in which none of the members have a conflict of interest.

So, in summary, there could be two random selections. The first random selection would determine which recusal (or abstention) segment is to be acted upon first. The second random selection would be to determine which disqualified member is to be selected to make the minimum quorum to act on that first segment pursuant to the Rule of Legally Required Participation. These two random selection methods could be consolidated into one random selection process that accomplishes both selections (the order that the segments are decided and who is selected to participate in the decision on the first segment) if, and only if, the FPPC provides formal advice that the member with the conflict of interest in the first segment (Smith) can be excluded from the pool of the officials with conflicts of interests from which one of them is selected to participate in the decisions on the first segment.

#### **F. Bundling Decisions into One or Multiple Ordinances or Resolutions.**

The early Advice Letters in which the procedures for segmentation were developed contained a recognition by the FPPC that some segmented decisions would need to be eventually brought together into one combined decision and one document. The most notable of those types of decisions is a public entity’s budget and general plan. In the *Olson Advice Letter*,<sup>58</sup> the FPPC stated that: “Although there may be separate items within the county budget that require

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<sup>58</sup> A-85-242 (1985)

disqualification, Ms. Thomson could vote on the final budget so long as those items that required disqualification are no longer subject to modification.”<sup>59</sup>

Similarly, in the context of a city’s adoption of a general plan, the FPPC, beginning in 1989 in the *Marino Advice Letter*,<sup>60</sup> expressly concluded that the “final vote” to adopt or reject a general plan could be made in one combined decision if no modifications are made at that time. Interestingly, the rationale for that conclusion stems from the public generally exception. In the *Joehnck Advice Letter*,<sup>61</sup> the FPPC explained:

“We have also advised that once all the specific decisions related to a general plan have been finalized, the final vote to adopt or reject the plan will not require disqualification so long as the plan is not modified at that time (Marino Advice Letter, No. I-89-291.) This is the case because the general plan, as implemented through each separate decision, will affect the public officials involved in the manner which is not distinguishable from the effect on the public generally.”<sup>62</sup> (Emphasis added.)

The FPPC’s advice in these situations appears to provide the background behind subsection (c) of the Segmentation Regulation, which as noted previously provides in relevant part:

“(c) Budget Decisions and General Plan Adoption or Amendment Decisions Affecting an Entire Jurisdiction: Once all the separate decisions related to a budget or general plan affecting the entire jurisdiction have been finalized, the public official may participate in the final vote to adopt or reject the agency’s budget or to adopt, reject, or amend the general plan.”

With this direction, a public entity could have one resolution approving a public entity budget or general plan rather than multiple resolutions for each segment. However, this limited permission for budget and general plan decisions, inevitably raises the question whether the other final decisions could be approved in one document. One such situation involves the adoption of an updated zoning ordinance. For example, once a general plan is updated, a city is required to bring the city’s zoning standards into consistency with the city’s general plan.<sup>63</sup>

In 2023, a request for an FPPC advice letter was sought for permission to use one final document to approve a comprehensive zoning ordinance update that was required following a recently amended general plan. Specifically, the question posed was whether the final decision of the city council to approve a comprehensive zoning code update implementing a comprehensive general plan update could be approved in one ordinance versus multiple ordinances. The FPPC concluded that segmentation could be used in the approval of a comprehensive zoning code update, but that because a comprehensive zoning code update was not a budget or general plan decision, the final decisions could not be combined into one single approving document pursuant to subsection (c)

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<sup>59</sup> *Id.* at p. 4.

<sup>60</sup> I-89-291 (1989)

<sup>61</sup> A-92-460 (1992).

<sup>62</sup> *Id.* at p. 4-5.

<sup>63</sup> Gov. Code § 65860.

of the Segmentation Regulation.<sup>64</sup> Accordingly, final decisions on comprehensive zoning code updates should involve the preparation of separate ordinances for each of the recusal segments and then another ordinance for the balance of the zoning code update.

## **V. Segmentation in other Situations.**

### **A. A Site Selection Decision is Linked to Ballot Measure Decisions to Fund a City Hall Project.**

A series of decisions that are inextricably linked to one decision in which a public official has a conflict of interest can result in disqualification as to all of the decisions. But segmentation is a possible solution to organize the decisions in a particular order to allow some of the decisions to be made by a public official who is disqualified from one of the decisions. In the *Stone Advice Letter*,<sup>65</sup> a councilmember owned property within 500 feet of one potential site for a new civic center project. There were a series of decisions that would have to occur by the city council and the voters for that particular site to be developed with a new civic center. First, the city council would need to place a measure on the ballot to repeal an earlier measure that limited the expenditure of funds on a new city hall, and the voters would need to pass that repeal measure. The voters would also need to approve a tax measure to fund the construction of the civic center. If those things occurred, the city council would need to select a site, approve an environmental document, approve the financing for the project, approve the design, and finally award the construction contract. The FPPC concluded that the city's decision to choose the site within 500 feet of a public official's property was the underlying decision and it was inextricably "interlinked" to the other decisions. This is because, under the facts presented, should the ballot measure be approved, the site within 500 feet of the public official's property was most likely the site for the new civic center. Therefore, absent segmentation, the councilmember would be required to recuse himself from all the interrelated decisions. However, the FPPC concluded that by reordering the decisions and having the city council make the decision selecting the site first with the councilmember's recusal, then as long as the subsequent decisions did not result in a reopening of, or otherwise financially affect, the decision in which the councilmember had the conflict of interest, the councilmember could participate in the those subsequent decisions.

### **B. Decisions in Response to a Referendum are Inextricably Interrelated to Decisions on the Underlying Ordinance.**

A city council's decisions in response to a referendum petition were found to be inextricably interrelated to the original decision to adopt the ordinance in the *Stricker Advice Letter*.<sup>66</sup> There, the FPPC had earlier concluded that the mayor of Santa Rosa has a conflict of interest in a rent control and tenant protection ordinance because the mayor was engaged in a residential rental business. As adopted, the ordinance did not apply to rented single family homes, including accessory dwelling units, and the mayor's interests fell within that exception. But because the FPPC had earlier concluded that the mayor had a conflict of interest in the decisions regarding the content of that ordinance, he was required to recuse himself from participating in the adoption of that ordinance. When a referendum petition was filed, the City Attorney asked if the mayor could

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<sup>64</sup> *Ennis Advice Letter*, A-23-106 (2023) at fn. 3.

<sup>65</sup> A-06-007 (2006).

<sup>66</sup> A-16-240 (2017).

participate in decisions of the City Council to either repeal the ordinance or submit it for approval or disapproval by the voters. The FPPC concluded that the two sets of decisions could not be segmented (adoption of the ordinance, on the one hand, and repeal of the ordinance or submission of it to the voters) because the option to repeal the ordinance would effectively nullify the earlier decision. For this reason, the FPPC concluded that the two sets of decisions were inextricably interrelated and the mayor was disqualified from taking part in the decisions of the city council in response to the referendum petition.

**C. Linked Decisions versus Inextricably Interrelated - Project Approvals Dependent on Plan Merger but Not the Other Way Around.**

Two decisions can be linked but the two are not necessarily inextricably interrelated if the linkage is only in one direction. A good example of this dynamic occurred in the *Yang Advice Letter*.<sup>67</sup> There, the City of Vallejo was considering a series of decisions related to a specific redevelopment project (the Waterfront Project) and a decision to merge two redevelopment plan areas (the Plan Merger). The facts indicated that the Waterfront Project was unlikely to move forward unless the Plan Merger occurred. However, the Plan Merger was not dependent on whether the Waterfront Project was approved. Two councilmembers owned property in proximity to the boundary of the Plan Merger but not near the property involved in the Waterfront Project. The FPPC concluded that the two councilmembers had a conflict of interest in the Plan Merger but not in the Waterfront Project. The FPPC then concluded that because the Plan Merger was necessary for the Waterfront Project to move forward, the two decisions were linked. However, because the approval of the Plan Merger could be made and would stand on its own whether or not the Waterfront Project was approved, the two decisions were not inextricably interrelated and could be segmented. This meant that the Plan Merger could be approved first, without the involvement of the two disqualified members, and then once that decision was made, those members could join the other councilmembers in acting on the Waterfront Project.

**D. Cannabis Cultivator Taxes - Segmentation of Indoor Versus Outdoor Cannabis Taxes.**

A member of the Humboldt County board of supervisors owned a farm and had obtained a County permit that allowed one acre of that farm to be devoted to outdoor cannabis cultivation. The County had a cannabis cultivation tax of one dollar per square foot for outdoor cultivation, two dollars per square foot for mixed light cultivation, and three dollars per square foot for indoor cultivation. In 2022, the County was considering a reduction or repeal of the tax. The FPPC concluded in the *Bushnell Advice Letter*,<sup>68</sup> that the tax reduction or repeal decision would have a reasonably foreseeable and material financial effect on the supervisor's property interest in the farm. The tax affected about 15% of businesses in the County, which was not sufficient to constitute of significant segment of all businesses and not sufficient to qualify the supervisor's interest under the Rule of Legally Required Participation. Accordingly, the FPPC concluded that the supervisor had a conflict of interest in the cannabis cultivator tax reduction or repeal decisions. However, the FPPC went on to indicate that if the outdoor cultivator tax reduction or repeal decision was segmented from the decisions on the other two categories of cultivator taxes, and the

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<sup>67</sup> I-06-198 (2006).

<sup>68</sup> I-22-022 (2022).

board made a final decision on the outdoor cultivator tax first, the supervisor may be able to participate in the decisions regarding the other two taxes. The FPPC suggested that further advice be sought to specifically evaluate the nature of the remaining decisions if the supervisors were going to segment the cannabis tax decisions.

**E. Segmentation of a City Budget When a Councilmember has a Remote Interest Under Section 1090 in One Funding Decision in the Budget.**

The use of segmentation in the context of a decision in which one councilmember had a remote interest in a contract under Government Code Section 1090 was addressed in the *Sarton Advice Letter*.<sup>69</sup> There, the FPPC concluded that a councilmember had a remote interest under Government Code Section 1091(b)(1) in a grant decision between a city and a nonprofit corporation that employed the councilmember. Decisions to fund potential contracts with nonprofit service providers were made as part of the annual adoption of the city's budget. The councilmember was required to recuse herself from that budgetary decision. However, rather than require the councilmember to recuse herself from other decisions involving the city budget, the FPPC indicated that the aspect of the budget that gave rise to remote interest could be segmented and acted upon first. The councilmember could then participate in the remaining portions of the budget.

**F. Segmentation May Be Allowed in Connection with Some Amendments to a 183-Acre Downtown Specific Plan.**

A continuing question with respect to when segmentation can be used is when a particular decision or series of decisions applies only to a limited geographic area of a city. As we saw in the *Ball Advice Letter*,<sup>70</sup> the FPPC found that zoning decisions with respect to a 690-acre site owned by San Diego Gas & Electric Company could not be segmented because zoning decisions with respect to one area of the site were interrelated with zoning and land use decisions with respect to the other portions of the site.

In contrast, in connection with a series of decisions regarding potential amendments to a 183-acre downtown specific plan, the FPPC left the door open for the use of segmentation for some of the proposed plan amendments. In the *Smith Advice Letter*,<sup>71</sup> the FPPC considered a councilmember's financial interest in a single-room occupancy hotel with shared bathrooms located within the plan area. The proposed amendments to the specific plan were extensive. They included revising the allowed architectural styles for buildings in the plan area, provisions that would encourage the creation of smaller pocket parks and paseos, the development of pedestrian amenities, such as wayfinding signs, public art, sidewalk cafes, benches, lighting and landscaping, revisions to height limits, amending development caps on the number of units developed in the plan area, the creation of a task force to develop long-term goals for the plan area, changing the plan boundaries, and changes that would incentivize the production of affordable housing in the plan area, and encourage development in certain portions of the plan area such as reduced development standards. The FPPC concluded that some of the proposed amendments would be likely to financially affect the councilmember's interest in the hotel and that he would be disqualified from participating in

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<sup>69</sup> A-17-027 (2017).

<sup>70</sup> A-98-124 (1998).

<sup>71</sup> I-17-094 (2017).

those decisions. Those decisions included the change in architecturally required styles, changes to the caps on future affordable housing units, and the prioritization for development of certain areas in the plan area, which could affect the development potential of the hotel site and its immediate area. However, other decisions, such as the encouragement of pocket parks, paseos, pedestrian access, and amenities, setting up a task force to consider long range goals for the entire plan area, and decisions to change the plan boundaries, were not likely to affect the hotel because it was already developed and operational. The FPPC indicated that the decisions regarding the plan amendments in which the councilmember would have a conflict of interest could be segmented so that the councilmember could participate in the plan amendments that were not likely to financially affect the hotel.

Similar permission to use segmentation was provided in the *Stewart Advice Letter*<sup>72</sup> in connection with decisions involving a 882-acre “North Village Specific Plan.” There, the councilmember resided in the Specific Plan in a planning area known as A-1. Some changes in land uses were proposed to area A-1 and located more than 1,000 feet from his home but others involving plan area A-2 were located between 500 to 1,000 feet from his home, including re-designating an area that was 500 to 1,000 feet away from his home from housing to open space. The FPPC concluded that segmentation could be used to have the city council take action on the items close to his home in which he had a conflict of interest and with his recusal, but that once those initial set of decisions were made, the councilmember could participate in other decisions regarding changes to the Specific Plan that were more than 1,000 feet away from his residence. The FPPC found that the councilmember’s own neighborhood was built-out, that decisions involving the changes 1,000 or more feet away from his home would not have any impact on the properties near his home. This outcome contrasts the facts considered in the *Ball Advice Letter*,<sup>73</sup> where the FPPC found that decisions involving land uses to be assigned to various parts of a 690 acre site, including portions of the site more than 2,500 feet away from the councilmember’s residence, would effectively determine what uses would and would occur near his residence.

**G. Decisions Regarding Two Major Projects Within a Specific Plan Area May Be Too Interrelated with the Specific Plan Amendments to be Segmented.**

In a series of Advice Letters, culminating in the *Moon Advice Letter*,<sup>74</sup> the FPPC was asked whether two councilmembers who each had a conflict of interest in decisions to amend a downtown specific plan, could participate in subsequent decisions to approve two separate development projects located within the plan area. The councilmembers’ homes were both located outside of, but within 1,000 feet of, the boundaries of the plan area, but more than 1,000 feet from either of the two development projects. The FPPC noted that the plan amendments were prompted by six pending development projects, and those amendments would allow higher density, a shift from retail spaces to mixed uses spaces, taller buildings in the commercial core area as well as additional policy and goal changes. The plan amendments would allow developers to exceed the standards in the plan in exchange for providing community benefits through a development agreement for the project. The FPPC cited to earlier Advice Letters in which they advised the two councilmembers to recuse themselves from decisions regarding the plan amendments. Two site-

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<sup>72</sup> A-23-130 (2023).

<sup>73</sup> A-98-124 (1998).

<sup>74</sup> A-20-092 (2020).

specific development projects were thereafter finalized for consideration, one of which was called the “CityLine” project that included a combination of office and residential buildings and associated uses. The other was called the “100 Altair” project and consisted of an office building and garage. The FPPC considered whether the two proposed development project decisions were “implementation type” decisions that may be segmented from the decision to approve the plan amendments or whether they included major policy decisions that would determine whether aspects of the plan would move forward.

The FPPC concluded that the development agreements for the two projects were heavily negotiated continuations of the downtown specific plan policy decisions because the plan allows for additional height, square footage, and residential units in each project through those agreements. Thus, the development agreements effectively reopened and permitted the alteration of the downtown specific plan decisions. The two sets of decisions (plan amendments and the project-specific decisions) were inextricably interrelated with each other. Accordingly, the FPPC determined that the decisions did not meet the requirements of the Segmentation Regulation, could not be segmented from the decision on the plan amendments, and both councilmembers were not able to participate in either set of decisions.

#### **H. Segmentation May be Allowed in Connection with a Package of Decisions Involving a City Trolley Service.**

In the *Craven Advice Letter*,<sup>75</sup> the FPPC determined that a councilmember may not take part in city decisions pertaining to a city trolley service that would impact a trolley stop within 500 feet of rental properties that she owned. Then, in the *Pierik Advice Letter*,<sup>76</sup> the FPPC was asked if the decisions regarding the trolley service could be segmented so that the councilmember could participate in other decisions and discussions related to trolley ridership numbers, its cost and funding sources, purchasing new or used trolley vehicles versus continuing to lease trolley vehicles, changing the route or service schedule, charging a fare for trolley rides, and possibly discontinuing the service under certain circumstances. The FPPC concluded that the councilmember is disqualified from taking part in the package of decisions if it includes decisions to terminate the trolley service or alter the trolley route in a way that would affect the trolley stop near her properties. But the FPPC left the door open for the use of segmentation for the other decisions in the package. Specifically, the FPPC indicated that if the requirements of the Segmentation Regulation are met and followed, the councilmember could take part in segmented trolley decisions that are relatively minor and do not implicate the termination of service or route changes within 500 feet of the councilmember’s property.

#### **I. Housing Element Affordable Housing “Site Inventory” and Related Decisions May be Segmented.**

The likelihood of conflicts of interests for public officials arises when a city is considering and approving the affordable housing “site inventory” in connection with an update to a city’s housing element of its general plan. As noted at the beginning of this Paper, it is possible that many potential conflict of interest issues arising in these decisions can be resolved through careful

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<sup>75</sup> I-20-030 (2020).

<sup>76</sup> A-20-060 (2020).

application of the Public Generally Exception.<sup>77</sup> But once that Exception is applied and does not resolve all potential conflicts of interests, segmentation may become the next available option. In applying the principles of segmentation to an affordability housing site inventory decision, the larger the quantity of identified sites, the lower the risk that a decision with respect to one site will be deemed inextricably interrelated to the decisions on the other sites.

This was exemplified in the *Sodergren Advice Letter*.<sup>78</sup> There, the City of Pleasanton was undertaking an update to its Housing Element. The affordable housing site inventory identified 27 potential sites. A housing commissioner had a financial interest in one of the sites and that particular site was within 1,000 feet of another site. The FPPC concluded that because the commissioner had a financial interest in the decision to include those two sites in its affordable housing site inventory, that the commissioner had a conflict of interest in all aspects of the Housing Element update. However, the FPPC went on to say that because there were 27 sites under consideration within the site inventory decision, it may be possible to segment the decision to allow the commissioner's participation in some of the decisions. The FPPC did not expressly say that the two sites could be segmented into a separate initial decision, and once that decision was made to include or not include those sites in the inventory, that the commissioner could then participate in the remaining decisions.

The possibility of segmentation of an affordable housing site inventory decision was similarly addressed in the *Kokotaylo Advice Letter*.<sup>79</sup> In that *Advice Letter*, the FPPC determined that a city's vice mayor's home was within 158 feet from one of 36 sites in the city's affordable housing site inventory that was proposed in connection with that city's housing element update. Facts were unavailable to determine if the Public Generally Exception applied.<sup>80</sup> The FPPC concluded that the vice mayor had a conflict of interest in the decisions regarding the draft Housing Element. However, similar to the *Sodergren Advice Letter*, the FPPC indicated that segmentation could potentially be used in this situation. The FPPC said: "For example, because there are 36 sites for consideration regarding the [Site] Inventory, it may be possible to segment this particular decision to allow the vice mayor to participate."<sup>81</sup> A similar outcome occurred in the *Silver Advice Letter*,<sup>82</sup> in which a councilmember had a conflict of interest involving three out of nine sites on the town's housing inventory list. After concluding that the facts did not allow the application of the Public Generally Exception, the FPPC stated "it is possible that the Town Council could segment certain decisions related to the draft Housing Element" with action on the three sites first and the balance of the sites and other provisions of the Housing Element second.<sup>83</sup>

In the *Vanni Advice Letter*,<sup>84</sup> the FPPC gave a more definitive and affirmative approval to a proposal for segmentation of a housing element update. There, a councilmember had a conflict of interest in the decision to include four sites among the 291 sites proposed for inclusion in the

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<sup>77</sup> Regulation § 18703.

<sup>78</sup> A-21-160 (2021).

<sup>79</sup> A-22-070(a) (2022).

<sup>80</sup> Under the Public Generally Exception, the analysis would require staff to determine the approximate distance that 15 percent of residential properties in the city would be from the 36 sites identified.

<sup>81</sup> *Id.* at p. 4.

<sup>82</sup> A-22-131(a) (2023).

<sup>83</sup> *Id.* at p. 6.

<sup>84</sup> A-23-022 (2023).



affordable housing site inventory. The city proposed to the FPPC that the housing element decisions be segmented. The segment in which the councilmember would recuse from participation was crafted to include those four sites along with certain policies that would affect those four sites. Once that segment was acted upon, the councilmember would then participate in the decisions regarding the other 287 sites and the other Housing Element policies not already addressed in the first segment. The FPPC concluded that the city's proposal for segmentation and the procedures outlined in the *Vanni Advice Letter* complied with the segmentation requirements.

In the *Barrow Advice Letter*,<sup>85</sup> a city was considering the adoption of a "Residential Infill Priority Area Overlay Zone" that would allow the "up-zoning" of 36 parcels to permit multi-family housing developments on those parcels at a much higher density than the underlying base zoning designation. This action was being taken to create sufficient sites to accommodate development of additional housing units, including affordable units as required by the city's housing element. The mayor owned property within 695 feet from one of the 36 sites proposed for inclusion in the Overlay Zone. All the other sites were more than 3,000 feet away from the mayor's property. The FPPC concluded that the mayor had a conflict of interest in the decisions regarding the Overlay Zone and that because the mayor's property was substantially larger in size compared to other residential properties, the Public Generally Exception did not apply. But the FPPC expressly approved of the use of segmentation in that decision. The FPPC stated that any decision regarding the property within 695 feet of the mayor's property must be considered first, without the mayor's involvement, and the decisions regarding the remaining 35 properties may not reopen the decision. The FPPC noted that the mayor must recuse himself from the decision on that first segment as required by the recusal regulation,<sup>86</sup> and the mayor must leave the room for the duration of the discussion and decision on that segment.<sup>87</sup>

## **VI. Conclusions and Some Practical Advice.**

Segmentation is a helpful tool for public entities to accomplish two competing goals: (i) ensuring that governmental decisions will not be made by public officials with financial interests in those decisions; and (ii) ensuring that public officials can represent the public's interest in matters that do not affect their financial interests by minimizing the scope of required recusal from important and sometimes multi-faceted decisions. Segmentation, as a tool, can help accomplish both of these important public policy goals.

The use of segmentation can pose challenges with respect to whether decisions are inextricably interrelated and not amenable to segmentation, or whether the decisions are linked but, if reordered, can still be segmented. Other challenges occur in deciding how to craft segments to ensure that it addresses all of a public official's financial interests in a decision and then which of multiple segments is acted upon first.

One of the biggest challenges to a city attorney is having sufficient advance notice of an upcoming significant and multi-faceted decision to then decide whether segmentation of the decision is appropriate. Another challenge is to make sure city staff and the decision-makers understand how segmentation works and how it will be carried out at the meeting or meetings when the important

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<sup>85</sup> A-23-135 (2023).

<sup>86</sup> Regulation § 18707.

<sup>87</sup> A-23-135 (2023).

and significant decision is to be made, so it is understandable and efficient and does not interfere with, or otherwise overshadow, the important decisions to be made at the meeting.

Once an upcoming and significant governmental decision is identified, it is important for the city attorney to first work with staff to think through whether potential conflicts of interest are likely to occur and to undertake the standard four-step process to determine if one or more officials are likely to have a conflict of interest in the decision. Before deciding that the public official or officials with a conflict of interest must recuse themselves from the entirety of the decision or that the Rule of Legally Required Participation is the only viable tool to obtain a quorum to act on the decision, the city attorney will need to consider whether individual components of that decision can be broken into separate segments and whether the decisions on each component are inextricably interrelated with other components. If the components are not inextricably interrelated, then segmentation may be viable.

Once segmentation is found to be viable, careful crafting of the appropriate segments with the assistance and collaboration with city staff will be important. Segments need to contain all the individual components that give rise to the applicable conflict of interest for the public official but not be over-inclusive of individual components that do not cause the conflict of interest. Similarly, if the impact of the decision on the official's real property interests are segmented, the geographic area included in the segment should be appropriately sized and delineated.

The next challenge is to explain the tool and process of segmentation to staff. Don't be surprised if city staff has never heard of segmentation or never carried it out in practice. Once staff understands segmentation, it will be important to reassure them that this can be done in a manner that is efficient and understandable to the public officials involved and the general public. Providing sample text for the staff report to explain the process and to summarize the segments will be helpful to staff. The city attorney can also assist in crafting a script to be read by staff and the presiding officer at the meeting to both explain the process and the segments. Advance briefings of decision-makers can also help prepare them to understand how segmentation will be carried out and why staff is undertaking this process.

Finally, while the city attorney and staff may be anxious that implementing segmentation procedures at the meeting will appear clunky and confusing, it is my experience that it becomes relatively easily understandable and does not create significant delays or confusion. Once completed, all officials, staff and the public can look back and see how the two competing goals have in fact been accomplished and how fair that is to the officials and the public interest and community interests they serve.

We hope this Paper is a useful guide as you plan for and then apply the tool of segmentation in important decisions facing your communities.

**Attachment A** : Sample Script for the Use of Segmentation

\* \* \*

I would like to thank Zachary Heinselman who assisted me in three major city decisions that we segmented, helped me learn and work through many of the issues noted in this Paper, and for his assistance in reviewing this Paper. I would also like to thank Chelsea Straus who always makes

my written work product better and for Linda Javier for her assistance in proofing this paper and putting it together. Thanks also to Leslie Ericson for the nudge she provided to me to undertake this Paper. Finally, I would like to thank Steve Dorsey, one of my retired mentors who brought me into this area of law and who I learned so much about it over the thirty years we worked together.

## Attachment A

### Sample Script for Segmentation of a Zoning Ordinance Update

#### Presentation of Zoning Ordinance Amendment No. [\_\_\_\_\_] and Segmentation of City Council's Adoption of Zoning Ordinance Amendment No. [\_\_\_\_\_]

**Staff:** The Staff Report and presentation of this agenda item will be divided into several sections. First, we will provide an overview of the Zoning Code Update. Following that presentation and after answering any questions of the City Council, we will take public testimony on this public hearing item.

After the Staff Presentation and public testimony on this Agenda Item \_\_, City Staff will seek the City Council's approval of the Zoning Code Update by way of segments.

*[General Staff Presentation of the Agenda item.]*

In order to ensure that City Councilmembers do not participate in making a decision that is reasonably foreseeable to materially affect their own property interests or properties within 1,000 feet of their property interests, City Staff has identified certain discrete components of the Zoning Code Update that require recusal by certain City Councilmembers. We have broken those particular components into four segments and will proceed through the adoption process in compliance with the segmentation rules provided by the FPPC. This process allows for the individual components of the comprehensive Zoning Code Update that implement the General Plan to be broken down into separate decisions that are not inextricably interrelated to the decision in which the official may have a disqualifying financial interest. In this way, a final decision will be reached without the disqualified official's participation in any way on each segment. Once the decision in which the official has a financial interest has been made, the disqualified public official's participation will proceed in a manner that does not result in a reopening of, or otherwise financially affect, the decision from which the official was disqualified. In compliance with rules and decisions of the FPPC, the recusal segments that City Staff and the City Attorney, have identified are defined and labeled as follows:

**Recusal Segment 1 involves Councilmember A.** Segment 1 involves the change to the zoning designation of Councilmember A's property on \_\_\_\_\_ from the \_\_\_ zone (\_\_\_ dwelling units per acre) to the \_\_\_ zone (\_\_\_ dwelling units per acre) and the change in zoning designations of properties within 1,000 feet of his property. It also includes the establishment of allowable uses and development standards for the \_\_\_ Zone that would apply to his commercial property on \_\_\_\_\_ if his property is rezoned to that \_\_\_\_\_ Zone. Councilmember A will be recusing himself from this component of the Zoning Code Update while the other Councilmembers participate in the Council's adoption of Segment 1 of Zoning Ordinance Amendment No. \_\_\_\_\_.

**Recusal Segment 2 involves Councilmember B.** For Councilmember B, the zoning of her property on \_\_\_\_\_ is not proposed to change, but properties within 1,000 feet of her property are proposed to change from \_\_\_\_\_ to \_\_\_\_\_ and from \_\_\_\_\_ and \_\_\_\_\_ to \_\_\_\_\_. Councilmember B will be recusing herself from these changes to the Zoning in the \_\_\_\_\_ Area while the other Councilmembers may participate in the Council's consideration of these proposed changes. We refer to this component as Recusal Segment 2.

**Recusal Segment 3 involves Councilmember C.** For Councilmember C, zoning of the property on which he operates his business on \_\_\_\_\_ and properties in that immediate vicinity are proposed to change from \_\_\_\_\_ with a \_\_\_\_\_ floor area ratio to \_\_\_\_\_ with a \_\_\_\_\_ floor area ratio. With the establishment that new zone, allowable uses and development standards are being established for properties in that Zone. Councilmember C will be recusing himself from this component of the Zoning Code and Zoning Map Update while other councilmembers may participate in the Council's confirmation of this proposed change. We refer to this component as Recusal Segment 3.

**Segment 4.** Segment 4 contains all properties within the City of \_\_\_\_\_ and all proposed Municipal Code text amendments not included in Segments 1 through 3 of Zoning Ordinance Amendment No. \_\_\_\_\_. No Councilmembers are required to recuse themselves from participating in the Council's adoption of Segment 4 of Zoning Ordinance Amendment No. \_\_\_\_\_.

After this Staff Presentation, we recommend that the Mayor open the public hearing and accept public testimony and comment on this hearing item. After closing the public comment portion of the hearing, we recommend that the City Council proceed through Segments 1 through 3, with the affected Councilmember announcing his or her recusal from the discussion and consideration of that Segment and leaving the room during the discussion and consideration of that Segment.

The order that the Segments 1 through 3 will be acted upon will be determined by random selection. In addition, the members who participate in the consideration and decision in the Segment that is randomly selected to be acted upon first, will be determined in accordance with the Rule of Legally Required Participation and also selected randomly, excluding the councilmember who has the disqualifying interest in that Segment.

After discussion on that Segment, and before proceeding to the next segment, the Mayor will entertain Council deliberation and a motion with respect to the each Ordinance separately. As each Segment is acted upon, the Councilmember who was recused from that segment can reenter the room and participate in the discussion and decisions on the remaining Segments.

Once Segments 1 through 3 are addressed separately, the Mayor will then move to Segment 4 which is the balance of the Zoning Code Update. The full Council will be permitted to discuss, consider, or act on Segment 4. If you have any questions during this process, feel free to ask Staff and we will help you through the process.

This ends our presentation.

*[Once overall Staff Presentation is completed, City Staff will proceed to answer Councilmember questions and then the Council will take public comments on the agenda item.]*

*[After the public testimony portion of the public hearing is completed, the Mayor will close the public hearing and the Mayor will proceed through each of the recusal segments].*

## Script for Mayor to follow to proceed through each Segment

**Mayor:** Now that we have had the City Staff Presentation and Public Hearing, we will now move through the Segments for comments or questions before we adopt the Ordinances that pertain to those Segments.

**Mayor:** We first have to randomly select which of the three segments in which councilmembers have a conflict of interest will be acted upon first.

**City Clerk:** *[Announces methodology to be utilized to randomly select the Segment to be acted upon first, and undertakes the steps for that random selection. Based on that random selection, the order of the Segments are reorganized accordingly.]*

*[Reorganize the order of the Segments to conform to the order randomly selected and announce that order.]*

**City Clerk:** Now that the order of the Segments has been randomly determined, we must undertake a second random selection process to select one of the three<sup>1</sup> Councilmembers to be randomly selected to create the minimum quorum of three persons to act on that Segment.

**City Clerk:** *[Announces methodology to be utilized to randomly select one of the three<sup>2</sup> Councilmembers who does not have a conflict of interest in the first segment to be selected to constitute the quorum for action on that first segment and undertakes the steps for that random selection.]*

*[Assuming the Segment order is Segment 1, 2, 3 and 4, the following steps are then followed. Reorder as needed to conform to order randomly determined.]*

### 1. Segment 1.

**Mayor:** We will now proceed with Recusal Segment 1 with the record noting that Councilmember A, B and C were recused from this segment as described earlier by City Staff but that Councilmember [A, B or C] was randomly selected to participate in this Segment pursuant to the Rule of Legally Required Participation because otherwise the City Council would be unable to achieve quorum on this segment due to the disclosed conflicts of interest of a majority of the councilmembers. Just to remind people, Recusal Segment 1 applies to the changes to the zoning designation of Councilmember A's property on \_\_\_\_\_ and the change in zoning designations of properties within 1,000 feet of his property. It also includes the establishment of allowable uses and development standards for the \_\_\_\_\_ Zone that would apply to his property on \_\_\_\_\_

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<sup>1</sup> As discussed in the Paper [on pages 20-22 in Section IV.E], formal advice should be sought from the FPPC to determine if a deviation from the Rule of Legally Required Participation may occur in these situations so as to permit the "pool" of disqualified members to be selected at random to exclude the Councilmember with the conflict of interest in the first segment so as to harmonize the random selection process with the Segmentation Regulation which requires that the segment is to be decided without the involvement of the Councilmember with the conflict in that segment. Once that advice is provided, this second random selection method may be modified accordingly.

<sup>2</sup> See immediately preceding footnote.

if his property is rezoned to \_\_\_\_\_. In connection with making the decision on Segment 1, the Council will also be making determinations under CEQA.

**Councilmembers [A, B, or C].** *[Councilmembers who were not selected to participate in the decision on the first segment read prepared recusal statements containing the requirements of Regulation Section 18707 and leave the dais and the room for the consideration of Segment 1.]*

**Councilmember [A, B, or C].** *[Councilmember who was selected at random reads prepared recusal statement containing the requirements of Regulation Section 18705 but notes that he or she is permitted to participate in the decisions on the first segment pursuant to the Rule of Legally Required Participation and he or she may stay in the room and participate in the consideration and decision regarding Segment 1.]*

**Mayor:** Are there any comments, questions or discussion on the environmental determination or on Segment 1?

***Councilmember Comments***

**Motion:** I move to approve the environmental determination [specify the determination or document, and if that determination is made in a separate resolution, read the title of the resolution] and introduce Ordinance No. \_\_\_ approving Segment 1 of Zoning Ordinance Amendment No. \_\_\_\_.

**Second:** *[Second of Motion.]*

**Mayor:** Will the [City Clerk] please read the title of Ordinance No. \_\_\_\_.

**City Clerk:** *[Reads title of Ordinance \_\_\_ for Segment No. 1.]*

**Mayor:** May we have the roll call.

**City Clerk:** *[Conducts Roll Call Vote.]*

**Mayor:** *[Announces the results of the vote.]*

**2. Segment 2.**

**Mayor:** We will now proceed with Segment 2 with the record noting that Councilmember B and Councilmember C are recusing themselves from this segment as described earlier by City Staff. Just to remind people, Recusal Segment 2 involves the change of zoning of Councilmember B's commercial property on \_\_\_\_\_ from \_\_\_\_\_ Zone to \_\_\_\_\_ Zone. In addition, this Segment also involves the rezoning of properties within 1,000 feet of Councilmember B's commercial property on \_\_\_\_\_ and properties within 1,000 feet of Councilmember B's property on \_\_\_\_\_ that are proposed to change from \_\_\_\_\_ to \_\_\_\_\_ and from \_\_\_\_\_ and \_\_\_\_\_ to R-2 \_\_\_\_\_.

**Councilmember B.** *[Councilmember reads prepared recusal statement and leaves the dais and the room for the consideration of Segment 1 and joins Councilmember C outside the room and Councilmember A returns to the room and dais.]*

**Mayor:** Are there any comments, questions or discussion on Segment 2?

***Councilmember Comments***

**Motion:** I move to wave full reading and introduce Ordinance \_\_\_\_\_ approving Segment 2 of Zoning Ordinance Amendment No. \_\_\_\_\_, as read by title.

**Second:** *[Second to Motion.]*

**Mayor:** Will the City Clerk please read the title of Ordinance.

**City Clerk:** *[Reads title of the Ordinance \_\_\_\_for Segment No. 2.]*

**Mayor:** May we have the roll call.

**City Clerk:** *[Conducts Roll Call Vote.]*

**Mayor:** *[Announces the results of the vote.]*

*[The Mayor can move on to the next Segment; and Councilmember B may return to the dais.]*

**3. Segment 3.**

**Mayor:** We will now provide any comments and direction to Staff on the land use changes noted in Recusal Segment 3 with the record noting that I am recusing myself (the Mayor is Councilmember 3 in this example) from this segment as described earlier by City Staff and will turn the gavel over to Mayor Pro Tem \_\_\_\_\_ for the consideration of this particular recusal segment.

**Mayor.** *[Mayor reads prepared recusal statement and leaves the dais and the room for the consideration of Segment 3.]*

**Mayor Pro Tem:** Are there any comments, questions or discussion on Recusal Segment 3? Just to remind people, Recusal Segment 3 is the change to the zoning to properties on \_\_\_\_\_ from \_\_\_\_\_ to \_\_\_\_\_ and to properties within the immediate vicinity and that have the same designation change and the establishment of allowable uses and development standards for that zone.

**Mayor Pro Tem:** Let the record note that Mayor \_\_\_\_\_ has recused himself from this segment.

**Mayor Pro Tem:** Are there any comments, questions or discussion on Segment 3? Otherwise, I will entertain a motion to waive full reading and introduce Ordinance No. \_\_\_\_\_ as read by title.



***Councilmember Comments***

**Motion:** I move to waive full reading and introduce Ordinance No. \_\_\_\_ approving Segment 3 of Zoning Ordinance Amendment No. \_\_\_\_\_, as read by title \_\_\_\_\_.

**Second:** *[Second to Motion.]*

**Mayor Pro Tem:** Will the City Clerk please read the title of Ordinance \_\_\_\_.

**City Clerk:** *[Reads title of the Ordinance \_\_\_\_ for Segment No. 3.]*

**Mayor Pro Tem:** May we have the roll call.

**City Clerk:** *[Conducts Roll Call Vote.]*

**Mayor Pro Tem:** *[Announces the results of the vote and the Mayor returns to the dais.]*

**4. Segment 4.**

**Mayor:** Now we are moving on to the adoption of the balance of the Zoning Ordinance Update. Are there any comments, questions or discussion on Segment 4 which are all other changes proposed by the Zoning Ordinance Update other than what was already addressed and approved in Segments 1 through 3? Otherwise, I will entertain a motion to waive full reading and introduce Ordinance No. \_\_\_\_ as read by title.

***Councilmember Comments***

**Motion:** I move to introduce Ordinance \_\_\_\_ approving Segment 4 of Zoning Ordinance Amendment No. \_\_\_\_.

**Second:** *[Second to Motion.]*

**Mayor:** Will the City Clerk please read the title of Ordinance \_\_\_\_.

**City Clerk:** *[Reads title of the Ordinance \_\_\_\_ for Segment No. 4.]*

**Mayor:** May we have the roll call.

**City Clerk:** *[Conducts Roll Call Vote.]*

**Mayor:** *[Announces the results of the vote.]*

**Mayor:** That concludes this item. Thank you very much.

**End of item.**



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# Municipal Tort and Civil Rights Litigation Update

Thursday, May 9, 2024

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# MUNICIPAL TORT AND CIVIL RIGHTS LITIGATION UPDATE

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League of California Cities  
Annual Conference  
Rancho Mirage, California  
May 9, 2024

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## I. CIVIL RIGHTS – LAW ENFORCEMENT LIABILITY

### A. *Snitko v. United States*, 90 F.4th 1250 (9th Cir. 2024)

- **Warrantless searches and seizure of anonymous safe deposit boxes violate the Fourth Amendment absent probable cause, and cannot be justified as an inventory search.**

US Private Vaults (USPV) in Beverly Hills operated as a safe deposit box rental business without requiring customers to provide identification. Following suspicions of money laundering and other illicit activities, the FBI investigated USPV. Subsequently, the government obtained a warrant to search and seize USPV's facilities, including its safe deposit boxes, as part of the probe into potential criminal activities. The warrant expressly prohibited a criminal search or seizure of box contents. It mandated that agents adhere to established protocols for inventorying items and notifying box owners to claim their property post-search. Nonetheless, agents searched safe deposit boxes, used drug-sniffing dogs on cash contained within the boxes, and made copies of documents. The DOJ then filed administrative forfeiture claims attempting to take more than \$100 million in cash and other valuables without charging any individual box owner with a crime.

Despite Plaintiffs' claims for the return of their seized property filed with the FBI after the raid on USPV, the government failed to return the property. Instead, it intended to initiate civil forfeiture proceedings for boxes meeting a monetary threshold of \$5,000.

In Part I of the decision, the panel concluded that the inventory search doctrine, an exception to the warrant requirement permitting authorities to search items within their lawful custody, did not apply. The panel determined that the Supplemental Instructions deviated from the scope of a typical "inventory" procedure. When the government introduces a series of "customized" instructions to a "standardized" inventory policy, the search ceases to be conducted in accordance with a "standardized" policy. The explicit creation of the

Supplemental Instructions specifically for the USPV search distinguished this case from a standardized “inventory” procedure.

In Part II of the decision, the panel held that the government exceeded the warrant’s scope. To make that determination, the panel compared the terms of the warrant to the search actually conducted. In this case, the warrant did not authorize a criminal search or seizure of the contents of the safe deposit boxes. The government expected, or even hoped, to find criminal evidence during its inventory. The instructions required agents to summarize the items found in the safe deposit boxes, tag items with forfeiture numbers, send them to “evidence control,” and preserve “drug evidence” for fingerprints.

**Significance:** Police departments must follow their standardized inventory procedure when doing an inventory search.

**B. *Miller v. City of Scottsdale*, 88 F.4th 800 (9th Cir. 2023)**

- **Summary judgment upheld in favor of a Scottsdale Police Officer and the City of Scottsdale in an action alleging constitutional violations arising from a restaurant owner’s arrest and citation for violating a Covid-19 emergency executive order, which prohibited on-site dining.**

On March 19, 2020, Arizona Governor Douglas Ducey issued an executive order prohibiting on-site dining. On March 23, 2020, an executive order included restaurants on a list of “essential functions” that could remain open during the pandemic to prepare and serve food for consumption off-premises. Issued on March 30, 2020, a new executive order set forth a physical distancing policy with a notice requirement that prior to any enforcement action, a person would be given notice and an opportunity to comply

Scottsdale police officers visited Randon Miller, the owner of Sushi Brokers, on March 27 and 28, 2020 in response to complaints that Sushi Brokers was violating the state’s Covid-19 emergency order prohibiting on-site dining. On April 10, 2020, Scottsdale police received a tip about people dining inside Sushi Brokers. An officer went to Sushi Brokers that evening

and saw about ten people inside the establishment, of whom four left without to-go food bags. The next day, April 11, 2020, Officer Christian Bailey and six other officers visited Sushi Brokers to serve Miller with a citation for violating the emergency executive orders. Miller shouted obscenities at Officer Bailey, who eventually managed to serve the citation. When Officer Bailey began to leave, Miller shouted at the other six officers. This led Officer Bailey to arrest Miller for violation of a COVID-19 executive order as well as disorderly conduct. These charges were later dismissed.

Miller sued Bailey and the City for a violation of Section 1983 asserting claims of (1) retaliatory arrest, in violation of the First Amendment; (2) false arrest, in violation of the Fourth Amendment; and (3) Monell liability against the City of Scottsdale.

***Judge Gould's Opinion:*** To prevail on any of his claims, Miller needed to demonstrate that Baileu lacked probable cause to arrest him. The probable cause inquiry turned not on whether there was a violation but on whether a reasonable officer would conclude that there was a fair probability of a violation. Here, given that officers had observed on-site dining at the restaurant and there were prior calls reporting violations, Bailey had probable cause to arrest Plaintiff.

Miller also argued that he did not violate the Executive Order issued on March 30, 2020, because he did not receive notice and an opportunity to comply before the arrest. He argued that the earlier warnings do not count because they came before the Executive Order was issued. The panel, however, determined that the newer executive order did not invalidate any prior warnings.

***Judge Hurwitz's Concurrence:*** Judge Hurwitz concurred, stating that Officer Bailey could not be faulted for concluding he could arrest Miller. The officer's belief that there was probable cause to cite and arrest Miller for violating the executive order was reasonable, which is all the law requires. The probable cause inquiry turns not on whether there was a violation

but on whether a reasonable officer would conclude that there was a fair probability of a violation.

Miller contended that the first executive order applied to businesses, not individuals. Judge Hurwitz rejected this argument and stated it “should not matter that Miller owned the restaurant through a limited liability corporation if he was serving in-person diners.” Miller’s other contention was that he did not receive notice and an opportunity to comply before the issuance of the citation. Judge Hurwitz also rejected this contention, finding that Miller had two warnings before April 11 that he was violating the ban on in-person dining. Even if the latest order somehow established an entirely new offense, the executive order did not invalidate any prior warnings.

***Judge Bumatay’s Dissent:*** Judge Bumatay stated: “Given the dizzying speed of all these orders, confusion was bound to happen.” Judge Bumatay noted that the earlier executive orders applied only to “restaurants” or “businesses”—not persons. While Miller received warnings on March 27 and 28, those warnings came before most recent executive order went into effect. Indeed, the order required notice and opportunity to comply with “this order”—meaning that only warnings made after the order’s March 31 effective date should count. Judge Bumatay asserted that prosecution would “unreasonably implicate the prohibition on ex post facto laws.”

***Significance:*** This legal debate in the Ninth Circuit could have been avoided had the executive order’s language been clearer regarding (1) whether individuals fall within the statute prohibiting restaurants from having on-site dining and (2) whether warnings before the issuance of the order were valid. However, to avoid this contention, an agency is best counseled to issue the requisite warnings after issuing the order (or effective date of legislation) when the law requires such notice.

C. *Waid v. County of Lyon*, 87 F.4th 383 (9th Cir. 2023)

- **Officers are entitled to qualified immunity for shooting and killing a suspect in a domestic call where the suspect used aggressive language, ignored an order from officers, and rushed toward officers in a small and confined space.**

Police received a 911 call seeking help with a domestic violence incident. The caller did not request emergency medical care or report any weapon. At the residence, two minor children, both distressed, told a police officer that their parents were fighting and that their mother needed an ambulance. One stated that there were no weapons in the house other than a BB gun. Medics were called.

The officers then entered the home. As they entered the kitchen, Decedent, out of view, shouted, “Fuck you, punks.” An officer, with his gun drawn, saw Anderson at the other end of the hallway and told him to get on the ground. The other officer also drew and pointed his gun in front of him.

Anderson ignored the commands and ran down the short hallway toward the officers. Officer Willey fired three shots in quick succession at Anderson as Anderson crossed the threshold between the short hallway and the kitchen. Officer Wright fired his weapon twice. Anderson fell to the ground and began to bleed from his chest as Willey continued to shout at him, “Get on the ground!” Willey reported the shots and that the suspect was down. Anderson, who was shot five times, died from his injuries. A federal civil rights lawsuit ensued, and the officers filed a motion for summary judgment asserting qualified immunity.

**Panel Opinion:** Qualified immunity protects government officials “from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.” *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982). In this case, the facts did not show that officers’ use of force clearly violated Anderson’s constitutional rights, even when viewed in the plaintiffs’ favor.



Anderson used aggressive language with the officers, ignored their orders, and rushed towards them in a small, confined space. Additionally, the officers were responding to an active domestic violence situation and needed to make split-second decisions when Anderson charged at them. This factual scenario was very different from other cases with facts extreme enough to deem that the constitutional violation was obvious (such as chaining a person shirtless to a hitching post in the hot sun with limited water and no bathroom breaks; detaining mere witnesses to a crime for five hours; and shooting a person holding a baseball bat who was not threatening anyone else).

Additionally, the Ninth Circuit found that Plaintiff failed to show that the existing body of caselaw would have placed a reasonable officer on notice that the conduct was unconstitutional in violation of the Fourth Amendment. The children had advised officers of a physical altercation and did not know the status of her welfare. Officers faced Anderson in a narrow hall with no barriers, meaning retreat was not viable and may have left Anderson's wife alone and allowed Anderson time to obtain a weapon. Anderson was upright and moving when he was shot. Anderson also ignored commands, was rapidly advancing on the officers, and could access their weapons if he was not stopped. None of the cases relied on by Plaintiffs were sufficiently analogous to put a reasonable officer on notice that the use of deadly force would be unconstitutional.

Finally, the Ninth Circuit agreed the officers did not violate Anderson's Fourteenth Amendment substantive due process rights. Children of a decedent have the right to assert substantive due process claims. However, only official conduct that "shocks the conscience" is cognizable as a due process violation. Where deliberation is not practical and officers make "a snap judgment because of an escalating situation," liability is only found to shock the conscience if the officer acts with a purpose to harm unrelated to legitimate law enforcement objectives. That was not present in this case.

***Judge Berzon's Partial Concurrence and Partial Dissent:*** Judge Berzon dissented. While agreeing that the officers were properly granted qualified immunity on the Fourteenth

Amendment familial interference claim, she asserted that the officers' use of force was unconstitutionally excessive and the officers are not entitled to qualified immunity on the Fourth Amendment claim. The dissent pointed to *A.K.H. ex rel. Landeros v. City of Tustin* to assert that an officer may not shoot an unarmed suspect several times—in rapid succession and without warning—when the suspect is not reaching for a gun, even if the suspect is involved in a domestic violence incident, is noncompliant with an order to get down, and is quickly moving toward the officer.

**Significance:** To show that an allegedly violated right was clearly established for the qualified immunity analysis, plaintiffs must show why their case is obvious under existing general principles or show specific cases that control or reflect a consensus of non-binding authorities in similar situations. This case reinforces the importance of an officer's ability to make split-second decisions.

**D. *Smith v. Agdeppa*, 81 F.4th 994 (9th Cir. 2023)**

- **The Ninth Circuit changes its prior ruling and finds the officers are entitled qualified immunity for fatally shooting a violent subject.**

In the men's locker room of a Hollywood gym, Albert Dorsey was shot and killed during an encounter with Los Angeles Police Department Officers Edward Agdeppa and Perla Rodriguez. The officers had responded to a call regarding a trespasser refusing to leave a gym, after threatening and assaulting other gym members and staff. When they arrived at the gym, they found Dorsey naked and dancing to music. Dorsey was 6'1" and about 280 pounds. Officers Agdeppa and Rodriguez were 5'1" and 5'5" respectively, and weighed approximately 145 pounds each.

Dorsey ignored orders to get dressed and leave. The officers made unsuccessful attempts to handcuff Dorsey. Agdeppa managed to place one handcuff onto Dorsey's right wrist, but for roughly a minute and twenty seconds, Dorsey used his size to thwart the smaller officers' attempts to handcuff him. After a continued struggle, Rodriguez deployed her taser.

Both officers attested that they used their tasers in “stun” mode several times as Dorsey became increasingly aggressive. The officers indicated that Dorsey did not attempt to flee but instead advanced towards them, punching at their heads and faces while the handcuff attached to his wrist also swung around and struck them. The officers stated that Dorsey struck Rodriguez, knocked her to the ground, allegedly straddled her, and began repeatedly striking her with his fists. Fearing for his partner’s life, Agdeppa allegedly warned Dorsey to stop before shooting him five times and killing him. Agdeppa said he was six to eight feet away from Dorsey when he fired the shots.

Eyewitness accounts and audio recordings from body worn cameras conflicted with this account of events. Witnesses said Agdeppa was within arm’s length of Dorsey and was holding Dorsey’s arm. Also, the deputies could not be heard issuing a warning to Dorsey before the shooting. Photographs showed Rodriguez to be “unscathed,” and the officers’ medical records reflected only minor injuries.

Agdeppa moved for summary judgment, relying on qualified immunity. The trial court initially denied the motion and the Ninth Circuit affirmed, stating that the “pervasive disputes of material fact make this case a textbook example of an instance in which summary judgment was improper.” The panel majority concluded that “a jury could find that a reasonable officer in Agdeppa’s position would not have believed that Rodriguez or anyone else was in imminent danger and, thus, would have understood that his use of deadly force violated plaintiff’s Fourth Amendment rights.” They also found “a reasonable factfinder could decide that Agdeppa’s characterization of the events in the locker room was contradicted by other evidence in the record. A reasonable jury could also conclude that Agdeppa had an opportunity to warn Dorsey and did not do so. The Ninth Circuit found these as valid grounds for the district court to deny qualified immunity. (See *Smith v. Agdeppa*, 56 F.4th 1193 (9th Cir. 2022), *reh’g granted, opinion withdrawn*, 66 F.4th 1199 (9th Cir. 2023). Judge Daniel Bress dissented.

However, United States District Judge Gary Feinerman, sitting by designation, resigned from judicial service and Judge Consuelo Callahan was named the replacement judge. Judge

Callahan and Judge Bress voted in favor of rehearing, and Judge Christen voted against rehearing. Upon rehearing, the result was very different.

The Ninth Circuit focused its opinion on the second prong set of qualified immunity- whether the alleged constitutional violation was “clearly established” at the time of the incident in question. Judge Bress, now writing for the majority, stated that it was “undisputed that the officers were placed in a high-stress, rapidly developing situation involving a person who had reportedly assaulted a gym security officer and threatened others, and who was violently resisting the officers and assaulting them in an enclosed area.” The Court also noted the size difference between Dorsey and the officers, and that “[j]ust before the fatal shots were fired, the officers can be heard crying out in pain as crashing and thrashing noises intensify.” With this in mind, it could not be said that the officers were violating clearly established law.

Plaintiff also argued that even if the degree of force here was permissible based on the threat the officers faced, Agdeppa was constitutionally required to warn Dorsey before using such deadly force. Although no warning was given, the law only requires warnings “whenever practical;” however this warning principle “is not a one-size-fits-all proposition that applies in every case or context.” The Ninth Circuit states that the “absence of a warning does not necessarily mean that [an officer’s] use of deadly force was unreasonable. In this case, the Ninth Circuit held that Plaintiff did not identify any controlling case or robust consensus of cases that clearly established that such a warning was required in this case.

***Significance:*** This case is unique procedurally, as a new judge joined the dissenting judge from the original opinion to issue a new decision granting qualified immunity to the officers. The Court decision recognizes the unpredictability of policing in rapidly evolving circumstances. However, four judges considered this matter, and there was an even split on the issue as to whether qualified immunity applied to the facts.

This case is a good reminder that officers, when feasible, should issue a warning before employing deadly force. However, general statements in prior cases about an officer providing a “warning,” when practicable, before using lethal force do not satisfy plaintiff’s burden.

**E. *Sabbe v. Washington County Board of Commissioners*, 84 F.4th 807 (9th Cir. 2023)**

- **Ninth Circuit affirms qualified immunity based on a lack of clearly-established law involving use of armored vehicles for pursuit intervention technique maneuvers, while announcing new law that will govern the use of such maneuvers going forward.**

The Washington County Sheriff’s Office received a report that Remi Sabbe was driving erratically on a rural field he owned, that Sabbe was drunk and belligerent, and that there may have been a gunshot on the property. Thirty law enforcement officers responded, in marked cars with overhead lights on to make their presence known. An hour later, two Sheriff’s Department armored vehicles entered the field. One was an unmarked Commando V150 personnel carrier. The V150 executed two pursuit intervention technique (“PIT”) maneuvers, in which officers deliberately collide their vehicle into the back half of the side of a target vehicle, hoping to cause the target vehicle’s engine to stall. The maneuvers crushed Sabbe’s pickup. Minutes later, officers heard a gunshot, and they opened fire. Sabbe was shot eighteen times and died at the scene.

Sabbe’s widow sued the officers and the County, alleging—among other things—42 U.S.C. § 1983 claims that defendants violated her husband’s Fourth and Fourteenth Amendment rights by entering the family’s private property, ramming his pickup with the V150, and shooting him. The district court granted summary judgment, holding that the officers’ conduct neither violated Sabbe’s constitutional rights nor

exceeded the scope of their qualified immunity. The Ninth Circuit affirmed in a divided opinion.

**Majority:** The majority (Judges Christen and Tallman) held that the illegal entry claim failed because even if the entry violated the Fourth Amendment, it was not the proximate cause of Sabbe’s death—rather, based on evidence that two officers perceived that Sabbe rammed the V150 and pointed a rifle after the PIT maneuvers, the majority concluded that Sabbe’s response to the warrantless entry was a superseding cause of his death. On the excessive force claim based on the PIT maneuver, the majority held that a jury could decide that the force was excessive, but that the officers were entitled to qualified immunity because no existing precedent clearly established that the PIT maneuver was unconstitutionally excessive under these circumstances. On the excessive force claim based on the shooting, the majority concluded that the officers reasonably perceived Sabbe as an immediate threat that justified responding with deadly force. On the *Monell* claim against the County for failure to train officers on the use of the V150, the majority held that plaintiff could not establish the standard for public entity liability—namely, that the need “for more or different action is so obvious, and the inadequacy of existing practice is likely to result in the violation of constitutional rights, that the policymakers can reasonably be said to have been deliberately indifferent to the need.” Specifically, the majority pointed to the County deponent’s testimony that the County did not have a policy because using an armored vehicle for this purpose was “not something we ever thought of.” In light of that testimony, “the record does not give rise to a genuine dispute that the County’s failure to establish guidelines for using the V150 to execute PIT maneuvers rose to the level of deliberate indifference.”

**Concurrence/dissent:** Judge Berzon disagreed with some, but not all, of the majority opinion. On the Fourth Amendment claim, she would have held that defendants’ entry onto Sabbe’s property violated his clearly established rights and that Sabbe’s conduct was not a superseding cause of his death. On the claim based on the

PIT maneuver, she agreed that the force was excessive, but would also have held that it violated clearly-established law despite the lack of precedent because it was so obviously excessive. On the shooting claim, she concluded that a jury could have found the force was excessive. On the *Monell* claim, she agreed that testimony that the department had never heard of using an armored vehicle to carry out a PIT maneuver weighs against a finding that the failure to train officers on such a use of the vehicle amounted to deliberate indifference.

**Significance:** *Sabbe* is significant for a number of reasons. The opinion notes that it has become common for law enforcement agencies to use armored vehicles. Going forward, *Sabbe* clearly establishes that using a large armored vehicle to execute a PIT maneuver may be excessive force. And in light of that holding, law enforcement departments that have V150s or similar vehicles may need to develop policies and training on using them in this type of encounter, to avoid potential *Monell* liability for deliberate indifference. The decision also highlights how dependent the outcome of federal cases are on which judges decide them: Between the district court and the split panel opinion, there are three different views on whether the various uses of force were excessive and violated clearly established law.

**F. *Martinez v. High*, 91 F.4th 1022 (9th Cir. 2024)**

- **Ninth Circuit affirms qualified immunity for an officer who disclosed reported abuse to the abuser, based on lack of clearly-established law at the time of the incident (but established post-incident).**

Desiree Martinez reported to City of Clovis police that her boyfriend, a Clovis police officer, was abusing her. Another officer, Officer High, told Martinez's boyfriend that Martinez had reported the abuse. That information provoked Martinez's boyfriend to further abuse her, until he was eventually arrested. Martinez sued Officer High, and other officers who, among other things, failed to arrest the abuser earlier in response to Martinez's 911 calls.

The district court granted summary judgment for everyone other than Officer High on qualified immunity grounds. But as to Officer High, the court found that it was clearly established at the time of the 2013 incident that sharing a domestic violence victim’s confidential information with the alleged abuser violates the victim’s substantive due process rights. Martinez appealed as to the grant of judgment for the other officers; Officer High did not appeal.

In the first appeal (*“Martinez I”*), the Ninth Circuit held that another officer who had also told the abuser about Martinez’s reports had violated her due process rights but that the violation was not clearly established at the time the conduct occurred. On remand, the district court allowed Officer High to file—and then granted—a new summary judgment motion based on *Martinez I*’s qualified immunity reasoning. Martinez appealed again.

**Majority:** In the second appeal (*“Martinez II”*), the Ninth Circuit affirmed the grant of qualified immunity for Officer High. Although police officers generally are not liable under the Due Process Clause for failing to prevent private parties’ act (here, the abuse), there is an exception when an officer affirmatively places the plaintiff in danger by acting with deliberate indifference to a known or obvious danger. The majority ruled that Officer High’s telling Martinez’s abuser about her report met the elements of this “state-created danger” exception, because (1) Officer High’s conduct foreseeably put Martinez at risk of violent retaliation by her abuser, and (2) Officer High was deliberately indifferent toward the risk of future abuse, given that she knew that the abuser was violent, understood that confidential abuse reports should not be disclosed to the abuser, and knew that Martinez was in the room with the abuser when she told the abuser about Martinez’s report. But the majority held that Officer High nonetheless was entitled to qualified immunity because it was not clearly established at the time of the 2013 incident that relaying a confidential abuse report to the abuser violated the victim’s due process rights—it became clearly established only when *Martinez I* was decided in 2019.



**Concurrence:** Judge Bumatay concurred in the judgment but not the full opinion. He would not have reached prong one of qualified immunity, whether Officer High violated Martinez’s rights, because he believes that the entire state-created-danger doctrine is misguided and should be pruned back. Instead, he would have affirmed based solely on qualified immunity’s “clearly established” prong, because “everyone agrees that no clearly established law existed at the time of the incident . . . .”

**Significance:** *Martinez II* highlights that qualified immunity’s clearly-established prong looks at the law as it existed at the time of the incident—so even if post-incident precedent clearly establishes that conduct is unconstitutional, qualified immunity will still be available for events occurring before that precedent was issued. The opinion also reiterates an appellate procedure point when it comes to qualified immunity appeals: Although a defendant can take an interlocutory appeal from the denial of qualified immunity, such an appeal is not required—the defendant can wait until the end of the case. (Here, Martinez argued that Officer High waived her qualified immunity defense by not appealing after the district court judge denied her first summary judgment motion. The Ninth Circuit rejected that argument, stressing that “the rule permitting a defendant to take an interlocutory appeal after a denial of a motion based on qualified immunity is not a rule *requiring* the defendant to take that appeal.”)

**G. *Moore v. Garnand*, 83 F.4th 743 (9th Cir. 2023)**

- **Ninth Circuit affirms grant of qualified immunity in First Amendment retaliation case, based on lack of clearly-established law.**

Police from the City of Tucson sought to interview Greg Moore, who was responsible for a building destroyed by arson. Moore invoked his right to remain silent. Officers later searched Moore’s house, and caused the police department to open a criminal financial investigation against Moore and his wife. The investigation was closed when subpoenas did not yield any evidence of a crime. The Moores then sued one of the officers for Fourth Amendment violations relating to the search, and allegedly in retaliation, the officers reopened

the criminal investigation and tried to induce the IRS to open an investigation as well. Plaintiffs then filed another suit, alleging that the officers violated Moore's First Amendment right to remain silent and that they retaliated against him for exercising that right. When the defendants moved for summary judgment, plaintiffs moved for a stay under FRCP 56(d) on the ground that they needed additional discovery. The district court agreed, and denied summary judgment without prejudice to re-filing after the completion of discovery. Defendants appealed.

The Ninth Circuit reversed, directing the entry of summary judgment for defendants. It held that it had jurisdiction to consider the interlocutory appeal, despite the fact that the district court had denied summary judgment to allow discovery rather than on the merits. It framed the question as whether, accepting plaintiffs' version of the facts, defendants had violated clearly-established rights. The court answered that question "no," holding that no precedent clearly establishes a *First Amendment* right to remain silent when questioned by police or that a retaliatory investigation per se violates the First Amendment.

**Significance:** *Moore* is a helpful case for public entities asserting qualified immunity defenses, as it rigorously applies the Supreme Court's guidance not to define rights at a high level of generality for purposes of the "clearly established" analysis. The Moores relied on the Supreme Court case of *Wooley v. Maynard*, which held that the First Amendment bars compelling plaintiffs to display a state motto on a license plate. In reaching its holding, *Wooley* stated generally that the "the right of freedom of thought protected by the First Amendment against state action includes both the right to speak freely and the right to refrain from speaking at all." The Ninth Circuit, however, said that *Wooley* did not clearly establish anything about First Amendment rights during *police questioning*, and distinguished two prior Ninth Circuit decisions involving retaliatory investigations as involving fact patterns.

**H. *Hernandez v. City of Los Angeles*, 96 F.4th 1209 (9th Cir. 2024)**

- **Ninth Circuit grants qualified immunity on excessive force claim despite finding a triable issue as to reasonableness of the force, based on lack of clearly-established law.**

Los Angeles Police Department officers came upon a multi-vehicle accident. Bystanders reported that the person who caused the accident had a knife and wanted to hurt himself, and was inside a smashed pickup truck. The officers saw a man (later identified as Daniel Hernandez) start to climb out of the truck and told him to raise his hands. Hernandez emerged holding a weapon. Officer Toni McBride ordered Hernandez to stay where he was and to drop the knife, but Hernandez instead advanced toward McBride, yelling. McBride again told Hernandez to drop the knife, but he continued to yell and advance toward her. McBride fired an initial volley of two shots, causing Hernandez to fall to the ground with his weapon still in his hand. Hernandez started to get up; McBride yelled “Drop it!” and fired two more shots, causing Hernandez to fall on his back. Hernandez began to roll over, at which point McBride fired a fifth shot. Hernandez continued to roll over, put his knee and elbow in position to push himself upwards, and then started to collapse to the ground. As he did so, McBride fired a sixth shot. Hernandez then lay still; he died from his injuries. Only twenty seconds elapsed between Hernandez exiting the truck and his collapse; the six shots were fired within eight seconds. The weapon in Hernandez’s hand turned out to be a box cutter.

Hernandez’s family sued the City of Los Angeles, the police department, and McBride under 42 U.S.C. § 1983 for excessive force, interference with familial relations, and *Monell* public entity liability. They also asserted related state law claims. The district court granted summary judgment for defendants. The Ninth Circuit affirmed in part and reversed in part.

On the excessive force claim, the Ninth Circuit held that McBride’s first four shots were reasonable as a matter of law, but that the reasonableness of the fifth and sixth shots was “a much closer question” to be decided by a trier of fact. The panel nonetheless affirmed

summary judgment for McBride based on qualified immunity’s “clearly established” prong. It reasoned that although a prior Ninth Circuit decision *could* support a finding that the fifth and sixth shots were excessive, that decision did not “place[] the outcome of this case ‘beyond debate,’” nor is excessiveness so obvious as to excuse the requirement of a prior decision squarely governing the facts at issue. On the interference with familial relations claim, the panel affirmed because there was no evidence that McBride acted with deliberate indifference; the panel emphasized how quickly the events took place, and that McBride acted for a legitimate law enforcement objective, i.e., stopping a dangerous suspect. On the *Monell* claim, where plaintiffs’ only argument was that they should have been given additional time for discovery, the panel affirmed summary judgment because “although the district court’s ruling [denying a continuance] may have been harsh, we cannot say that the court abused its discretion in concluding that [plaintiffs] had not shown sufficient diligence and that an extension of the discovery cut-off was unwarranted.” On the state law claims, the panel reversed because the district court’s summary judgment had rested entirely on its finding that the force was reasonable as a matter of law—a finding with which the panel disagreed.

***Significance:*** *Hernandez* is another helpful citation for defendants, in that it strictly applies the Supreme Court’s rule that overcoming qualified immunity requires the plaintiff to identify very factually-similar precedent. Affirmance of judgment for the City on the *Monell* claim despite the district court’s “harsh” denial of a continuance also illustrates that the abuse-of-discretion standard of review does not allow the reviewing court to substitute its judgment for that of the district court—it will affirm unless the district court’s ruling was beyond all bounds of reason.

## II. CIVIL RIGHTS – NON-POLICING CONTEXTS

### A. *Tucson v. Seattle*, 91 F.4th 1318 (9th Cir. 2024)

- **Ninth Circuit reverses preliminary injunction that prohibited enforcement of ordinance criminalizing writing on buildings and other property.**

Plaintiffs were arrested for writing political messages on a wall outside the Seattle Police Department’s East Precinct. Their documented offense was violating Seattle Municipal Code § 12A.08.020, which criminalizes writing on buildings or other property without express permission. After they were released from jail, they sued the City and its officers under 42 U.S.C. § 1983. Their theories included, among other things, that § 12A.08.020 is substantially overbroad in violation of the First Amendment, and facially vague in violation of the Fourteenth Amendment such that it can never be enforced. Agreeing that plaintiffs were likely to succeed on their overbreadth and vagueness challenges, the district court preliminarily enjoined the City from enforcing the ordinance.

The Ninth Circuit reversed the preliminary injunction. As to overbreadth, it held that the district court erred in failing to consider applications of the ordinance that would not implicate any protected speech. Without that consideration, the district court could not undertake the requisite analysis—namely, whether the number of unconstitutional applications was substantially disproportionate to the ordinance’s lawful sweep. As to vagueness, the district court erred in speculating about vagueness in “hypothetical and fanciful situations not before the court,” instead of examining whether the ordinance is vague in most of its intended applications. Moreover, the mere fact that a public entity and its officers have discretion to enforce an ordinance in some circumstances and not others does not establish that an ordinance is wholly vague such that it can never be enforced.

**Significance:** *Tucson* provides a good overview of the analysis courts must undertake when considering a facial overbreadth or vagueness challenge to a statute—and, by extension, guidance on how to evaluate draft legislation for constitutionality.

**B. *Camenzind v. California Exposition & State Fair*, 84 F.4th 1102 (9th Cir. 2023)**

- **The Ninth Circuit rejects a leafletter’s challenge to free-speech guidelines at the Cal Expo fairgrounds.**

Plaintiff visited the Hmong New Year Festival, a privately organized event at the state-owned California Exposition and State Fair (“Cal Expo”) fairgrounds, hoping to distribute religious tokens to attendees. These tokens bore biblical verses and other religious messages. Cal Expo’s Free Speech Activities Guidelines govern all fairgrounds events and prohibit attendees from leafletting, picketing, or gathering signatures within the enclosed portion of the fairgrounds. Police officers told Plaintiff he could instead distribute his tokens in designated Free Speech Zones outside the entry gates. Plaintiff instead purchased a ticket, entered the festival, and began handing out the tokens. He claims his removal by police from the fairgrounds violated the First Amendment of the United States Constitution and the Speech Clause of the California Constitution.

Plaintiff argued that the Cal Expo fairgrounds, in their entirety, constitute a “public forum,” entitling his speech to the greatest protection under the federal and state constitutions. He also argued that the Free Expression Zones outside the entry gates impermissibly limited his ability to interact with fairgoers. The Court determined that the areas within and outside the fairgrounds – separated by a physical barrier and governed by different policies – require a distinct analysis. When determining whether a location is a traditional public forum for First Amendment purposes, courts are to consider: (1) the actual use and purposes of the property, particularly status as a public thoroughfare and availability of free public access to the area; (2) the area’s physical characteristics, including its location and the existence of clear boundaries delimiting the area; and (3) traditional or historic use of both the property in

question and other similar properties. (*Wright v. Incline Vill. Gen. Improvement Dist.*, 665 F.3d 1128, 1135 (9th Cir. 2011.)

The Court determined that none of the factors weighed in favor of treating the enclosed portion of the fairgrounds as a traditional public forum. First, the space does not serve as a public thoroughfare, and Cal Expo does not permit free public access to it. Second, the surrounding fencing marked the space's boundaries. Third, no evidence suggested that all who sought to distribute material were granted access. In fact, the policy designated free speech expression zones for demonstrations for free speech activity.

The exterior portion of the fairgrounds presented the judges with a closer question as to whether it is a public forum under the First Amendment. However, the Court avoided the constitutional issue because it found that the exterior portion was a public forum under the California Speech Clause. The public's interest in engaging in expressive activity in the exterior portion was strong due to the significant volume of pedestrian traffic at the 2018 Hmong New Year Festival, which attracted nearly 30,000 attendees. Meanwhile, the plaintiff handing out tokens was not likely to interfere with the use of the property. However, designating a Free Speech Zone was a valid regulation of speech. The regulation was content-neutral because Cal Expo allocated space in the zone on a first-come, first-served basis. Also, the regulation served the significant governmental interest of preventing congestion. Additionally, the zones did not "burden substantially more speech than is necessary to achieve the government's public-safety interest."

***Dissent:*** Dissenting in part, Judge VanDyke felt case should be remanded because he did not feel the court of appeal had "enough information to properly evaluate whether Cal Expo is a public forum during the Hmong New Year Festival under the California Speech Clause."

***Significance:*** The state prevailed in part because Cal Expo (1) has a clear non-discriminatory policy; (2) enclosed the event space; (3) leased the space (it was not free) for

the privilege of using it; (4) ensures that the space is not continually open to the public and remains locked and inaccessible until leased by a private party; and (5) designate a free speech zone outside of the event space.

### III. MUNICIPAL TORT LIABILITY

A. *City of Norwalk v. City of Cerritos*, 99 Cal.App.5th 977 (2024), as modified on denial of reh’g (Feb. 22, 2024), review filed (Mar. 12, 2024)

- **A city is immune from liability to a neighboring city for diverting traffic onto its streets.**

The decision begins in a Dickensian manner: “This is a tale of two cities.” In 1974, the City of Cerritos enacted an ordinance limiting “any commercial vehicle or any vehicle exceeding six thousand pounds” to certain major arteries. Subsequent amendments removed one of those arteries.

The neighboring City of Norwalk sued, claiming that the ordinance’s restrictions substantially increased heavy truck traffic through Norwalk streets, severely impacting Norwalk residents, businesses, and property. Norwalk asserted that the ordinance caused “adverse effects” accompanying heavier traffic flow. Cerritos demurred, arguing that a city is immune from public nuisance liability under Civil Code Section 3482 for any acts “done or maintained under the express authority of a statute” and two sections of the Vehicle Code explicitly authorize cities to regulate the use of their streets by commercial or heavy vehicles.

The question framed by the Second District Court of Appeal was as follows: “Is the alleged nuisance an inexorable and inescapable consequence that necessarily flows from the statutorily authorized act, such that the statutorily authorized act and the alleged nuisance are flip sides of the same coin?” The Court of Appeal answered in the affirmative:

Is Cerritos immune from liability for the public nuisance of diverting traffic into Norwalk? Yes, because the immunity conferred by Civil Code section 3482 applies not only to the specific act expressly authorized by statute (namely, enacting an ordinance designating routes for commercial vehicles and those



exceeding weight limits), but also to the inexorable and inescapable consequences that necessarily flow from that act (namely, that drivers unable to use those routes will take different routes, thereby causing adverse effects of heavier traffic on those other routes). Where, as here, the authorized act and its consequence are flip sides of the same coin, immunity applies to both, and a public nuisance claim fails as a matter of law.

Although the state has generally preempted the field of motor vehicle traffic regulation, the state has nevertheless delegated to local governments the authority “to regulate traffic within their jurisdictions by specified means.” The state authorized Cerritos to enact their ordinance. Although the ordinance may shift vehicle traffic to Norwalk, Section 3482 immunity “reaches beyond the act specifically authorized to the consequences inexorably flowing from that act.” The Court of Appeal stated: “The closure of one artery to through traffic necessarily diverts that traffic to a different artery. When one channel of a river is blocked, the water necessarily finds a different channel. Life finds a way; so does traffic.”

**Significance:** Section 3482 immunity applies where an alleged nuisance inexorably and inescapably flows from the statutorily authorized act.

**B. *Stufkosky v. California Dep’t of Transportation, 97 Cal.App.5th 492 (2023), as modified (Nov. 28, 2023)***

- **A failure to warn claim was barred by design immunity where warnings were addressed by plans.**

SR-154 is a state-owned highway built in 1934. At postmile 9.62, a four-foot-wide painted median separates traffic at a roadway portion of a state highway that had a 55-mile-per-hour speed limit. A vehicle struck a deer at that location, sending it into the opposing lane, where it struck an oncoming SUV. The SUV lost control and collided with a vehicle driven by plaintiffs’ decedent.

Six deer warning signs appear along the 15-mile roadway segment where the accident occurred. The plaintiffs sued the state for maintaining a dangerous condition of public

property, alleging the roadway's design, lack of deer crossing signs, and high speed limit created a substantial risk of injury to motorists. The state asserted design immunity.

There are three elements of design immunity: (1) a causal relationship between the plan or design and the accident; (2) discretionary approval of the plan or design prior to construction; and (3) substantial evidence supporting the reasonableness of the plan or design.

First, the state met the causal relation prong by showing that the complaint alleged the required causal connection. The complaint alleged that Caltrans was aware of the deer crossing and yet failed to warn of the danger adequately. In other words, plaintiffs alleged that the state designed the roadway without certain safety features they contend would have made it safer.

Next, the state fulfilled the discretionary approval requirement by presenting comprehensive plans for the section of the roadway where the accident occurred. Additionally, the state provided testimony from a traffic engineer confirming adherence to relevant design standards and detailing Caltrans' measures to mitigate risks associated with deer entering traffic and vehicles crossing the median. The court of appeal noted that a public entity is not required to introduce evidence that it considered a particular design feature but decided against including it. Such a requirement would impose an unrealistic burden on public entities to address every possible design aspect during the approval process.

Lastly, Caltrans produced substantial evidence that the design was reasonable. The plaintiffs did not dispute that the plans were properly approved and complied with prevailing design standards. Nor did they dispute that Caltrans placed deer warning signs east and west of the accident site. These facts alone showed that the approved design plans were reasonable. But other facts were submitted, such as over 40 million vehicles had traveled through the accident site in eight years and no accidents involved a deer crossing or head-on collision.

Plaintiffs' expert expert opined that considering a larger area would have revealed a far greater number of collisions involving wildlife and centerline crossings during the same period. The Court of Appeal addressed this:

'Generally, a civil engineer's opinion regarding reasonableness is substantial evidence sufficient to satisfy this element. Approval of the plan by competent professionals can, in and of itself, constitute substantial evidence of reasonableness.' 'We are not concerned with whether the evidence of reasonableness is undisputed; the statute provides immunity when there is substantial evidence of reasonableness, even if contradicted.' That a plaintiff's expert may disagree does not create a triable issue of fact.'

*Stufkovsky*, 97 Cal.App.5th at 500 (quoting *Grenier v. City of Irwindale*, 57 Cal.App.4th 931, (1997)) (citations omitted.)

The Court of Appeal then addressed whether design immunity protected Caltrans from liability for failure to warn motorists of that condition in light of the state supreme court's 2023 decision in *Tansavatdi v. City of Rancho Palos Verdes* (2023) 14 Cal.5th 639. *Tansavatdi* stands for the principle that design immunity does not permit it to remain silent when it has notice that an element of the road design presents a concealed danger. However, the California Supreme Court declined to decide whether design immunity affected a failure to warn claim when a public entity produces evidence that it considered whether to provide a warning. Because Caltrans produced evidence that its design plans specified the quantity and placement of deer crossing signs, the Court of Appeal upheld the lower court ruling in favor of the state.

**Significance:** For design immunity, it is not necessary to expressly consider each possible alternative design that a plaintiff claims would have been more protective of the driving public. Additionally, where a public entity warns motorists of a danger according to design plans, a cause of action will not survive for merely asserting that the motorist warning was inadequate.

C. ***Summerfield v. City of Inglewood*, 96 Cal.App.5th 983 (2023)**

- **A dangerous condition is not created from a lack of a security in a public park.**

Plaintiffs' decedent drove to Darby Park in the City of Inglewood to play basketball. While in his vehicle in the parking lot, he was shot and killed. Plaintiffs filed a wrongful death action against the City, alleging that there were no cameras in the parking lot and a lack of adequate precautions such as "control measures and/or security." They also alleged two other parking shootings in the past 23 years showed that the lack of security attracted criminal activity to ongoing criminal activity. As such, Plaintiffs alleged the existence of a dangerous condition.

The Second District Court of Appeal noted that a dangerous condition exists when public property "is physically damaged, deteriorated, or defective in such a way as to endanger those using the property itself foreseeably or possesses physical characteristics in its design, location, features or relationship to its surroundings that endanger user" (citing *Bonanno v. Central Contra Costa Transit Authority* (2003) 30 Cal.4th 139, 148-149). The Court of Appeal noted that the presence or absence of security guards is not a physical characteristic of public property. Therefore, such a theory is not legally cognizable.

The Court of Appeal also rejected the theory that the City's alleged notice of "ongoing shootings" triggered a duty to install security cameras as a crime deterrent. The Court of Appeal found two crimes throughout a 23-year span, which does not constitute ongoing criminal activity. The complaint did not sufficiently allege with the requisite particularity that the absence of surveillance cameras in the parking lot facilitated decedent's shooting, such that it was a defective or dangerous condition. The absence of security cameras did not create a substantial risk of being shot.

Lastly, as to a theory of failing to warn, a public entity has no duty to warn against criminal conduct.

**Significance:** This case provides helpful guidance for municipal park operators with regard to security measures. A contrary ruling would presumably have created a duty for every California public entity to install and maintain security cameras at municipal parks.

**D. Carr v. City of Newport Beach, 94 Cal.App.5th 1199 (2023)**

- **Court of Appeal broadly interprets hazardous recreational immunity relating to diving injuries, over a dissent.**

After drinking a few beers while kayaking in Newport Bay, plaintiff walked onto a 20-inch-wide seawall and dove into the water headfirst. His head hit the ocean floor, causing a spinal cord injury that left him a quadriplegic. He sued the City of Newport Beach for an alleged dangerous condition of public property.

The trial court granted summary judgment for the City based on Government Code section 831.7, subdivision (b)(2), which immunizes public entities from liability to participants in a “hazardous recreational activity” including “[a]ny form of diving into water from other than a diving board or diving platform, or at any place or from any structure where diving is prohibited and reasonable warning thereof has been given.” The Court of Appeal affirmed summary judgment in a split opinion that turns largely on interpretation of section 831.7’s diving provision.

**Majority:** The majority held that because section 831.7’s diving provision uses a disjunctive “or”, its immunity applies if the plaintiff either (1) dove from any location other than a diving board or diving platform, or (2) dove from any place where diving is prohibited and a reasonable warning is given. Under this interpretation, immunity applies even absent a prohibition and warning, if the diver dove from a location other than a diving board or diving platform. The seawall here was not a diving board or platform – it was built to protect adjacent property from erosion damage. Accordingly, in the majority’s view, immunity applies. The majority further held that this case does not fall within section 831.7’s exception for gross negligence, because “[g]ross negligence does not lie in the failure to protect against, or warn

about, an inherent risk of a hazardous recreational activity,” and California law recognizes that diving headfirst into water inherently risks being injured by hitting the bottom. The majority further observed that plaintiff’s theory that lifeguards should have warned him that the City Code prohibited diving also fails under Government Code section 818.2, which immunizes public entities from liability for injuries arising from a failure to enforce the law.

***Dissent:*** Justice Moore would have interpreted section 831.7’s diving provision differently. She does not see diving from a location other than a diving board or platform as an independent basis for immunity. Rather, in her view, immunity applies only where a public entity prohibits diving and reasonably warns of the prohibition—a warning that she concluded could easily have been given here but wasn’t. Justice Moore also concluded that there was a triable issue of fact as to whether the seawall presented a dangerous condition. The majority had not reached that question.

***Significance:*** The majority’s broad interpretation of section 831.7 diving immunity benefits public entities. But in the California court system, although a published decision binds all superior courts statewide, it does not bind any appellate court (including the court that issued the decision). Justice Moore’s dissent shows that some appellate justices view section 831.7 diving-related immunity more narrowly, creating a risk that a similar case before a different appellate panel might come out differently. To guard against that risk, it may be prudent to ensure that warnings are clearly displayed in areas where diving is prohibited.

**E. *Whitehead v. City of Oakland*, 99 Cal.App.5th 775 (2024)**

- **Court of Appeal affirms validity of release of prospective negligence liability relating to fundraiser bike ride.**

Plaintiff was injured when his bicycle hit a pothole on a City of Oakland road during a training ride for the AIDS LifeCycle fundraiser. He sued the City on a dangerous condition theory (Gov. Code, § 835 et seq.). The City moved for summary judgment based on plaintiff having signed an agreement before the ride releasing the “owners/lessors of the course or

facilities used in the Event” from future liability. Plaintiff cross-moved for summary adjudication of the City’s waiver and assumption-of-risk defenses; he argued that the release was void under *Tunkl v. Regents of University of Cal.*, 60 Cal.2d 92 (1963) because it affected a matter of public interest, i.e., the maintenance of safe public roads, and that primary assumption of risk did not apply because the dangerous condition affected all road users, not just recreational cyclists.

The trial court found that the release was valid and, on that basis, denied plaintiff’s motion and granted summary judgment for the City. The Court of Appeal affirmed the summary judgment.

Under *Tunkl*, a release from liability for future negligence is valid if it does not involve a transaction implicating the public interest. Courts consider six factors in determining whether a transaction implicates the public interest: whether (1) the type of business is thought suitable for public regulation, (2) the service is of practical necessity for members of the public, (3) the service is available to all who seek it, (4) the releasor and releasee have unequal bargaining power, (5) the contract is one of adhesion, and (6) the transaction places the releasor under control of the releasee.

Applying the *Tunkl* factors, the Court of Appeal concluded that the training ride did not implicate the public interest, and the release therefore was not void as against public policy. The court rejected plaintiff’s argument that it should analyze whether the road where he fell implicated the public interest; it explained that under well-settled case law, the focus is on the transaction for which the release is given—here, training rides for a recreational fundraiser.

The Court of Appeal also rejected plaintiff’s theory that the release did not apply because it did not cover gross negligence, and the City’s road maintenance was grossly negligent. It reasoned that plaintiff’s evidence would not support a finding that the City’s conduct marked an extreme departure from the ordinary standard of conduct.

**Significance:** *Whitehead* provides a comprehensive summary of when advance releases for possible negligence are, and aren't enforceable.

**F. *Miller v. Pacific Gas and Electric Co.*, 97 Cal.App.5th 1161 (2023)**

- **Court of Appeal affirms summary judgment for defendants in sidewalk defect case.**

Plaintiff injured her ankle when she tripped on a vertical misalignment between the sidewalk and a utility plate covering a Pacific Gas & Electric Co. underground vault in San Francisco. She sued PG&E and the owner of the property adjacent to the sidewalk. The trial court granted summary judgment for both defendants under the trivial defect doctrine. That well-settled doctrine provides that landowners do not have a duty to protect pedestrians from every sidewalk defect, just those that create a substantial risk of injury.

The Court of Appeal affirmed summary judgment for defendants. It held that they met their initial burden of presenting evidence (including photographs) that the vertical misalignment was trivial, because (1) it was less than one inch with no jagged edges, (2) the sidewalk was sufficiently illuminated to ensure visibility, and (3) there was no evidence of anyone else having tripped on the misalignment. That showing was not undermined by City guidelines that require repairing sidewalk differentials one-half inch or greater, and a City inspector's order that the misalignment be repaired: There was no evidence that the City's standard has been accepted as the statewide standard for safe sidewalks, or that the City's repair order was based on a finding that the misalignment was a hazardous condition. Plaintiff failed to raise a triable issue of material fact overcoming defendants' prima facie showing—for example, there was no photographic evidence drawing into question defendants' visibility showing. And plaintiff forfeited a new negligence per se theory raised for the first time in her reply brief by failing to raise it in the trial court or her opening brief.



***Significance:*** *Miller* illustrates the type of sidewalk defect case that is amenable to summary judgment—namely, where the defendant makes a robust prima facie showing of triviality, and the plaintiff’s response is contrastingly weak.



# Update on Open and Public Publication – A Focus on the Brown Act

Thursday, May 9, 2024

**Presented By:**

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# Open & Public VI

A GUIDE TO THE RALPH M. BROWN ACT

REVISED JANUARY 2024



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# Open & Public VI

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# Chapter 1

## IT IS THE PEOPLE’S BUSINESS

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# Chapter 1

## IT IS THE PEOPLE'S BUSINESS



### The right of access

Two key parts of the Brown Act have not changed since its adoption in 1953. One is the act's initial section, declaring the Legislature's intent:

*"In enacting this chapter, the Legislature finds and declares that the public commissions, boards and councils and the other public agencies in this State exist to aid in the conduct of the people's business. It is the intent of the law that their actions be taken openly and that their deliberations be conducted openly.*

*"The people of this State do not yield their sovereignty to the agencies which serve them. The people, in delegating authority, do not give their public servants the right to decide what is good for the people to know and what is not good for them to know. The people insist on remaining informed so that they may retain control over the instruments they have created."<sup>1</sup>*

The people reconfirmed that intent 50 years later in the November 2004 election by adopting Proposition 59, amending the California Constitution to include a public right of access to government information:

*"The people have the right of access to information concerning the conduct of the people's business, and, therefore, the meetings of public bodies and the writings of public officials and agencies shall be open to public scrutiny."<sup>2</sup>*

The Brown Act's other unchanged provision is a single sentence:

*"All meetings of the legislative body of a local agency shall be open and public, and all persons shall be permitted to attend any meeting of the legislative body of a local agency, except as otherwise provided in this chapter."<sup>3</sup>*

That one sentence is by far the most important of the entire Brown Act. If the opening is the soul, that sentence is the heart of the Brown Act.

### Broad coverage

The Brown Act covers members of virtually every type of local government body, elected or appointed, decision-making or advisory. Some types of private organizations are covered, as are newly elected members of a legislative body, even before they take office.

Similarly, meetings subject to the Brown Act are not limited to face-to-face gatherings. They also include any communication medium or device through which a majority of a legislative body discusses, deliberates, or takes action on an item of business outside of a noticed meeting. They include meetings held from remote locations by teleconference or videoconference.

**PRACTICE TIP:** The key to the Brown Act is a single sentence. In summary, all meetings shall be **open and public** except when the Brown Act authorizes otherwise.

New communication technologies present new Brown Act challenges. For example, common email practices of forwarding or replying to messages can easily lead to a serial meeting prohibited by the Brown Act, as can participation by members of a legislative body in an internet chatroom or blog dialogue. Social Media posts, comments, and “likes” can result in a Brown Act violation. Communicating during meetings using electronic technology (such as laptop computers, tablets, or smart phones) may create the perception that private communications are influencing the outcome of decisions, and some state legislatures have banned the practice. On the other hand, widespread video streaming and videoconferencing of meetings has greatly expanded public access to the decision-making process.

### Narrow exemptions

The express purpose of the Brown Act is to ensure that local government agencies conduct the public’s business openly and publicly. Courts and the California Attorney General usually broadly construe the Brown Act in favor of greater public access and narrowly construe exemptions to its general rules.<sup>4</sup>

Generally, public officials should think of themselves as living in glass houses, and that they may only draw the curtains when it is in the public interest to preserve confidentiality. Closed sessions may be held only as specifically authorized by the provisions of the Brown Act itself.

The Brown Act, however, is limited to meetings among a majority of the members of multimember government bodies when the subject relates to local agency business. It does not apply to independent conduct of individual decision-makers. It does not apply to social, ceremonial, educational, and other gatherings as long as a majority of the members of a body do not discuss issues related to their local agency’s business. Meetings of temporary advisory committees — as distinguished from standing committees — made up solely of less than a quorum of a legislative body are not subject to the Brown Act.

The law does not apply to local agency staff or employees, but they may facilitate a violation by acting as a conduit for discussion, deliberation, or action by the legislative body.<sup>5</sup>

The law, on the one hand, recognizes the need of individual local officials to meet and discuss matters with their constituents and staff. On the other hand, it requires — with certain specific exceptions to protect the community and preserve individual rights — that the decision-making process be public. Sometimes the boundary between the two is not easy to draw.

### Public participation in meetings

In addition to requiring the public’s business to be conducted in open, noticed meetings, the Brown Act also extends to the public the right to participate in meetings. Individuals, lobbyists, and members of the news media possess the right to attend, record, broadcast, and participate in public meetings. The public’s participation is further enhanced by the Brown Act’s requirement that a meaningful agenda be posted in advance of meetings, by limiting discussion and action to matters listed on the agenda, and by requiring that meeting materials be made available.

Legislative bodies may, however, adopt reasonable regulations on public testimony and the conduct of public meetings, including measures to address disruptive conduct and limits on the time allotted to each speaker. For more information, see chapter 4.

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**PRACTICE TIP:** Think of the government’s house as being made of glass. The curtains may be drawn only to further the public’s interest. A local policy on the use of laptop computers, tablets, and smart phones during Brown Act meetings may help avoid problems.

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## Controversy

Not surprisingly, the Brown Act has been a source of confusion and controversy since its inception. News media and government watchdogs often argue the law is toothless, pointing out that there has never been a single criminal conviction for a violation. They often suspect that closed sessions are being misused.

Some public officials complain that the Brown Act makes it difficult to respond to constituents and requires public discussions of items better discussed privately, such as why a particular person should not be appointed to a board or commission. Many elected officials find the Brown Act inconsistent with their private business experiences. Closed meetings can be more efficient; they eliminate grandstanding and promote candor. The techniques that serve well in business — the working lunch, the sharing of information through a series of phone calls or emails, the backroom conversations and compromises — are often not possible under the Brown Act.

As a matter of public policy, California (along with many other states) has concluded that there is more to be gained than lost by conducting public business in the open. Government behind closed doors may well be efficient and businesslike, but it may be perceived as unresponsive and untrustworthy.

**PRACTICE TIP:** Transparency is a foundational value for ethical government practices. The Brown Act is a floor, not a ceiling, for conduct.

## Beyond the law — good business practices

Violations of the Brown Act can lead to invalidation of an agency's action, payment of a challenger's attorney fees, public embarrassment, even criminal prosecution. But the Brown Act is a floor, not a ceiling, for conduct of public officials. This guide is focused not only on the Brown Act as a minimum standard, but also on meeting practices or activities that, legal or not, are likely to create controversy. Problems may crop up, for example, when agenda descriptions are too brief or vague, when an informal get-together takes on the appearance of a meeting, when an agency conducts too much of its business in closed session or discusses matters in closed session that are beyond the authorized scope, or when controversial issues arise that are not on the agenda.

The Brown Act allows a legislative body to adopt practices and requirements for greater access to meetings for itself and its subordinate committees and bodies that are more stringent than the law itself requires.<sup>6</sup> Rather than simply restate the basic requirements of the Brown Act, local open meeting policies should strive to anticipate and prevent problems in areas where the Brown Act does not provide full guidance. As with the adoption of any other significant policy, public comment should be solicited.

A local policy could build on these basic Brown Act goals:

- A legislative body's need to get its business done smoothly.
- The public's right to participate meaningfully in meetings, and to review documents used in decision-making at a relevant point in time.



- A local agency's right to confidentially address certain negotiations, personnel matters, claims, and litigation.
- The right of the press to fully understand and communicate public agency decision-making.

A detailed and comprehensive public meeting and information policy, especially if reviewed periodically, can be an important element in maintaining or improving public relations. Such a policy exceeds the absolute requirements of the law — but if the law were enough, this guide would be unnecessary. A narrow legalistic approach will not avoid or resolve potential controversies. An agency should consider going beyond the law and look at its unique circumstances to determine if there is a better way to prevent potential problems and promote public trust. At the very least, local agencies need to think about how their agendas are structured in order to make Brown Act compliance easier. They need to plan carefully to make sure public participation fits smoothly into the process.

### Achieving balance

The Brown Act should be neither an excuse for hiding the ball nor a mechanism for hindering efficient and orderly meetings. The Brown Act represents a balance among the interests of constituencies whose interests do not always coincide. It calls for openness in local government, yet should allow government to function responsively and productively.

There must be both adequate notice of what discussion and action are to occur during a meeting as well as a normal degree of spontaneity in the dialogue between elected officials and their constituents.

The ability of an elected official to confer with constituents or colleagues must be balanced against the important public policy prohibiting decision-making outside of public meetings.

In the end, implementation of the Brown Act must ensure full participation of the public and preserve the integrity of the decision-making process, yet not stifle government officials and impede the effective and natural operation of government.

### Historical note

In late 1951, *San Francisco Chronicle* reporter Mike Harris spent six weeks looking into the way local agencies conducted meetings. State law had long required that business be done in public, but Harris discovered secret meetings or caucuses were common. He wrote a 10-part series titled "Your Secret Government" that ran in May and June 1952.

Out of the series came a decision to push for a new state open-meeting law. Harris and Richard (Bud) Carpenter, legal counsel for the League of California Cities, drafted such a bill and Assembly Member Ralph M. Brown agreed to carry it. The Legislature passed the bill, and Governor Earl Warren signed it into law in 1953.

The Ralph M. Brown Act, known as the Brown Act, has evolved under a series of amendments and court decisions, and has been the model for other open-meeting laws, such as the Bagley-Keene Act, enacted in 1967 to cover state agencies.

Assembly Member Brown is best known for the open-meeting law that carries his name. He was elected to the Assembly in 1942 and served 19 years, including the last three years as Speaker. He then became an appellate court justice.

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**PRACTICE TIP:** The Brown Act should be viewed as a tool to facilitate the business of local government agencies. Local policies that go beyond the minimum requirements of law may help instill public confidence and avoid problems.

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Updates to this publication responding to changes in the Brown Act or new court interpretations are available at <https://www.calcities.org/home/resources/open-government2>. A current version of the Brown Act may be found at <https://leginfo.ca.gov>.

### ENDNOTES

- 1 Cal. Gov. Code, § 54950.
- 2 Cal. Const., Art. 1, § 3, subd. (b)(1).
- 3 Cal. Gov. Code, § 54953, subd. (a).
- 4 This principle of broad construction when it furthers public access and narrow construction if a provision limits public access is also stated in the amendment to the State's Constitution adopted by Proposition 59 in 2004. California Const., Art. 1, § 3, subd. (b)(2).
- 5 Cal. Gov. Code, § 54952.2, subds. (b)(2) and (c)(1); *Wolfe v. City of Fremont* (2006) 144 Cal.App.4th 533.
- 6 Cal. Gov. Code, § 54953.7.



# Chapter 2

## LEGISLATIVE BODIES

What is a “legislative body” of a local agency? ..... 12

What is not a “legislative body” for purposes of the Brown Act? ..... 14

# Chapter 2

## LEGISLATIVE BODIES

*The Brown Act applies to the legislative bodies of local agencies. It defines “legislative body” broadly to include just about every type of decision-making body of a local agency.<sup>1</sup>*



### What is a “legislative body” of a local agency?

A “legislative body” includes the following:

- The “**governing body** of a local agency” and certain of its subsidiary bodies; “or any other local body created by state or federal statute.”<sup>2</sup> This includes city councils, boards of supervisors, school boards, and boards of trustees of special districts. A “local agency” is any city, county, city and county, school district, municipal corporation, successor agency to a redevelopment agency, district, political subdivision, or other local public agency.<sup>3</sup> A housing authority is a local agency under the Brown Act even though it is created by and is an agent of the state.<sup>4</sup> The California Attorney General has opined that air pollution control districts and regional open space districts are also covered.<sup>5</sup> Entities created pursuant to joint powers agreements are also local agencies within the meaning of the Brown Act.<sup>6</sup>

- **Newly elected members** of a legislative body who have not yet assumed office must conform to the requirements of the Brown Act as if already in office.<sup>7</sup> Thus, meetings between incumbents and newly elected members of a legislative body, such as a meeting between two outgoing members and a member-elect of a five-member body, could violate the Brown Act.

**Q.** On the morning following the election to a five-member legislative body of a local agency, two successful candidates, neither an incumbent, meet with an incumbent member of the legislative body for a celebratory breakfast. Does this violate the Brown Act?

**A.** *It might, and absolutely would if the conversation turns to agency business. Even though the candidates-elect have not officially been sworn in, the Brown Act applies. If purely a social event, there is no violation, but it would be preferable if others were invited to attend to avoid the appearance of impropriety.*

**PRACTICE TIP:** The prudent presumption is that an advisory committee or task force is subject to the Brown Act. Even if one clearly is not, it may want to comply with the Brown Act. Public meetings may reduce the possibility of misunderstandings and controversy.



- **Appointed bodies** — whether permanent or temporary, decision-making or advisory — including planning commissions, civil service commissions, and other subsidiary committees, boards, and bodies. Volunteer groups, executive search committees, task forces, and blue ribbon committees created by formal action of the governing body are legislative bodies. When the members of two or more legislative bodies are appointed to serve on an entirely separate advisory group, the resulting body may be subject to the Brown Act. In one reported case, a city council created a committee of two members of the city council and two members of the city planning commission to review qualifications of prospective planning commissioners and make recommendations to the council. The court held that their joint mission made them a legislative body subject to the Brown Act. Had the two committees remained separate and met only to exchange information and report back to their respective boards, they would have been exempt from the Brown Act.<sup>8</sup>
- **Standing committees** of a legislative body, irrespective of their composition, which have either (1) a continuing subject matter jurisdiction or (2) a meeting schedule fixed by charter, ordinance, resolution, or formal action of a legislative body.<sup>9</sup> Even if it comprises less than a quorum of the governing body, a standing committee is subject to the Brown Act. For example, if a governing body creates committees on budget and finance or on public safety that are not limited in duration or scope, those are standing committees subject to the Brown Act. Further, according to the California Attorney General, function over form controls. For example, a statement by the legislative body that the advisory committee “shall not exercise continuing subject matter jurisdiction” or the fact that the committee does not have a fixed meeting schedule is not determinative.<sup>10</sup> “Formal action” by a legislative body includes authorization given to the agency’s executive officer to appoint an advisory committee pursuant to agency-adopted policy.<sup>11</sup> A majority of the members of a legislative body may attend an open and public meeting of a standing committee of that body, provided the members who are not part of the standing committee only observe.<sup>12</sup> For more information, see chapter 3.
- The governing body of any **private organization** either (1) created by the legislative body in order to exercise authority that may lawfully be delegated by such body to a private corporation, limited liability company, or other entity or (2) that receives agency funding and whose governing board includes a member of the legislative body of the local agency appointed by the legislative body as a full voting member of the private entity’s governing board.<sup>13</sup> These include some nonprofit corporations created by local agencies.<sup>14</sup> If a local agency contracts with a private firm for a service (for example, payroll, janitorial, or food services), the private firm is not covered by the Brown Act.<sup>15</sup> When a member of a legislative body sits on a board of a private organization as a private person and is not appointed by the legislative body, the board will not be subject to the Brown Act. Similarly, when the legislative body appoints someone other than one of its own members to such boards, the Brown Act does not apply. Nor does it apply when a private organization merely receives agency funding.<sup>16</sup>

**PRACTICE TIP:** It can be difficult to determine whether a subcommittee of a body falls into the category of a standing committee or an exempt temporary committee. Suppose a committee is created to explore the renewal of a franchise or a topic of similarly limited scope and duration. Is it an exempt temporary committee or a nonexempt standing committee? The answer may depend on factors such as how meeting schedules are determined, the scope of the committee’s charge, or whether the committee exists long enough to have “continuing jurisdiction.”

- Q.** The local chamber of commerce is funded in part by the city. The mayor sits on the chamber's board of directors. Is the chamber board a legislative body subject to the Brown Act?
- A.** *Maybe. If the chamber's governing documents require the mayor to be on the board and the city council appoints the mayor to that position, the board is a legislative body. If, however, the chamber board independently appoints the mayor to its board, or the mayor attends chamber board meetings in a purely advisory capacity, it is not.*
- Q.** If a community college district board creates an auxiliary organization to operate a campus bookstore or cafeteria, is the board of the organization a legislative body?
- A.** *Yes. But if the district instead contracts with a private firm to operate the bookstore or cafeteria, the Brown Act would not apply to the private firm.*

- **Certain types of hospital operators.** A lessee of a hospital (or portion of a hospital) first leased under Health and Safety Code subsection 32121(p) after Jan. 1, 1994, which exercises "material authority" delegated to it by a local agency, whether or not such lessee is organized and operated by the agency or by a delegated authority.<sup>17</sup>

### What is not a "legislative body" for purposes of the Brown Act?

- A temporary advisory committee composed **solely of less than a quorum** of the legislative body that serves a limited or single purpose, that is not perpetual, and that will be dissolved once its specific task is completed is not subject to the Brown Act.<sup>18</sup> Temporary committees are sometimes called *ad hoc* committees, a term not used in the Brown Act. Examples include an advisory committee composed of less than a quorum created to interview candidates for a vacant position or to meet with representatives of other entities to exchange information on a matter of concern to the agency, such as traffic congestion.<sup>19</sup>
- Groups advisory to a single decision-maker or appointed by staff are not covered. The Brown Act applies only to committees created by formal action of the legislative body and not to committees created by others. A committee advising a superintendent of schools would not be covered by the Brown Act. However, the same committee, if created by formal action of the school board, would be covered.<sup>20</sup>

- Q.** A member of the legislative body of a local agency informally establishes an advisory committee of five residents to advise her on issues as they arise. Does the Brown Act apply to this committee?
- A.** *No, because the committee has not been established by formal action of the legislative body.*
- Q.** During a meeting of the city council, the council directs the city manager to form an advisory committee of residents to develop recommendations for a new ordinance. The city manager forms the committee and appoints its members; the committee is instructed to direct its recommendations to the city manager. Does the Brown Act apply to this committee?
- A.** *Possibly, because the direction from the city council might be regarded as a formal action of the body, notwithstanding that the city manager controls the committee.*

- Individual decision-makers who are not elected or appointed members of a legislative body are not covered by the Brown Act. For example, a disciplinary hearing presided over by a department head or a meeting of agency department heads is not subject to the Brown Act since such assemblies are not those of a legislative body.<sup>21</sup>
- Public employees, each acting individually and not engaging in collective deliberation on a specific issue, such as the drafting and review of an agreement, do not constitute a legislative body under the Brown Act, even if the drafting and review process was established by a legislative body.<sup>22</sup>
- County central committees of political parties are also not Brown Act bodies.<sup>23</sup>

Legal counsel for a governing body is not a member of the governing body, therefore, the Brown Act does not apply to them. But counsel should take care not to facilitate Brown Act violations by members of the governing body.<sup>24</sup>

## ENDNOTES

- 1 *Taxpayers for Livable Communities v. City of Malibu* (2005) 126 Cal.App.4th 1123, 1127.
- 2 Cal. Gov. Code, § 54952, subs. (a) and (b).
- 3 Cal. Gov. Code, § 54951; Cal. Health & Saf. Code, § 34173, subd. (g) (successor agencies to former redevelopment agencies subject to the Brown Act). But see Cal. Ed. Code § 35147, which exempts certain school councils and school site advisory committees from the Brown Act and imposes upon them a separate set of rules.
- 4 *Torres v. Board of Commissioners of Housing Authority of Tulare County* (1979) 89 Cal.App.3d 545, 549-550.
- 5 71 Ops.Cal.Atty.Gen. 96 (1988); 73 Ops.Cal.Atty.Gen. 1 (1990).
- 6 *McKee v. Los Angeles Interagency Metropolitan Police Apprehension Crime Task Force* (2005) 134 Cal. App.4th 354, 362.
- 7 Cal. Gov. Code, § 54952.1.
- 8 *Joiner v. City of Sebastopol* (1981) 125 Cal.App.3d 799, 804-805.
- 9 Cal. Gov. Code, § 54952, subd. (b)
- 10 79 Ops.Cal.Atty.Gen. 69 (1996).
- 11 *Frazer v. Dixon Unified School District* (1993) 18 Cal.App.4th 781, 793.
- 12 Cal. Gov. Code § 54952, subd. (c)(6).
- 13 Cal. Gov. Code, § 54952, subd. (c)(1). Regarding private organizations that receive local agency funding, the same rule applies to a full voting member appointed prior to February 9, 1996, who, after that date, is made a nonvoting board member by the legislative body. Cal. Gov. Code § 54952, subd. (c)(2).
- 14 Cal. Gov. Code, § 54952(c)(1)(A); *International Longshoremen's and Warehousemen's Union v. Los Angeles Export Terminal, Inc.* (1999) 69 Cal.App.4th 287, 300; *Epstein v. Hollywood Entertainment Dist. II Business Improvement District* (2001) 87 Cal.App.4th 862, 876; see also 85 Ops.Cal.Atty.Gen. 55 (2002).
- 15 *International Longshoremen's and Warehousemen's Union v. Los Angeles Export Terminal, Inc.* (1999) 69 Cal.App.4th 287, 300 fn. 5.
- 16 "The Brown Act, Open Meetings for Local Legislative Bodies," California Attorney General's Office (2003), p. 7.

- 17 Cal. Gov. Code, § 54952, subd. (d).
- 18 Cal. Gov. Code, § 54952, subd. (b); see also *Freedom Newspapers, Inc. v. Orange County Employees Retirement System Board of Directors* (1993) 6 Cal.4th 821, 832.
- 19 *Taxpayers for Livable Communities v. City of Malibu* (2005) 126 Cal.App.4th 1123, 1129.
- 20 56 Ops.Cal.Atty.Gen. 14, 16-17 (1973).
- 21 *Wilson v. San Francisco Municipal Railway* (1973) 29 Cal.App.3d 870, 878-879.
- 22 *Golightly v. Molina* (2014) 229 Cal.App.4th 1501, 1513.
- 23 59 Ops.Cal.Atty.Gen. 162, 164 (1976).
- 24 *GFRCO, Inc. v. Superior Court of Riverside County* (2023) 89 Cal.App.5th 1295, 1323; *Stockton Newspapers, Inc. v. Redevelopment Agency of the City of Stockton* (1985) 171 Cal.App.3d 95, 105 (a series of individual telephone calls between the agency attorney and the members of the body constituted a meeting).



# Chapter 3

## MEETINGS

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# Chapter 3

## MEETINGS



The Brown Act only applies to meetings of local legislative bodies. It defines a meeting as “any congregation of a majority of the members of a legislative body at the same time and location, including teleconference location as permitted by Section 54953, to hear, discuss, deliberate, or take any action on any item that is within the subject matter jurisdiction of the legislative body.”<sup>1</sup> The term *meeting* is not limited to gatherings at which action is taken but includes deliberative gatherings as well. A hearing before an individual hearing officer is not a meeting under the Brown Act because it is not a hearing before a legislative body.<sup>2</sup>

### Brown Act meetings

Brown Act meetings include a legislative body’s regular meetings, special meetings, emergency meetings, and adjourned meetings.

- **“Regular meetings”** are meetings occurring at the dates, times, and location set by resolution, ordinance, or other formal action by the legislative body and are subject to 72-hour posting requirements.<sup>3</sup>
- **“Special meetings”** are meetings called by the presiding officer or majority of the legislative body to discuss only discrete items on the agenda under the Brown Act’s notice requirements for special meetings and are subject to 24-hour posting requirements.<sup>4</sup>
- **“Emergency meetings”** are a limited class of meetings held when prompt action is needed due to actual or threatened disruption of public facilities and are held on little notice.<sup>5</sup>
- **“Adjourned meetings”** are regular or special meetings that have been adjourned or re-adjourned to a time and place specified in the order of adjournment, with no agenda required for regular meetings adjourned for less than five calendar days as long as no additional business is transacted.<sup>6</sup>

### Six exceptions to the meeting definition

The Brown Act creates six exceptions to the meeting definition:<sup>7</sup>

#### *Individual contacts*

The first exception involves individual contacts between a member of the legislative body and any other person. The Brown Act does not limit a legislative body member acting on their own. This exception recognizes the right to confer with constituents, advocates, consultants, news reporters, local agency staff, or a colleague.

Individual contacts, however, cannot be used to do in stages what would be prohibited in one step. For example, a series of individual contacts that leads to discussion, deliberation, or action among a majority of the members of a legislative body is prohibited. Such serial meetings are discussed below.

## Conferences

The second exception allows a legislative body majority to attend a conference or similar gathering open to the public that addresses issues of general interest to the public or to public agencies of the type represented by the legislative body.

Among other things, this exception permits legislative body members to attend annual association conferences of city, county, school, community college, and other local agency officials, as long as those meetings are open to the public. However, a majority of members cannot discuss among themselves, other than as part of the scheduled program, business of a specific nature that is within their local agency's subject matter jurisdiction.

## Community meetings

The third exception allows a legislative body majority to attend an open and publicized meeting held by another organization to address a topic of local community concern. A majority cannot discuss among themselves, other than as part of the scheduled program, business of a specific nature that is within the legislative body's subject matter jurisdiction. Under this exception, a legislative body majority may attend a local service club meeting or a local candidates' night if the meetings are open to the public.

**"I see we have four distinguished members of the city council at our meeting tonight," said the chair of the Environmental Action Coalition. "I wonder if they have anything to say about the controversy over enacting a slow growth ordinance?"**

*The Brown Act permits a majority of a legislative body to attend and speak at an open and publicized meeting conducted by another organization. The Brown Act may nevertheless be violated if a majority discusses, deliberates, or takes action on an item during the meeting of the other organization. There is a fine line between what is permitted and what is not; hence, members should exercise caution when participating in these types of events.*

- Q.** The local chamber of commerce sponsors an open and public candidate debate during an election campaign. Three of the five agency members are up for reelection and all three participate. All of the candidates are asked their views on a controversial project scheduled for a meeting to occur just after the election. May the three incumbents answer the question?
- A.** Yes, because the chamber of commerce, not the city, is organizing the debate. The city should not sponsor the event or assign city staff to help organize or run the event. Also, the Brown Act does not constrain the incumbents from expressing their views regarding important matters facing the local agency as part of the political process the same as any other candidates. Finally, incumbents participating in the event should take care to limit their remarks to the program set by the chamber and safeguard due process by indicating they will keep an open mind regarding specific applications that might come before the council.
- Q.** May the three incumbents accept an invitation from the editorial board of a local paper to all candidates to meet as a group and answer questions about and/or debate city issues?
- A.** No, unlike the chamber of commerce event, this would not be allowed under the Brown Act because it is not an open and publicized meeting.

### Other legislative bodies

The fourth exception allows a majority of a legislative body to attend an open and publicized meeting of (1) another body of the local agency and (2) a legislative body of another local agency.<sup>8</sup> Again, the majority cannot discuss among themselves, other than as part of the scheduled meeting, business of a specific nature that is within their subject matter jurisdiction. This exception allows, for example, a city council or a majority of a board of supervisors to attend a controversial meeting of the planning commission.

Nothing in the Brown Act prevents the majority of a legislative body from sitting together at such a meeting. They may choose not to, however, to preclude any possibility of improperly discussing local agency business and to avoid the appearance of a Brown Act violation. Further, aside from the Brown Act, there may be other reasons, such as due process considerations, why the members should avoid giving public testimony, trying to influence the outcome of proceedings before a subordinate body, or discussing the merits with interested parties.

**Q.** The entire legislative body intends to testify against a bill before the Senate Local Government Committee in Sacramento. Must this activity be noticed as a meeting of the body?

**A.** *No, because the members are attending and participating in an open meeting of another governmental body that the public may attend.*

**Q.** The members then proceed upstairs to the office of their local assembly member to discuss issues of local interest. Must this session be noticed as a meeting and be open to the public?

**A.** *Yes, because the entire body may not meet behind closed doors except for proper closed sessions. The same answer applies to a private lunch or dinner with the assembly member.*

### Standing committees

The fifth exception authorizes the attendance of a majority at an open and noticed meeting of a standing committee of the legislative body, provided that the legislative body members who are not members of the standing committee attend only as observers (meaning that they cannot speak or otherwise participate in the meeting, and they must sit where members of the public sit).<sup>9</sup>

**Q.** The legislative body establishes a standing committee of two of its five members that meets monthly. A third member of the legislative body wants to attend these meetings and participate. May she?

**A.** *She may attend, but only as an observer; she may not participate.*

**Q.** Can the legislative body establish multiple standing committees with partially overlapping jurisdiction?

**A.** *Yes. One result of this overlap in jurisdiction may be that three or more of the members of the legislative body ultimately end up discussing an issue as part of a standing committee meeting. This is allowed under the Brown Act provided each standing committee meeting is publicly noticed and no more than two of the five members discuss the issue at any given standing committee meeting.*



### **Social or ceremonial events**

The final exception permits a majority of a legislative body to attend a purely social or ceremonial occasion. Once again, a majority cannot discuss business among themselves of a specific nature that is within the subject matter jurisdiction of the legislative body.

Nothing in the Brown Act prevents a majority of members from attending the same football game, party, wedding, funeral, reception, or farewell. The test is not whether a majority of a legislative body attend the function, but whether business of a specific nature within the subject matter jurisdiction of the body is discussed. As long as no such business is discussed, there is no violation of the Brown Act.

### **Grand Jury Testimony**

In addition, members of a legislative body, either individually or collectively, may give testimony in private before a grand jury.<sup>10</sup> This is the equivalent of a seventh exception to the Brown Act's definition of a "meeting."

### **Collective briefings**

None of these exceptions permits a majority of a legislative body to meet together with staff in advance of a meeting for a collective briefing. Any such briefings that involve a majority of the body in the same place and time must be open to the public and satisfy Brown Act meeting notice and agenda requirements. Staff may provide written briefings (e.g., staff updates, emails from the city manager, confidential memos from the city attorney) to the full legislative body, but apart from privileged memos, the written materials may be subject to disclosure as public records as discussed in chapter 4.

### **Retreats, trainings, and workshops of legislative bodies**

Gatherings by a majority of legislative body members at the legislative body's retreats, study sessions, trainings, or workshops are subject to the requirements of the Brown Act. This is the case whether the gathering focuses on long-range agency planning, discussion of critical local issues, satisfying state-mandated ethics training requirements, or team building and group dynamics.<sup>11</sup>



- Q.** The legislative body wants to hold a team-building session to improve relations among its members. May such a session be conducted behind closed doors?
- A.** *No, this is not a proper subject for a closed session, and there is no other basis to exclude the public. Council relations are a matter of public business.*

### Serial meetings

One of the most frequently asked questions about the Brown Act involves serial meetings. At any one time, such meetings include only a portion of a legislative body, but eventually they comprise a majority. The Brown Act provides that “[a] majority of the members of a legislative body shall not, outside a meeting ... use a series of communications of any kind, directly or through

intermediaries, to discuss, deliberate, or take action on any item of business that is within the subject matter jurisdiction of the legislative body.”<sup>12</sup> The problem with serial meetings is the process, which deprives the public of an opportunity for meaningful observation of and participation in legislative body decision-making.

The serial meeting may occur by either a “daisy chain” or a “hub and spoke” sequence. In the daisy chain scenario, Member A contacts Member B, Member B contacts Member C, Member C contacts Member D, and so on until a quorum has discussed, deliberated, or taken action on an item within the legislative body’s subject matter jurisdiction. The hub and spoke process involves at least two scenarios. In the first scenario, Member A (the hub) sequentially contacts Members B, C, D, and so on (the spokes) until a quorum has been contacted. In the second scenario, a staff member (the hub), functioning as an intermediary for the legislative body

or one of its members, communicates with a majority of members (the spokes) one by one for discussion, deliberation, or a decision on a proposed action.<sup>13</sup> Another example of a serial meeting is when a chief executive officer (the hub) briefs a majority of members (the spokes) prior to a formal meeting and, in the process, information about the members’ respective views is revealed. Each of these scenarios violates the Brown Act.

A legislative body member has the right, if not the duty, to meet with constituents to address their concerns. That member also has the right to confer with a colleague (but not with a majority of the body, counting the member) or appropriate staff about local agency business. An employee or official of a local agency may engage in separate conversations or communications outside of an open and noticed meeting “with members of a legislative body in order to answer questions or provide information regarding a matter that is within the subject matter jurisdiction of the local agency if that person does not communicate to members of the legislative body the comments or position of any other member or members of the legislative body.”<sup>14</sup>

The Brown Act is violated, however, if several one-on-one meetings or conferences lead to a discussion, deliberation, or action by a majority. In one case, a violation occurred when a quorum



Photo credit: Courtesy of the City of West Hollywood. Photo by Jon Viscott.

of a city council, by a letter that had been circulated among members outside of a formal meeting, directed staff to take action in an eminent domain proceeding.<sup>15</sup>

A unilateral written communication to the legislative body, such as an informational or advisory memorandum, does not violate the Brown Act.<sup>16</sup> Such a memo, however, may be a public record.<sup>17</sup>

**The phone call was from a lobbyist. “Say, I need your vote for that project in the south area. How about it?”**

**“Well, I don’t know,” replied Board Member Aletto. “That’s kind of a sticky proposition. You sure you need my vote?”**

**“Well, I’ve got Bradley and Cohen lined up and another vote leaning. With you, I’d be over the top.”**

**Moments later, the phone rings again. “Hey, I’ve been hearing some rumbles on that south area project,” said the newspaper reporter. “I’m counting noses. How are you voting on it?”**

*The lobbyist and the reporter are facilitating a violation of the Brown Act. The board member may have violated the Brown Act by hearing about the positions of other board members and indeed coaxing the lobbyist to reveal the other board members’ positions by asking, “You sure you need my vote?” The prudent course is to avoid such leading conversations and to caution lobbyists, staff, and news media against revealing such positions of others.*

**The mayor sat down across from the city manager. “From now on,” he declared, “I want you to provide individual briefings on upcoming agenda items. Some of this material is very technical, and the council members don’t want to sound like idiots asking about it in public. Besides that, briefings will speed up the meeting.”**

*Agency employees or officials may have separate conversations or communications outside of an open and noticed meeting “with members of a legislative body in order to answer questions or provide information regarding a matter that is within the subject matter jurisdiction of the local agency if that person does not communicate to members of the legislative body the comments or position of any other member or members of the legislative body.”<sup>18</sup> Members should always be vigilant when discussing local agency business with anyone to avoid conversations that could lead to a discussion, deliberation, or action taken among the majority of the legislative body.*

**“Thanks for the information,” said Council Member Kim. “These zoning changes can be tricky, and now I think I’m better equipped to make the right decision.”**

**“Glad to be of assistance,” replied the planning director. “I’m sure Council Member Jones is OK with these changes. How are you leaning?”**

**“Well,” said Council Member Kim, “I’m leaning toward approval. I know that two of my colleagues definitely favor approval.”**

**PRACTICE TIP:** When briefing legislative body members, staff must exercise care not to disclose other members’ views and positions.

*The planning director should not disclose Jones' prospective vote, and Kim should not disclose the prospective votes of two colleagues. Under these facts, there likely has been a serial meeting in violation of the Brown Act.*

- Q.** Various social media platforms and websites include forums where agency employees and officials can discuss issues of local agency business. Members of the legislative body participate regularly. Does this scenario present a potential for violation of the Brown Act?
- A.** *Yes, because it is a technological device that may serve to allow for a majority of members to discuss, deliberate, or take action on matters of agency business.*
- Q.** A member of a legislative body contacts two other members on a five-member body relative to scheduling a special meeting. Is this an illegal serial meeting?
- A.** *No, the Brown Act expressly allows a majority of a body to call a special meeting, though the members should avoid discussing the merits of what is to be taken up at the meeting.*

Particular care should be exercised when staff briefings of legislative body members occur by email because of the ease of using the “reply all” option that may inadvertently result in a Brown Act violation. Staff should consider using the “bcc” (blind carbon copy) option when addressing an email to multiple members of the legislative body and remind recipients not to “reply all.”

Social media should also be used with care. A member of the legislative body cannot respond directly to any communication on an internet-based social media platform that is made, posted, or shared by any other member of the legislative body. This applies to matters within the subject matter jurisdiction of the legislative body. For example, if one member of a legislative body “likes” a social media post of one other member of the same body, that could violate the Brown Act, depending on the nature of the post.<sup>19</sup>

Finally, electronic communications (such as text messaging) among members of a legislative body during a public meeting should be discouraged. If such communications are sent to a majority of members of the body, either directly or through an intermediary, on a matter on the meeting agenda, that could violate the Brown Act. Electronic communications sent to less than a majority of members of the body during a quasi-judicial proceeding could potentially raise due process concerns, even if not per se prohibited by the Brown Act. Additionally, some legislative bodies have rules governing electronic communications during meetings of the legislative body and how their members should proceed if they receive a communication on an agenda item that is not part of the record or not part of an agenda packet.

### **Informal gatherings**

Members of legislative bodies are often tempted to mix business with pleasure — for example, by holding a post-meeting gathering. Informal gatherings at which local agency business is discussed or transacted violate the law if they are not conducted in conformance with the Brown Act.<sup>20</sup> A gathering at which a quorum of the legislative body discusses matters within their jurisdiction violates the Brown Act even if that gathering occurs in a public place. The Brown Act is not satisfied by public visibility alone. It also requires public notice and an opportunity to attend, hear, and participate.

Thursday at 11:30 a.m., as they did every week, the board of directors of the Dry Gulch Irrigation District trooped into Pop’s Donut Shoppe for an hour of talk and fellowship. They sat at the corner window, fronting on Main and Broadway, to show they had nothing to hide. Whenever he could, the managing editor of the weekly newspaper down the street hurried over to join the board.

*A gathering like this would not violate the Brown Act if board members scrupulously avoided talking about irrigation district issues — which might be difficult. This kind of situation should be avoided. The public is unlikely to believe the board members could meet regularly without discussing public business. A newspaper executive’s presence does not lessen the potential for a violation of the Brown Act.*

### Technological conferencing

Except for certain non-substantive purposes, such as scheduling a special meeting, a conference call including a majority of the members of a legislative body is an unlawful meeting. But in an effort to keep up with modern technologies, the Brown Act specifically allows a legislative body to use any type of teleconferencing to meet, receive public comment and testimony, deliberate, or conduct a closed session.<sup>21</sup> While the Brown Act contains specific requirements for conducting a teleconference, the decision to use teleconferencing is entirely discretionary with the body. No person has a right under the Brown Act to have a meeting by teleconference.

Teleconference is defined as “a meeting of a legislative body, the members of which are in different locations, connected by electronic means, through either audio or video, or both.”<sup>22</sup> In addition to the specific requirements relating to teleconferencing, the meeting must comply with all provisions of the Brown Act otherwise applicable. The Brown Act contains the following teleconferencing requirements:<sup>23</sup>

- Teleconferencing may be used for all purposes during any meeting.
- At least a quorum of the legislative body must participate from locations within the local agency’s jurisdiction.
- Additional teleconference locations may be made available for the public.
- Each teleconference location must be specifically identified in the notice and agenda of the meeting, including a full address and room number, as may be applicable.
- Agendas must be posted at each teleconference location, even if a hotel room or a residence.
- Each teleconference location, including a hotel room or residence, must be accessible to the public and have technology, such as a speakerphone, to enable the public to participate
- The agenda must provide the opportunity for the public to address the legislative body directly at each teleconference location.
- All votes must be by roll call.



Photo credit: Courtesy of the City of West Hollywood. Photo by Jon Viscott.

**Q.** A member on vacation wants to participate in a meeting of the legislative body and vote by cellular phone from her car while driving from Washington, D.C., to New York. May she?

**A.** *She may not participate or vote because she is not in an open, noticed, and posted teleconference location.*

Until Jan. 1, 2026, teleconferencing may also be used on a limited basis where a member indicates their need to participate remotely for “just cause” (e.g., childcare or a contagious illness) or due to

“emergency circumstances” (e.g., a physical or family medical emergency). This teleconferencing option has extremely detailed requirements, and careful review is needed. If the City experiences a technical issue that prevents members of the public from viewing the meeting and/or offering comments virtually, then no further action can be taken until the technical issue is resolved.<sup>24</sup>

The use of teleconferencing to conduct a legislative body meeting presents a variety of issues beyond the scope of this guide to discuss in detail. Therefore, before teleconferencing a meeting, legal counsel for the local agency should be consulted.

### Location of meetings

The Brown Act generally requires all regular and special meetings of a legislative body, including retreats and workshops, to be held within the boundaries of the territory over which the local agency exercises jurisdiction.<sup>25</sup>

An open and publicized meeting of a legislative body may be held outside of agency boundaries if the purpose of the meeting is one of the following:<sup>26</sup>

- Comply with state or federal law or a court order, or attend a judicial conference or administrative proceeding in which the local agency is a party.
- Inspect real or personal property that cannot be conveniently brought into the local agency’s territory, provided the meeting is limited to items relating to that real or personal property.

**Q.** The agency is considering approving a major retail mall. The developer has built other similar malls and invites the entire legislative body to visit a mall outside the jurisdiction. May the entire body go?

**A.** *Yes, the Brown Act permits meetings outside the boundaries of the agency for specified reasons and inspection of property is one such reason. The field trip must be treated as a meeting and the public must be allowed to attend.*

- Participate in multiagency meetings or discussions; however, such meetings must be held within the boundaries of one of the participating agencies, and all of those agencies must give proper notice.
- Meet in the closest meeting facility if the local agency has no meeting facility within its boundaries, or meet at its principal office if that office is located outside the territory over which the agency has jurisdiction.



- Meet with elected or appointed federal or California officials when a local meeting would be impractical, solely to discuss a legislative or regulatory issue affecting the local agency and over which the federal or state officials have jurisdiction.
- Meet in or nearby a facility owned by the agency, provided that the topic of the meeting is limited to items directly related to the facility.
- Visit the office of its legal counsel for a closed session on pending litigation when to do so would reduce legal fees or costs.<sup>27</sup>

In addition, the governing board of a school or community college district may hold meetings outside of its boundaries to attend a conference on nonadversarial collective bargaining techniques, interview candidates for school district superintendent, or interview a potential employee from another district.<sup>28</sup> A school board may also interview members of the public residing in another district if the board is considering employing that district’s superintendent.

Similarly, meetings of a joint powers authority can occur within the territory of at least one of its member agencies, and a joint powers authority with members throughout the state may meet anywhere in the state.<sup>29</sup>

Finally, if a fire, flood, earthquake, or other emergency makes the usual meeting place unsafe, the presiding officer can designate another meeting place for the duration of the emergency. News media that have requested notice of meetings must be notified of the designation by the most rapid means of communication available.<sup>30</sup> State law has also allowed for virtual meetings under certain emergency situations.<sup>31</sup>

## ENDNOTES

- 1 Cal. Gov. Code, § 54952.2, subd. (a).
- 2 *Wilson v. San Francisco Municipal Railway* (1973) 29 Cal.App.3d 870.
- 3 Cal. Gov. Code, § 54954, subd. (a).
- 4 Cal. Gov. Code, § 54956.
- 5 Cal. Gov. Code, § 54956.5.
- 6 Cal. Gov. Code, § 54955.
- 7 Cal. Gov. Code, § 54952.2, subd. (c).
- 8 Cal. Gov. Code, § 54952.2, subd. (c)(4).
- 9 Cal. Gov. Code, § 54952.2, subd. (c)(6). See 81 Ops.Cal.Atty.Gen. 156 (1998).
- 10 Cal. Gov. Code, § 54953.1.
- 11 “*The Brown Act*,” California Attorney General (2003), p. 10.
- 12 Cal. Gov. Code, § 54952.2, subd. (b)(1).
- 13 *Stockton Newspapers, Inc. v. Redevelopment Agency of the City of Stockton* (1985) 171 Cal.App.3d 95.
- 14 Cal. Gov. Code, § 54952.2, subd. (b)(2).
- 15 *Common Cause v. Stirling* (1983) 147 Cal.App.3d 518.
- 16 *Roberts v. City of Palmdale* (1993) 5 Cal.4th 363.
- 17 Cal. Gov. Code, § 54957.5, subd. (a).
- 18 Cal. Gov. Code, § 54952.2, subd. (b)(2).
- 19 Cal. Gov. Code, § 54952.2, subd. (b)(3).

- 20 Cal. Gov. Code, § 54952.2; 43 Ops.Cal.Atty.Gen. 36 (1964).
- 21 Cal. Gov. Code, § 54953, subd. (b)(1).
- 22 Cal. Gov. Code, § 54953, subd. (b)(4).
- 23 Cal. Gov. Code, § 54953. Until Jan. 1, 2024, the legislative body could use teleconferencing “during a proclaimed state of emergency” by the Governor in specified circumstances, and teleconference locations were exempt from certain requirements, such as identification in and posting of the agenda.
- 24 Cal Gov. Code, § 54953, subd. (f) (which will become Govt. §54953(e) as of Jan. 1, 2024).
- 25 Cal. Gov. Code, § 54954, subd. (b).
- 26 Cal. Gov. Code, § 54954, subd. (b)(1)-(7).
- 27 94 Ops.Cal.Atty.Gen. 15 (2011).
- 28 Cal. Gov. Code, § 54954, subd. (c).
- 29 Cal. Gov. Code, § 54954, subd. (d).
- 30 Cal. Gov. Code, § 54954, subd. (e).
- 31 Cal. Gov. Code, § 54953, subd. (e) (exp. January 1, 2026).





# Chapter 4

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# Chapter 4

## AGENDAS, NOTICES, AND PUBLIC PARTICIPATION



Effective notice is essential for an open and public meeting. Whether a meeting is open or how the public may participate in that meeting is academic if nobody knows about the meeting.

### Agendas for regular meetings

Every regular meeting of a legislative body of a local agency — including advisory committees, commissions, or boards, as well as standing committees of legislative bodies — must be preceded by a posted agenda that advises the public of the meeting and the matters to be transacted or discussed.

The agenda must be posted at least 72 hours before the regular meeting in a location “freely accessible to members of the public.”<sup>1</sup> The courts have not definitively interpreted the “freely accessible” requirement. The California Attorney General has interpreted this

provision to require posting in a location open and accessible to the public 24 hours a day during the 72-hour period, but any of the 72 hours may fall on a weekend.<sup>2</sup> This provision may be satisfied by posting on a touch screen electronic kiosk accessible without charge to the public 24 hours a day during the 72-hour period.<sup>3</sup> While posting an agenda on an agency’s internet website will not, by itself, satisfy the “freely accessible” requirement since there is no universal access to the internet, an agency has a supplemental obligation to post the agenda on its website if (1) the local agency has a website and (2) the legislative body whose meeting is the subject of the agenda is either (a) a governing body or (b) has members that are compensated, with one or more members that are also members of a governing body.<sup>4</sup>

- Q.** May the meeting of a governing body go forward if its agenda was either inadvertently not posted on the city’s website or if the website was not operational during part or all of the 72-hour period preceding the meeting?
- A.** *At a minimum, the Brown Act calls for “substantial compliance” with all agenda posting requirements, including posting to the agency website.<sup>5</sup> Should website technical difficulties arise, seek a legal opinion from your agency attorney. The California Attorney General has opined that technical difficulties that cause the website agenda to become inaccessible for a portion of the 72 hours preceding a meeting do not automatically or inevitably lead to a Brown Act violation, provided the agency can demonstrate substantial compliance.<sup>6</sup> This inquiry requires a fact-specific examination of whether the agency or its legislative body made “reasonably effective efforts to notify interested persons of a public meeting” through online posting and other available means.<sup>7</sup> The Attorney General’s opinion suggests that this examination would include an evaluation of how long a technical problem persisted, the efforts made to correct the problem or otherwise ensure that the public was informed, and the actual effect the problem had on public*

*awareness, among other factors.<sup>8</sup> For these reasons, obvious website technical difficulties might not require cancellation of a meeting, provided that the agency meets all other Brown Act posting requirements and the agenda is available on the website once the technical difficulties are resolved.*

The agenda must state the meeting time and place and must contain “a brief general description of each item of business to be transacted or discussed at the meeting, including items to be discussed in closed session.”<sup>9</sup> For a discussion of descriptions for open and closed-session agenda items, see chapter 5. Special care should be made to describe on the agenda each distinct action to be taken by the legislative body, while an overbroad description of a “project” must be avoided if the “project” is actually a set of distinct actions, in which case each action must be listed separately on the agenda.<sup>10</sup> For example, the listing of an “initiative measure” alone on an agenda was found insufficient where the agency was also deciding whether to accept a gift from the measure proponent to pay for the election.<sup>11</sup>

**PRACTICE TIP:** Putting together a meeting agenda requires careful thought.

**Q.** The agenda for a regular meeting contains the following items of business:

- Consideration of a report regarding traffic on Eighth Street.
- Consideration of a contract with ABC Consulting.

Are these descriptions adequate?

**A.** *If the first is, it is barely adequate. A better description would provide the reader with some idea of what the report is about and what is being recommended. The second is not adequate. A better description might read, “Consideration of a contract with ABC Consulting in the amount of \$50,000 for traffic engineering services regarding traffic on Eighth Street.”*

**Q.** The agenda includes an item entitled City Manager’s Report, during which time the city manager provides a brief report on notable topics of interest, none of which is listed on the agenda.

Is this permissible?

**A.** *Yes, as long as it does not result in extended discussion or action by the body.*

A brief general description may not be sufficient for closed-session agenda items. The Brown Act provides safe harbor language for the various types of permissible closed sessions.<sup>12</sup> Substantial compliance with the safe harbor language is recommended to protect legislative bodies and elected officials from legal challenges.

### **Mailed agenda upon written request**

The legislative body, or its designee, must mail a copy of the agenda or, if requested, the entire agenda packet, to any person who has filed a written request for such materials. These copies shall be mailed at the time the agenda is posted or upon distribution to all, or a majority of all, of the members of the legislative body, whichever occurs first. If the local agency has an internet website, this requirement can be satisfied by emailing a copy of, or website link to, the agenda or agenda packet if the person making the request asks for it to be emailed. Further, if requested, these materials must be made available in appropriate alternative formats to persons with disabilities.

A request for notice is valid for one calendar year and renewal requests must be filed following January 1 of each year. The legislative body may establish a fee to recover the cost of providing the service. Failure of the requesting person to receive the agenda does not constitute grounds for invalidation of actions taken at the meeting.<sup>13</sup>



### Notice requirements for special meetings

There is no express agenda requirement for special meetings, but the notice of the special meeting effectively serves as the agenda and limits the business that may be transacted or discussed. Written notice must be sent to each member of the legislative body (unless waived in writing by that member) and to each local newspaper of general circulation and each radio and television station that has requested such notice in writing. This notice must be delivered at least 24 hours before the time of the meeting by personal delivery or any other means that ensures receipt.

The notice must state the time and place of the meeting as well as all business to be transacted or discussed. It is recommended that the business to be transacted or discussed be described in the same manner that an item for a regular meeting would be described on the agenda, that is, with a brief general description. Some items must appear on a regular, not special, meeting agenda (e.g., general law city adoption of an ordinance or consideration of local agency executive compensation).<sup>14</sup>

As noted above, closed session items should be described in accordance with the Brown Act's safe harbor provisions to protect legislative bodies and elected officials from challenges of noncompliance with notice requirements.

The special meeting notice must also be posted at least 24 hours prior to the special meeting using the same methods as posting an agenda for a regular meeting: at a site that is freely accessible to the public, and on the agency's website if (1) the local agency has a website and (2) the legislative body whose meeting is the subject of the agenda is either (a) a governing body or (b) has members that are compensated, with one or more

members that are also members of a governing body.<sup>15</sup>

### Notices and agendas for adjourned and continued meetings and hearings

A regular or special meeting can be adjourned and re-adjourned to a time and place specified in the order of adjournment.<sup>16</sup> If no time is stated, the meeting is continued to the hour for regular meetings. Whoever is present (even if they are less than a quorum) may so adjourn a meeting; if no member of the legislative body is present, the clerk or secretary may adjourn the meeting. If a meeting is adjourned for less than five calendar days, no new agenda need be posted so long as a new item of business is not introduced.<sup>17</sup> A copy of the order of adjournment must be posted within 24 hours after the adjournment, at or near the door of the place where the meeting was held.

A hearing can be continued to a subsequent meeting. The process is the same as for continuing adjourned meetings, except that if the hearing is continued to a time less than 24 hours away, a copy of the order or notice of continuance must be posted immediately following the meeting.<sup>18</sup>

## Notice requirements for emergency meetings

The special meeting notice provisions apply to emergency meetings, except for the 24-hour notice.<sup>19</sup> News media that have requested written notice of special meetings must be notified by telephone at least one hour in advance of an emergency meeting, and all telephone numbers provided in that written request must be tried. If telephones are not working, the notice requirements are deemed waived. However, the news media must be notified as soon as possible of the meeting and any action taken.

News media may make a practice of having written requests on file for notification of special or emergency meetings. Absent such a request, a local agency has no legal obligation to notify news media of special or emergency meetings — although notification may be advisable in any event to avoid controversy.

## Notice of compensation for simultaneous or serial meetings

A legislative body that has convened a meeting and whose membership constitutes a quorum of another legislative body, may convene a simultaneous or serial meeting of the other legislative body only after a clerk or member of the convened legislative body orally announces (1) the amount of compensation or stipend, if any, that each member will be entitled to receive as a result of convening the meeting of the other legislative body; and (2) that the compensation or stipend is provided as a result of convening the meeting of that body.<sup>20</sup>

No oral disclosure of the amount of the compensation is required if the entire amount of such compensation is prescribed by statute and no additional compensation has been authorized by the local agency. Further, no disclosure is required with respect to reimbursements for actual and necessary expenses incurred in the performance of the member's official duties, such as for travel, meals, and lodging.

## Educational agency meetings

The Education Code contains some special agenda and special meeting provisions.<sup>21</sup> However, they are generally consistent with the Brown Act. An item is probably void if not posted.<sup>22</sup> A school district board must also adopt regulations to make sure the public can place matters affecting the district's business on meeting agendas and can address the board on those items.<sup>23</sup>

## Notice requirements for tax or assessment meetings and hearings

The Brown Act prescribes specific procedures for adoption by a city, county, special district, or joint powers authority of any new or increased tax or assessment imposed on businesses.<sup>24</sup> Although written broadly, these Brown Act provisions do not apply to new or increased real property taxes or assessments, as those are governed by the California Constitution, Article XIII C or XIII D, enacted by Proposition 218. At least one public meeting must be held to allow public testimony on the tax or assessment. In addition, there must also be at least 45 days notice of a public hearing at which the legislative body proposes to enact or increase the tax or assessment. Notice of the public meeting and public hearing must be provided at the same time and in the same document. The public notice relating to general taxes must be provided by newspaper publication. The public notice relating to new or increased business assessments must be provided through a



mailing to all business owners proposed to be subject to the new or increased assessment. The agency may recover the reasonable costs of the public meetings, hearings, and notice.

The Brown Act exempts certain fees, standby or availability charges, recurring assessments, and new or increased assessments that are subject to the notice and hearing requirements of the Constitution.<sup>25</sup> As a practical matter, the Constitution's notice requirements have preempted this section of the Brown Act.

### Non-agenda items

The Brown Act generally prohibits any action or discussion of items not on the posted agenda. However, there are three specific situations in which a legislative body can act on an item not on the agenda:<sup>26</sup>

- When a majority decides there is an “emergency situation” (as defined for emergency meetings).
- When two-thirds of the members present (or all members if less than two-thirds are present) determine there is a need for immediate action, and the need to take action “came to the attention of the local agency subsequent to the agenda being posted.” This exception requires a degree of urgency. Further, an item cannot be considered under this provision if the legislative body or the staff knew about the need to take immediate action before the agenda was posted. A new need does not arise because staff forgot to put an item on the agenda or because an applicant missed a deadline.
- When an item appeared on the agenda of, and was continued from, a meeting held not more than five days earlier.

The exceptions are narrow, as indicated by this list. The first two require a specific determination by the legislative body. That determination can be challenged in court and, if unsubstantiated, can lead to invalidation of an action.

**“I’d like a two-thirds vote of the board so we can go ahead and authorize commencement of phase two of the East Area Project,” said Chair Lopez.**

**“It’s not on the agenda. But we learned two days ago that we finished phase one ahead of schedule — believe it or not — and I’d like to keep it that way. Do I hear a motion?”**

*The desire to stay ahead of schedule generally would not satisfy “a need for immediate action.” Too casual an action could invite a court challenge by a disgruntled resident. The prudent course is to place an item on the agenda for the next meeting and not risk invalidation.*

**“We learned this morning of an opportunity for a state grant,” said the chief engineer at the regular board meeting, “but our application has to be submitted in two days. We’d like the board to give us the go-ahead tonight, even though it’s not on the agenda.”**

*A legitimate immediate need can be acted upon even though not on the posted agenda by following a two-step process:*

**PRACTICE TIP:** Subject to very limited exceptions, the Brown Act prohibits any action or discussion of an item not on the posted agenda.

- First, make two determinations: (1) that there is an immediate need to take action and (2) that the need arose after the posting of the agenda. The matter is then placed on the agenda.
- Second, discuss and act on the added agenda item.

## Responding to the public

The public can talk about anything within the jurisdiction of the legislative body, but the legislative body generally cannot act on or discuss an item not on the agenda. What happens when a member of the public raises a subject not on the agenda?

While the Brown Act does not allow discussion or action on items not on the agenda, it does allow members of the legislative body, or its staff, to “briefly respond” to comments or questions from members of the public, provide a reference to staff or other resources for factual information, or direct staff to place the issue on a future agenda. In addition, even without a comment from the public, a legislative body member or a staff member may ask for information, request a report back, request to place a matter on the agenda for a subsequent meeting (subject to the body’s rules or procedures), ask a question for clarification, make a brief announcement, or briefly report on their own activities.<sup>27</sup> However, caution should be used to avoid any discussion or action on such items.



**Council Member Jefferson: I would like staff to respond to Resident Joe’s complaints during public comment about the repaving project on Elm Street. Are there problems with this project?**

**City Manager Frank: The public works director has prepared a 45-minute PowerPoint presentation for you on the status of this project and will give it right now.**

**Council Member Brown: Take all the time you need; we need to get to the bottom of this. Our residents are unhappy.**

*It is clear from this dialogue that the Elm Street project was not on the council’s agenda but was raised during the public comment period for items not on the agenda. Council Member Jefferson properly asked staff to respond; the city manager should have given at most a brief response. If a lengthy report from the public works director was warranted, the city manager should have stated that it would be placed on the agenda for the next meeting. Otherwise, both the long report and the likely discussion afterward will improperly embroil the council in a matter that is not listed on the agenda.*

### The right to attend and observe meetings

A number of Brown Act provisions protect the public's right to attend, observe, and participate in meetings.

Members of the public cannot be required to register their names, provide other information, complete a questionnaire, or otherwise "fulfill any condition precedent" to attending a meeting. Any attendance list, questionnaire, or similar document posted at or near the entrance to the meeting room or circulated at a meeting must clearly state that its completion is voluntary and that all persons may attend whether or not they fill it out.<sup>28</sup>

No meeting can be held in a facility that prohibits attendance based on race, religion, color, national origin, ethnic group identification, age, sex, sexual orientation, or disability, or that is inaccessible to the disabled. Nor can a meeting be held where the public must make a payment or purchase in order to be present.<sup>29</sup> This does not mean, however, that the public is entitled to free entry to a conference attended by a majority of the legislative body.<sup>30</sup>

While a legislative body may use teleconferencing in connection with a meeting, the public must be given notice of and access to the teleconference location. Members of the public must be able to address the legislative body from the teleconference location.<sup>31</sup>

Action by secret ballot, whether preliminary or final, is flatly prohibited.<sup>32</sup>

All actions taken by the legislative body in open session, and the vote of each member thereon, must be disclosed to the public at the time the action is taken.<sup>33</sup>

**Q.** The agenda calls for election of the legislative body's officers. Members of the legislative body want to cast unsigned written ballots that would be tallied by the clerk, who would announce the results. Is this voting process permissible?

**A.** *No. The possibility that a public vote might cause hurt feelings among members of the legislative body or might be awkward — or even counterproductive — does not justify a secret ballot.*

The legislative body may remove persons from a meeting who willfully interrupt or disrupt proceedings.<sup>34</sup> Ejection is justified only when audience members actually disrupt the proceedings,<sup>35</sup> or, alternatively, if the presiding member of the legislative body warns a person that their behavior is disruptive and that continued disruption may result in their removal (but no prior warning is required if there is a use of force or true threat of force).<sup>36</sup> If order cannot be restored after ejecting disruptive persons, the meeting room may be cleared. Members of the news media who have not participated in the disturbance must be allowed to continue to attend the meeting. The legislative body may establish a procedure to readmit an individual or individuals not responsible for the disturbance.<sup>37</sup>



## Records and recordings

The public has the right to review agendas and other writings distributed by any person to a majority of the legislative body in connection with a matter subject to discussion or consideration at a meeting. Except for privileged documents, those materials are public records and must be made available upon request without delay.<sup>38</sup> A fee or deposit as permitted by the California Public Records Act may be charged for a copy of a public record.<sup>39</sup>

- Q.** In connection with an upcoming hearing on a discretionary use permit, counsel for the legislative body transmits a memorandum to all members of the body outlining the litigation risks in granting or denying the permit. Must this memorandum be included in the packet of agenda materials available to the public?
- A.** *No. The memorandum is a privileged attorney-client communication.*
- Q.** In connection with an agenda item calling for the legislative body to approve a contract, staff submits to all members of the body a financial analysis explaining why the terms of the contract favor the local agency. Must this memorandum be included in the packet of agenda materials available to the public?
- A.** *Yes. The memorandum has been distributed to the majority of the legislative body, relates to the subject matter of a meeting, and is not a privileged communication.*

A legislative body may discuss or act on some matters without considering written materials. But if writings are distributed to a majority of a legislative body in connection with an agenda item, they must also be available to the public. A nonexempt or otherwise non-privileged writing distributed to a majority of the legislative body less than 72 hours before the meeting must be made available for inspection at the time of distribution at a public office or location designated for that purpose, and the agendas for all meetings of the legislative body must include the address of this office or location.<sup>40</sup> The location designated for public inspection must be open to the public, not a locked or closed office. Alternatively, the documents can be posted on the city's website for public review if statutory requirements are met.<sup>41</sup>

A writing distributed during a meeting must be made public:

- At the meeting if prepared by the local agency or a member of its legislative body.
- After the meeting if prepared by some other person.<sup>42</sup>

This requirement does not prevent assessing a fee or deposit for providing a copy of a public record pursuant to the California Public Records Act except where required to accommodate persons with disabilities.<sup>43</sup>

Any tape or film record of an open and public meeting made for whatever purpose by or at the direction of the local agency is subject to the California Public Records Act; however, it may be erased or destroyed 30 days after the taping or recording. Any inspection of a video or tape recording is to be provided without charge on a video or tape player made available by the local agency.<sup>44</sup> The agency may impose its ordinary charge for copies that is consistent with the California Public Records Act.<sup>45</sup>

In addition, the public is specifically allowed to use audio or videotape recorders or still or motion picture cameras at a meeting to record meetings of legislative bodies, absent a reasonable finding by the body that noise, illumination, or obstruction of view caused by recorders or cameras would persistently disrupt the proceedings.<sup>46</sup>

**PRACTICE TIP:** Public speakers cannot be compelled to give their name or address as a condition of speaking. The clerk or presiding officer may request speakers to complete a speaker card or identify themselves for the record but must respect a speaker's desire for anonymity.

Similarly, a legislative body cannot prohibit or restrict the public broadcast of its open and public meetings without making a reasonable finding that the noise, illumination, or obstruction of view would persistently disrupt the proceedings.<sup>47</sup>

### The public's right to speak during a meeting

Every agenda for a regular meeting must allow members of the public to speak on any item of interest, as long as the item is within the subject matter jurisdiction of the legislative body. Further, the public must be allowed to speak on a specific item of business before or during the legislative body's consideration of it.<sup>48</sup>

- Q.** Must the legislative body allow members of the public to show videos or make a PowerPoint presentation during the public comment part of the agenda, as long as the subject matter is relevant to the agency and is within the established time limit?
- A.** *Probably, although the agency is under no obligation to provide equipment.*

Moreover, the Brown Act, as well as case law, prevents legislative bodies from prohibiting public criticism of policies, procedures, programs, or services of the agency or the acts or omissions of the legislative body itself.<sup>49</sup> However, this prohibition does not provide immunity for defamatory statements.<sup>50</sup>

- Q.** May the presiding officer prohibit a member of the audience from publicly criticizing an agency employee by name during public comments?
- A.** *No, as long as the criticism pertains to job performance.*
- Q.** During the public comment period of a regular meeting of the legislative body, a resident urges the public to support and vote for a candidate vying for election to the body. May the presiding officer gavel the speaker out of order for engaging in political campaign speech?
- A.** *There is no case law on this subject. Some would argue that purely campaign issues are outside the subject matter jurisdiction of the body within the meaning of Section 54954.3(a). Others take the view that the speech must be allowed under paragraph (c) of that section where relevant to the governing of the agency and an implicit criticism of the incumbents' performance of city business.*

The legislative body may adopt reasonable regulations, including a limit on the total time permitted for public comment and a limit on the time permitted per speaker.<sup>51</sup> Such regulations should be enforced fairly and without regard to speakers' viewpoints. The legislative body has discretion to modify its regulations regarding time limits on public comment if necessary. For example, the time limit could be shortened to accommodate a lengthy agenda or lengthened to allow additional time for discussion on a complicated matter.<sup>52</sup>

The public does not need to be given an opportunity to speak on an item that has already been considered by a committee made up exclusively of members of the legislative body at a regular (but not special) public meeting if all interested members of the public had the opportunity to

speak on the item before or during its consideration, and if the item has not been substantially changed.<sup>53</sup>

Notices and agendas for special meetings must also give members of the public the opportunity to speak before or during consideration of an item on the agenda but need not allow members of the public an opportunity to speak on other matters within the jurisdiction of the legislative body.<sup>54</sup>

## ENDNOTES

- 1 Cal. Gov. Code, § 54954.2, subd. (a)(1).
- 2 78 Ops.Cal.Atty.Gen. 327 (1995).
- 3 88 Ops.Cal.Atty.Gen. 218 (2005).
- 4 Cal. Gov. Code, §§ 54954.2, subd. (a)(1) and 54954.2, subd. (d).
- 5 Cal. Gov. Code, § 54960.1, subd. (d)(1).
- 6 99 Ops.Cal.Atty.Gen. 11 (2016).
- 7 *North Pacifica LLC v. California Coastal Commission* (2008) 166 Cal.App.4th 1416, 1432.
- 8 99 Ops.Cal.Atty.Gen. 11 (2016).
- 9 Cal. Gov. Code, § 54954.2, subd. (a)(1).
- 10 *San Joaquin Raptor Rescue v. County of Merced* (2013) 216 Cal.App.4th 1167 (legislative body's approval of California Environmental Quality Act [CEQA] action [mitigated negative declaration] without specifically listing it on the agenda violates the Brown Act, even if the agenda generally describes the development project that is the subject of the CEQA analysis). See also *GI Industries v. City of Thousand Oaks* (2022) 84 Cal.App.5th 814 (depublished) (Brown Act requires CEQA finding of exemption to be listed on agenda items that are projects under CEQA).
- 11 *Hernandez v. Town of Apple Valley* (2017) 7 Cal.App.5th 194.
- 12 Cal. Gov. Code, § 54954.5.
- 13 Cal. Gov. Code, § 54954.1.
- 14 Cal. Gov. Code, §§ 36934; 54956, subd. (b).
- 15 Cal. Gov. Code, § 54956, subds. (a) and (c).
- 16 Cal. Gov. Code, § 54955.
- 17 Cal. Gov. Code, § 54954.2, subd. (b)(3).
- 18 Cal. Gov. Code, § 54955.1.
- 19 Cal. Gov. Code, § 54956.5.
- 20 Cal. Gov. Code, § 54952.3.
- 21 Cal. Edu. Code, §§ 35144, 35145, and 72129.
- 22 *Carlson v. Paradise Unified School District* (1971) 18 Cal.App.3d 196.
- 23 Cal. Edu. Code, § 35145.5
- 24 Cal. Edu. Code, § 54954.6
- 25 See Cal. Const. Art. XIII C, XIII D; Cal. Gov. Code, § 54954.6, subd. (h).
- 26 Cal. Gov. Code, § 54954.2, subd. (b).
- 27 Cal. Gov. Code, § 54954.2, subd. (a)(2); *Cruz v. City of Culver City* (2016) 2 Cal.App.5th 239 (six-minute colloquy on non-agenda item with staff answering questions and advising that matter could be placed on future agenda fell within exceptions to discussing or acting upon non-agenda items).



- 28 Cal. Gov. Code, § 54953.3.
- 29 Cal. Gov. Code, § 54961, subd. (a); Cal. Gov. Code, § 11135, subd. (a).
- 30 Cal. Gov. Code, § 54952.2, subd. (c)(2).
- 31 Cal. Gov. Code, § 54953, subd. (b).
- 32 Cal. Gov. Code, § 54953, subd. (c).
- 33 Cal. Gov. Code, § 54953, subd. (c)(2).
- 34 Cal. Gov. Code, §§ 54957.9, 54957.95.
- 35 *Norse v. City of Santa Cruz* (9th Cir. 2010) 629 F.3d 966 (silent and momentary Nazi salute directed toward mayor is not a disruption); *Acosta v. City of Costa Mesa* (9th Cir. 2013) 718 F.3d 800 (city council may not prohibit “insolent” remarks by members of the public absent actual disruption); but see *Kirkland v. Luken* (S.D. Ohio 2008) 536 F.Supp.2d 857 (finding no First Amendment violation by mayor for turning off microphone and removing speaker who used foul and inflammatory language that was deemed as “likely to incite the members of the audience during the meeting, cause disorder, and disrupt the meeting”).
- 36 Cal. Gov. Code, § 54957.95.
- 37 Cal. Gov. Code, § 54957.9.
- 38 Cal. Gov. Code, § 54957.5.
- 39 Cal. Gov. Code, § 54957.5, subd. (d).
- 40 Cal. Gov. Code, § 54957.5(b); see also *Sierra Watch v. Placer County* (2021) 69 Cal.App.5th 1.
- 41 Cal. Gov. Code § 54957.5.
- 42 Cal. Gov. Code, § 54957.5, subd. (c).
- 43 Cal. Gov. Code, § 54957.5, subd. (d).
- 44 Cal. Gov. Code, § 54953.5, subd. (b).
- 45 Cal. Gov. Code, § 54957.5, subd. (d).
- 46 Cal. Gov. Code, § 54953.5, subd. (a).
- 47 Cal. Gov. Code, § 54953.6.
- 48 Cal. Gov. Code, § 54954.3, subd. (a).
- 49 Cal. Gov. Code, § 54954.3, subd. (c); *Acosta v. City of Costa Mesa* (9th Cir. 2013) 718 F.3d 800.
- 50 Cal. Gov. Code, § 54954.3, subd. (c).
- 51 *Ribakoff v. City of Long Beach* (2018) 27 Cal.App.5th 150 (public comment time limit of three minutes for each speaker did not violate First Amendment).
- 52 Cal. Gov. Code, § 54954.3, subd. (b); *Chaffee v. San Francisco Public Library Commission* (2005) 134 Cal.App.4th 109; 75 Ops.Cal.Atty.Gen. 89 (1992).
- 53 Cal. Gov. Code, § 54954.3, subd. (a); *Preven v. City of Los Angeles* (2019) 32 Cal.App.5th 925.
- 54 Cal. Gov. Code, § 54954.3, subd. (a).



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# Chapter 5

## CLOSED SESSIONS

A closed session is a meeting of a legislative body conducted in private without the attendance of the public or press. A legislative body is authorized to meet in closed session only to the extent expressly authorized by the Brown Act.<sup>1</sup>



As summarized in chapter 1 of this guide, it is clear that the Brown Act must be interpreted liberally in favor of open meetings, and exceptions that limit public access (including the exceptions for closed session meetings) must be narrowly construed.<sup>2</sup> The most common purposes of the closed session provisions in the Brown Act are to avoid revealing confidential information (e.g., prejudicing the city's position in litigation or compromising the privacy interests of employees). Closed sessions should be conducted keeping those narrow purposes in mind. It is not enough that a subject is sensitive, embarrassing, or controversial. Without specific authority in the Brown Act for a closed session, a matter to be considered by a legislative body must be discussed in public. However, there is no prohibition in putting overlapping exceptions on an agenda in order to provide an opportunity for more robust closed session discussions. As an example, a city council cannot give direction to the city manager about a property

negotiation during a performance evaluation exception. However, if both real property negotiation and performance evaluation exceptions are on the agenda, those discussions might be conducted. Similarly, a board of police commissioners cannot meet in closed session to provide general policy guidance to a police chief, even though some matters are sensitive and the commission considers their disclosure contrary to the public interest.<sup>3</sup>

In this chapter, the grounds for convening a closed session are called "exceptions" because they are exceptions to the general rule that meetings must be conducted openly. In some circumstances, none of the closed session exceptions applies to an issue or information the legislative body wishes to discuss privately. In these cases, it is not proper to convene a closed session, even to protect confidential information. For example, although the Brown Act does authorize closed sessions related to specified types of contracts (e.g., specified provisions of real property agreements, employee labor agreements, and litigation settlement agreements),<sup>4</sup> the Brown Act does not authorize closed sessions for other contract negotiations.

### Agendas and reports

Closed session items must be briefly described on the posted agenda, and the description must state the specific statutory exemption.<sup>5</sup> An item that appears on the open meeting portion of the agenda may not be taken into closed session until it has been properly put on the agenda as a

**PRACTICE TIP:** Some problems over closed sessions arise because secrecy itself breeds distrust. The Brown Act does not require closed sessions and legislative bodies may do well to resist the tendency to call a closed session simply because it may be permitted. A better practice is to go into closed session only when necessary.

closed session item or unless it is properly added as a closed-session item by a two-thirds vote of the body after making the appropriate urgency findings.<sup>6</sup>

The Brown Act supplies a series of fill-in-the-blank sample agenda descriptions for various types of authorized closed sessions that provide a “safe harbor” from legal attacks. These sample agenda descriptions cover license and permit determinations, real property negotiations, existing or anticipated litigation, liability claims, threats to security, public employee appointments, evaluations and discipline, labor negotiations, multijurisdictional law enforcement cases, hospital boards of directors, medical quality assurance committees, joint powers agencies, and audits by the California State Auditor’s Office.<sup>7</sup>

If the legislative body intends to convene in closed session, it must include the section of the Brown Act authorizing the closed session in advance on the agenda, and it must make a public announcement prior to the closed session discussion. In most cases, the announcement may simply be a reference to the agenda item.<sup>8</sup> The legislative body must take public comment on the closed session item before convening in a closed session.

Following a closed session, the legislative body must provide an oral or written report on certain actions taken and the vote of every elected member present. The timing and content of the report vary according to the reason for the closed session and the action taken.<sup>9</sup> The announcements may be made at the site of the closed session, as long as the public is allowed to be present to hear them.

If there is a standing or written request for documentation, any copies of contracts, settlement agreements, or other documents finally approved or adopted in closed session must be provided to the requestor(s) after the closed session if final approval of such documents does not rest with any other party to the contract or settlement. If substantive amendments to a contract or settlement agreement approved by all parties requires retyping, such documents may be held until retyping is completed during normal business hours, but the substance of the changes must be summarized for any person inquiring about them.<sup>10</sup>

The Brown Act does not require minutes, including minutes of closed sessions. However, a legislative body may adopt an ordinance or resolution to authorize a confidential “minute book” be kept to record actions taken at closed sessions.<sup>11</sup> If one is kept, it must be made available to members of the legislative body, provided that the member asking to review minutes of a particular meeting was not disqualified from attending the meeting due to a conflict of interest.<sup>12</sup> A court may order the disclosure of minute books for the court’s review if a lawsuit makes sufficient claims of an open meeting violation.

## Litigation

The Brown Act expressly authorizes closed sessions to discuss what is considered pending litigation.<sup>13</sup> The rules that apply to holding a litigation closed session involve complex, technical definitions and procedures. Essentially, a closed session can be held by the body to confer with, or receive advice from, its legal counsel when open discussion would prejudice the position of the local agency in litigation in which the agency is, or could become, a party.<sup>14</sup> The litigation exception under the Brown Act is narrowly construed and does not permit activities beyond a legislative body’s conferring with its own legal counsel and required support staff.<sup>15</sup> For example, it is not permissible to hold a closed session in which settlement negotiations take place between a legislative body, a representative of an adverse party, and a mediator.<sup>16</sup>

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**PRACTICE TIP:** Pay close attention to closed session agenda descriptions. Using the wrong label can lead to invalidation of an action taken in closed session if not substantially compliant.

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The California Attorney General has opined that if the agency's attorney is not a participant, a litigation closed session cannot be held.<sup>17</sup> In any event, local agency officials should always consult the agency's attorney before placing this type of closed session on the agenda in order to be certain that it is being done properly.

Before holding a closed session under the pending litigation exception, the legislative body must publicly state the basis for the closed session by identifying one of the following three types of matters: existing litigation, anticipated exposure to litigation, or anticipated initiation of litigation.<sup>18</sup>

### *Existing litigation*

- Q.** May the legislative body agree to settle a lawsuit in a properly noticed closed session without placing the settlement agreement on an open session agenda for public approval?
- A.** *Yes, but the settlement agreement is a public document and must be disclosed on request. Furthermore, a settlement agreement cannot commit the agency to matters that are required to have public hearings.*<sup>19</sup>

Existing litigation includes any adjudicatory proceedings before a court, administrative body exercising its adjudicatory authority, hearing officer, or arbitrator. The clearest situation in which a closed session is authorized is when the local agency meets with its legal counsel to discuss a pending matter that has been filed in a court or with an administrative agency and names the local

agency as a party. The legislative body may meet under these circumstances to receive updates on the case from attorneys, participate in developing strategy as the case develops, or consider alternatives for resolution of the case. Generally, an agreement to settle litigation may be approved in closed session. However, an agreement to settle litigation cannot be approved in closed session if it commits the city to take an action that is required to have a public hearing.<sup>20</sup>

### *Anticipated exposure to litigation against the local agency*

Closed sessions are authorized for legal counsel to inform the legislative body of a significant exposure to litigation against the local agency, but only if based on "existing facts and circumstances" as defined by the Brown Act.<sup>21</sup> The legislative body may also meet under this exception to determine whether a closed session is authorized based on information provided by legal counsel or staff. In general, the "existing facts and

circumstances" must be publicly disclosed unless they are privileged written communications or not yet known to a potential plaintiff. If an agency receives a documented threat of litigation, and intends to discuss that matter in closed session, the record of a litigation threat must be included in the body's agenda packet.<sup>22</sup>





### **Anticipated initiation of litigation by the local agency**

A closed session may be held under the exception for the anticipated initiation of litigation when the legislative body seeks legal advice on whether to protect the agency's rights and interests by initiating litigation.

Certain actions must be reported in open session at the same meeting following the closed session. Other actions, such as when final approval rests with another party or the court, may be announced when they become final and upon inquiry of any person.<sup>23</sup> Each agency attorney should be aware of and make the disclosures that are required by the particular circumstances.

### **Real estate negotiations**

A legislative body may meet in closed session with its negotiator to discuss the purchase, sale, exchange, or lease of real property by or for the local agency. A "lease" includes a lease renewal or renegotiation. The purpose is to grant authority to the legislative body's negotiator on price and terms of payment.<sup>24</sup> Caution should be exercised to limit discussion to price and terms of payment without straying to other related issues, such as site design, architecture, or other aspects of the project for which the transaction is contemplated.<sup>25</sup>

**Q.** May other terms of a real estate transaction, aside from price and terms of payment, be addressed in closed session?

**A.** *No. However, there are differing opinions over the scope of the phrase "price and terms of payment" in connection with real estate closed sessions. Many agency attorneys argue that any term that directly affects the economic value of the transaction falls within the ambit of "price and terms of payment." Others take a narrower, more literal view of the phrase.*

The agency's negotiator may be a member of the legislative body itself. Prior to the closed session, or on the agenda, the legislative body must identify its negotiators, the real property that the negotiations may concern,<sup>26</sup> and the names of the parties with whom its negotiator may negotiate.<sup>27</sup>

After real estate negotiations are concluded, the approval and substance of the agreement must be publicly reported. If its own approval makes the agreement final, the body must report in open session at the public meeting during which the closed session is held. If final approval rests with another party, the local agency must report the approval and the substance of the agreement upon inquiry by any person as soon as the agency is informed of it.<sup>28</sup>

**"Our population is exploding, and we have to think about new school sites," said Board Member Jefferson.**

**"Not only that," interjected Board Member Tanaka, "we need to get rid of a couple of our older facilities."**

**"Well, obviously the place to do that is in a closed session," said Board Member O'Reilly. "Otherwise we're going to set off land speculation. And if we even mention closing a school, parents are going to be in an uproar."**

*A closed session to discuss potential sites is not authorized by the Brown Act. The exception is limited to meeting with its negotiator over specific sites — which must be identified at an open and public meeting.*

**PRACTICE TIP:** Discussions of who to appoint to an advisory body and whether or not to censure a fellow member of the legislative body must be held in the open.

## Public employment

The Brown Act authorizes a closed session “to consider the appointment, employment, evaluation of performance, discipline, or dismissal of a public employee or to hear complaints or charges brought against the employee.”<sup>29</sup> The purpose of this exception — commonly referred to as the “personnel exception” — is to avoid undue publicity or embarrassment for an employee or applicant for employment and to allow full and candid discussion by the legislative body; thus, it is restricted to discussing individuals, not general personnel policies.<sup>30</sup> The body must possess the power to appoint, evaluate, or dismiss the employee to hold a closed session under this exception.<sup>31</sup> That authority may be delegated to a subsidiary appointed body.<sup>32</sup>

An employee must be given at least 24 hours’ notice of any closed session convened to hear specific complaints or charges against them. This occurs when the legislative body is reviewing evidence, which could include live testimony, and adjudicating conflicting testimony offered as evidence. A legislative body may examine (or exclude) witnesses,<sup>33</sup> and the California Attorney General has opined that, when an affected employee and advocate have an official or essential role to play, they may be permitted to participate in the closed session.<sup>34</sup> The employee has the right to have the specific complaints and charges discussed in a public session rather than closed session.<sup>35</sup> If the employee is not given the 24-hour prior notice, any disciplinary action is null and void.<sup>36</sup>

However, an employee is not entitled to notice and a hearing where the purpose of the closed session is to consider a performance evaluation. The Attorney General and the courts have determined that personnel performance evaluations do not constitute complaints and charges, which are more akin to accusations made against a person.<sup>37</sup>

- Q.** Must 24 hours’ notice be given to an employee whose negative performance evaluation is to be considered by the legislative body in closed session?
- A.** *No, the notice is reserved for situations where the body is to hear complaints and charges from witnesses.*

Correct labeling of the closed session on the agenda is critical. A closed session agenda that identified discussion of an employment contract was not sufficient to allow dismissal of an employee.<sup>38</sup> An incorrect agenda description can result in invalidation of an action and much embarrassment.

For purposes of the personnel exception, “employee” specifically includes an officer or an independent contractor who functions as an officer or an employee. Examples of the former include a city manager, district general manager, or superintendent. Examples of the latter include a legal counsel or engineer hired on contract to act as local agency attorney or chief engineer.

Elected officials, appointees to the governing body or subsidiary bodies, and independent contractors other than those discussed above are not employees for purposes of the personnel exception.<sup>39</sup> Action on individuals who are not “employees” must also be public — including discussing and voting on appointees to committees, debating the merits of independent contractors, or considering a complaint against a member of the legislative body itself.

The personnel exception specifically prohibits discussion or action on proposed compensation in closed session except for a disciplinary reduction in pay. That means, among other things, there can be no personnel closed sessions on a salary change (other than a disciplinary reduction) between any unrepresented individual and the legislative body. However, a legislative body may address the compensation of an unrepresented individual, such as a city manager, in a closed session as part of a labor negotiation (discussed later in this chapter), yet another example of the importance of using correct agenda descriptions.

Reclassification of a job must be public, but an employee’s ability to fill that job may be considered in closed session.

Any closed session action to appoint, employ, dismiss, accept the resignation of, or otherwise affect the employment status of a public employee must be reported at the public meeting during which the closed session is held. That report must identify the title of the position, but not the names of all persons considered for an employment position.<sup>40</sup> However, a report on a dismissal or non-renewal of an employment contract must be deferred until administrative remedies, if any, are exhausted.<sup>41</sup>

**“I have some important news to announce,” said Mayor Garcia. “We’ve decided to terminate the contract of the city manager effective immediately. The council has met in closed session, and we’ve negotiated six months’ severance pay.”**

**“Unfortunately, that has some serious budget consequences, so we’ve had to delay phase two of the East Area Project.”**

*This may be an improper use of the personnel closed session if the council agenda described the item as the city manager’s evaluation. In addition, other than labor negotiations, any action on individual compensation must be taken in open session. Caution must be exercised not to discuss in closed session issues, such as budget impacts in this hypothetical, beyond the scope of the posted closed session notice.*

## Labor negotiations

The Brown Act allows closed sessions for some aspects of labor negotiations. Different provisions (discussed below) apply to school and community college districts.

A legislative body may meet in closed session to instruct its bargaining representatives, which may be one or more of its members,<sup>42</sup> on employee salaries and fringe benefits for both represented (“union”) and unrepresented employees. For represented employees, it may also consider working conditions that by law require negotiation. For the purpose of labor negotiation closed sessions, an “employee” includes an officer or an independent contractor who functions as an officer or an employee, but independent contractors who do not serve in the capacity of an officer or employee are not covered by this closed session exception.<sup>43</sup>

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**PRACTICE TIP:** The personnel exception specifically prohibits discussion or action on proposed compensation in closed session except for a disciplinary reduction in pay.

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**PRACTICE TIP:** Prior to the closed session, the legislative body must hold an open and public session in which it identifies its designated representatives.

These closed sessions may take place before or during negotiations with employee representatives. Prior to the closed session, the legislative body must hold an open and public session in which it identifies its designated representatives.

During its discussions with representatives on salaries and fringe benefits, the legislative body may discuss available funds and funding priorities, but only to instruct its representative. The body may also meet in closed session with a conciliator who has intervened in negotiations.<sup>44</sup>

The approval of an agreement concluding labor negotiations with represented employees must be reported after the agreement is final and has been accepted or ratified by the other party. The report must identify the item approved and the other party or parties to the negotiation.<sup>45</sup> The labor closed sessions specifically cannot include final action on proposed compensation of one or more unrepresented employees.

### Labor negotiations — school and community college districts

Employee relations for school districts and community college districts are governed by the Rodda Act, where different meeting and special notice provisions apply. The entire board, for example, may negotiate in closed sessions.

Four types of meetings are exempted from compliance with the Rodda Act:

1. A negotiating session with a recognized or certified employee organization.
2. A meeting of a mediator with either side.
3. A hearing or meeting held by a fact finder or arbitrator.
4. A session between the board and its bargaining agent, or the board alone, to discuss its position regarding employee working conditions and instruct its agent.<sup>46</sup>

Public participation under the Rodda Act also takes another form.<sup>47</sup> All initial proposals of both sides must be presented at public meetings and are public records. The public must be given reasonable time to inform itself and to express its views before the district may adopt its initial proposal. In addition, new topics of negotiations must be made public within 24 hours. Any votes on such a topic must be followed within 24 hours by public disclosure of the vote of each member.<sup>48</sup> The final vote must be in public.

### Other Education Code exceptions

The Education Code governs student disciplinary meetings by boards of school districts and community college districts. District boards may hold a closed session to consider the suspension or discipline of a student if a public hearing would reveal personal, disciplinary, or academic information about the student contrary to state and federal pupil privacy law. The student's parent or guardian may request an open meeting.<sup>49</sup>

Community college districts may also hold closed sessions to discuss some student disciplinary matters, awarding of honorary degrees, or gifts from donors who prefer to remain anonymous.<sup>50</sup> Kindergarten through 12th grade districts may also meet in closed session to review the contents of the statewide assessment instrument.<sup>51</sup>

**PRACTICE TIP:** Attendance by the entire legislative body before a grand jury would not constitute a closed session meeting under the Brown Act.

## Joint powers authorities

The legislative body of a joint powers authority may adopt a policy regarding limitations on disclosure of confidential information obtained in closed session, and may meet in closed session to discuss information that is subject to the policy.<sup>52</sup>

## License applicants with criminal records

A closed session is permitted when an applicant who has a criminal record applies for a license or license renewal and the legislative body wishes to discuss whether the applicant is sufficiently rehabilitated to receive the license. The applicant and the applicant's attorney are authorized to attend the closed session meeting. If the body decides to deny the license, the applicant may withdraw the application. If the applicant does not withdraw it, the body must deny the license in public, either immediately or at its next meeting. No information from the closed session can be revealed without consent of the applicant, unless the applicant takes action to challenge the denial.<sup>53</sup>

## Public security

Legislative bodies may meet in closed session to discuss matters posing a threat to the security of public buildings; essential public services, including water, sewer, gas, or electric service; or to the public's right of access to public services or facilities over which the legislative body has jurisdiction. Closed session meetings for these purposes must be held with designated security or law enforcement officials, including the Governor, Attorney General, district attorney, agency attorney, sheriff or chief of police, or their deputies or agency security consultant or security operations manager.<sup>54</sup> Action taken in closed session with respect to such public security issues is not reportable action.

## Multijurisdictional law enforcement agency

A joint powers agency formed to provide law enforcement services (involving drugs; gangs; sex crimes; firearms trafficking; felony possession of a firearm; high technology, computer, or identity theft; human trafficking; or vehicle theft) to multiple jurisdictions may hold closed sessions to discuss case records of an ongoing criminal investigation, to hear testimony from persons involved in the investigation, and to discuss courses of action in particular cases.<sup>55</sup>

The exception applies to the legislative body of the joint powers agency and to any body advisory to it. The purpose is to prevent impairment of investigations, to protect witnesses and informants, and to permit discussion of effective courses of action.<sup>56</sup>

## Hospital peer review and trade secrets

Two specific kinds of closed sessions are allowed for district hospitals and municipal hospitals under other provisions of law:<sup>57</sup>

1. A meeting to hear reports of hospital medical audit or quality assurance committees or for related deliberations. However, an applicant or medical staff member whose staff privileges are the direct subject of a hearing may request a public hearing.
2. A meeting to discuss "reports involving trade secrets" — provided no action is taken.



A “trade secret” is defined as information that is not generally known to the public or competitors and that (1) “derives independent economic value, actual or potential” by virtue of its restricted knowledge; (2) is necessary to initiate a new hospital service or program or facility; and (3) would, if prematurely disclosed, create a substantial probability of depriving the hospital of a substantial economic benefit.

The provision prohibits use of closed sessions to discuss transitions in ownership or management, or the district’s dissolution.<sup>58</sup>

### Other legislative bases for closed session

Since any closed session meeting of a legislative body must be authorized by the Legislature, it is important to review the Brown Act carefully to determine if there is a provision that authorizes a closed session for a particular subject matter. There are some less frequently

encountered topics that are authorized to be discussed by a legislative body in closed session under the Brown Act, including a response to a confidential final draft audit report from the Bureau of State Audits,<sup>59</sup> consideration of the purchase or sale of particular pension fund investments by a legislative body of a local agency that invests pension funds,<sup>60</sup> hearing a charge or complaint from a member enrolled in a health plan by a legislative body of a local agency that provides Medical services,<sup>61</sup> discussions by a county board of supervisors that governs a health plan licensed pursuant to the Knox-Keene Health Care Services Plan Act related to trade secrets or contract negotiations concerning rates of payment,<sup>62</sup> and discussions by an insurance pooling joint powers agency related to a claim filed against, or liability of, the agency or a member of the agency.<sup>63</sup>

**PRACTICE TIP:** Meetings are either open or closed. There is nothing “in between.”<sup>64</sup>

### Who may attend closed sessions

Meetings of a legislative body are either fully open or fully closed; there is nothing in between. Therefore, local agency officials and employees must pay particular attention to the authorized attendees for the particular type of closed session. As summarized above, the authorized attendees may differ based on the topic of the closed session. Closed sessions may involve only the members of the legislative body and only agency counsel, management and support staff, and consultants necessary for consideration of the matter that is the subject of closed session, with very limited exceptions for adversaries or witnesses with official roles in particular types of hearings (e.g., personnel disciplinary hearings and license hearings). In any case, individuals who do not have an official or essential role in the closed session subject matters must be excluded from closed sessions.<sup>65</sup>

**Q.** May the lawyer for someone suing the agency attend a closed session in order to explain to the legislative body why it should accept a settlement offer?

**A.** *No, attendance in closed sessions is reserved exclusively for the agency’s advisors.*

## The confidentiality of closed session discussions

The Brown Act explicitly prohibits the unauthorized disclosure of confidential information acquired in a closed session by any person present, and offers various remedies to address breaches of confidentiality.<sup>66</sup> It is incumbent upon all those attending lawful closed sessions to protect the confidentiality of those discussions. One court has held that members of a legislative body cannot be compelled to divulge the content of closed session discussions through the discovery process.<sup>67</sup> Only the legislative body acting as a body may agree to divulge confidential closed session information. With regard to attorney-client privileged communications, the entire body is the holder of the privilege, and only the entire body can decide to waive the privilege.<sup>68</sup>

Before adoption of the Brown Act provision specifically prohibiting disclosure of closed session communications, agency attorneys and the Attorney General long opined that officials have a fiduciary duty to protect the confidentiality of closed session discussions. The Attorney General issued an opinion that it is “improper” for officials to disclose information regarding pending litigation that was received during a closed session,<sup>69</sup> though the Attorney General has also concluded that a local agency is preempted from adopting an ordinance criminalizing public disclosure of closed session discussions.<sup>70</sup> In any event, in 2002, the Brown Act was amended to prescribe particular remedies for breaches of confidentiality. These remedies include injunctive relief and, if the breach is a willful disclosure of confidential information, disciplinary action against an employee and referral of a member of the legislative body to the grand jury.<sup>71</sup>

The duty of maintaining confidentiality, of course, must give way to the responsibility to disclose improper matters or discussions that may come up in closed sessions. In recognition of this public policy, under the Brown Act, a local agency may not penalize a disclosure of information learned during a closed session if the disclosure (1) is made in confidence to the district attorney or the grand jury due to a perceived violation of law; (2) is an expression of opinion concerning the propriety or legality of actions taken in closed session, including disclosure of the nature and extent of the illegal action; or (3) is information that is not confidential.<sup>72</sup>

The interplay between these possible sanctions and an official’s First Amendment rights is complex and beyond the scope of this guide. Suffice it to say that this is a matter of great sensitivity and controversy.

**“I want the press to know that I voted in closed session against filing the eminent domain action,” said Council Member Chang.**

**“Don’t settle too soon,” reveals Council Member Watson to the property owner, over coffee. “The city’s offer coming your way is not our bottom line.”**

*The first comment to the press may be appropriate if it is a part of an action taken by the city council in closed session that must be reported publicly.<sup>73</sup> The second comment to the property owner is not. Disclosure of confidential information acquired in closed session is expressly prohibited and harmful to the agency.*

**PRACTICE TIP:** There is a strong interest in protecting the confidentiality of proper and lawful closed sessions.

## ENDNOTES

- 1 Cal. Gov. Code, § 54962.
- 2 Cal. Const. , Art. 1, § 3.
- 3 61 Ops.Cal.Atty.Gen. 220 (1978); but see Cal. Gov. Code, § 54957.8 (multijurisdictional law enforcement agencies are authorized to meet in closed session to discuss the case records of ongoing criminal investigations and other related matters).
- 4 Cal. Gov. Code, § 54957.1.
- 5 Cal. Gov. Code, § 54954.5.
- 6 Cal. Gov. Code, § 54954.2.
- 7 Cal. Gov. Code, § 54954.5.
- 8 Cal. Gov. Code, §§ 54956.9, 54957.7.
- 9 Cal. Gov. Code, § 54957.1, subd. (a).
- 10 Cal. Gov. Code, § 54957.1, subd. (b).
- 11 Cal. Gov. Code, § 54957.2.
- 12 *Hamilton v. Town of Los Gatos* (1989) 213 Cal.App.3d 1050; 2 Cal. Code Regs. § 18707.
- 13 But see *Roberts v. City of Palmdale* (1993) 5 Cal.4th 363 (protection of the attorney-client privilege alone cannot by itself be the reason for a closed session).
- 14 Cal. Gov. Code, § 54956.9; *Shapiro v. Board of Directors of Center City Development Corp.* (2005) 134 Cal.App.4th 170 (agency must be a party to the litigation).
- 15 82 Ops.Cal.Atty.Gen. 29 (1999).
- 16 *Page v. Miracosta Community College District* (2009) 180 Cal.App.4th 471.
- 17 “*The Brown Act*,” California Attorney General (2003), p. 40.
- 18 Cal. Gov. Code, § 54956.9, subd. (g).
- 19 See e.g., *Avco Community Developers, Inc. v. South Coast Regional Com.* (1976) 17 Cal.3d 785; *Trancas Property Owners Assn. v. City of Malibu* (2006) 138 Cal.App.4th 172.
- 20 *Trancas Property Owners Assn. v. City of Malibu* (2006) 138 Cal.App.4th 172.
- 21 Cal. Gov. Code, § 54956.9, subd. (e).
- 22 *Fowler v. City of Lafayette* (2020) 46 Cal.App.5th 360.
- 23 Cal. Gov. Code, § 54957.1.
- 24 Cal. Gov. Code, § 54956.8.
- 25 *Shapiro v. San Diego City Council* (2002) 96 Cal.App.4th 904. See also 93 Ops.Cal.Atty.Gen. 51 (2010) (redevelopment agency may not convene a closed session to discuss rehabilitation loan for a property already subleased to a loan recipient, even if the loan incorporates some of the sublease terms and includes an operating covenant governing the property); 94 Ops.Cal.Atty.Gen. 82 (2011) (real estate closed session may address form, manner, and timing of consideration and other items that cannot be disclosed without revealing price and terms).
- 26 73 Ops.Cal.Atty.Gen. 1 (1990).
- 27 Cal. Gov. Code, §§ 54956.8, 54954.5, subd. (b).
- 28 Cal. Gov. Code, § 54957.1, subd. (a)(1).
- 29 Cal. Gov. Code, § 54957, subd. (b).
- 30 63 Ops.Cal.Atty.Gen. 153 (1980); but see *Duwall v. Board of Trustees* (2000) 93 Cal.App.4th 902 (board may discuss personnel evaluation criteria, process and other preliminary matters in closed session but only if related to the evaluation of a particular employee).



- 31 *Gillespie v. San Francisco Public Library Commission* (1998) 67 Cal.App.4th 1165; 85 Ops.Cal.Atty.Gen. 77 (2002).
- 32 *Gillespie v. San Francisco Public Library Commission* (1998) 67 Cal.App.4th 1165; 80 Ops.Cal.Atty.Gen. 308 (1997). Interviews of candidates to fill a vacant staff position conducted by a temporary committee appointed by the governing body may be done in closed session.
- 33 Cal. Gov. Code, § 54957, subd. (b)(3).
- 34 88 Ops.Cal.Atty.Gen. 16 (2005).
- 35 *Morrison v. Housing Authority of the City of Los Angeles* (2003) 107 Cal.App.4th 860.
- 36 Cal. Gov. Code, § 54957, subd. (b); but see *Bollinger v. San Diego Civil Service Commission* (1999) 71 Cal.App.4th 568 (notice not required for closed session deliberations regarding complaints or charges when there was a public evidentiary hearing prior to closed session).
- 37 78 Ops.Cal.Atty.Gen. 218 (1995); *Bell v. Vista Unified School District* (2000) 82 Cal.App.4th 672; *Furtado v. Sierra Community College* (1998) 68 Cal.App.4th 876; *Fischer v. Los Angeles Unified School District* (1999) 70 Cal.App.4th 87.
- 38 *Moreno v. City of King* (2005) 127 Cal.App.4th 17.
- 39 Cal. Gov. Code, § 54957.
- 40 *Gillespie v. San Francisco Public Library Commission* (1998) 67 Cal.App.4th 1165.
- 41 Cal. Gov. Code, § 54957.1, subd. (a)(5).
- 42 Cal. Gov. Code, § 54957.6.
- 43 Cal. Gov. Code, § 54957.6, subd. (b); see also 98 Ops.Cal.Atty.Gen. 41 (2015) (a project labor agreement between a community college district and workers hired by contractors or subcontractors is not a proper subject of closed session for labor negotiations because the workers are not “employees” of the district).
- 44 Cal. Gov. Code, § 54957.6; 51 Ops.Cal.Atty.Gen. 201 (1968).
- 45 Cal. Gov. Code, § 54957.1, subd. (a)(6).
- 46 Cal. Gov. Code, § 3549.1.
- 47 Cal. Gov. Code, § 3540.
- 48 Cal. Gov. Code, § 3547.
- 49 Cal. Edu. Code, § 48918; but see *Rim of the World Unified School District v. Superior Court* (2003) 104 Cal.App.4th 1393 (Section 48918 preempted by the Federal Family Educational Right and Privacy Act in regard to expulsion proceedings).
- 50 Cal. Edu. Code, § 72122.
- 51 Cal. Edu. Code, § 60617.
- 52 Cal. Gov. Code, § 54956.96.
- 53 Cal. Gov. Code, § 54956.7.
- 54 Cal. Gov. Code, § 54957.
- 55 *McKee v. Los Angeles Interagency Metropolitan Police Apprehension Crime Task Force* (2005) 134 Cal. App.4th 354.
- 56 Cal. Gov. Code, § 54957.8.
- 57 Cal. Gov. Code, § 54962.
- 58 Cal. Health and Saf. Code, § 32106.
- 59 Cal. Gov. Code, § 54956.75.
- 60 Cal. Gov. Code, § 54956.81.

- 61 Cal. Gov. Code, § 54956.86.
- 62 Cal. Gov. Code, § 54956.87.
- 63 Cal. Gov. Code, § 54956.95.
- 64 Ops.Cal.Atty.Gen. 34 (1965)
- 65 82 Ops.Cal.Atty.Gen. 29 (1999); 2022 WL 1814322, 105 Ops. Cal.Atty.Gen. 89 (2022).
- 66 Cal. Gov. Code, § 54963.
- 67 *Kleitman v. Superior Court* (1999) 74 Cal.App.4th 324, 327. See also Cal. Gov. Code, § 54963.
- 68 *Roberts v. City of Palmdale* (1993) 5 Cal.4th 363.
- 69 80 Ops.Cal.Atty.Gen. 231 (1997).
- 70 76 Ops.Cal.Atty.Gen. 289 (1993).
- 71 Cal. Gov. Code, § 54963.
- 72 Cal. Gov. Code, § 54963.
- 73 Cal. Gov. Code, § 54957.1.



# Chapter 6

## REMEDIES

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# Chapter 6

## REMEDIES



A violation of the Brown Act can lead to invalidation of the agency's action, payment of a challenger's attorney fees, public embarrassment, and even criminal prosecution. As explained below, a legislative body often has an opportunity to correct a violation prior to the filing of a lawsuit. Compliance ultimately results from regular training and a good measure of self-regulation on the part of public officials. This chapter discusses the remedies available to the public when that self-regulation is ineffective.

### Invalidation of action taken

Any interested person, including the district attorney, may seek to invalidate certain actions of a legislative body on the grounds that they violate the Brown Act.<sup>1</sup> The following actions cannot be invalidated:

- Those taken in substantial compliance with the law. No Brown Act violation is found when the given notice substantially complies with the Brown Act, even when the notice erroneously cites the wrong Brown Act section but adequately advises the public that the legislative body will meet with legal counsel to discuss potential litigation in closed session.<sup>2</sup>
- Those involving the sale or issuance of notes, bonds, or other indebtedness, or any related contracts or agreements.<sup>3</sup>
- Those creating a contractual obligation, including a contract awarded by competitive bid for other than compensation for professional services, upon which a party has in good faith relied to its detriment.<sup>4</sup>
- Those connected with the collection of any tax.<sup>5</sup>
- Those in which the complaining party had actual notice at least 72 hours prior to the regular meeting or 24 hours prior to the special meeting, as the case may be, at which the action is taken.<sup>6</sup>

Before filing a court action seeking invalidation, a person who believes that a violation has occurred must send a written "cure or correct" demand to the legislative body. This demand must clearly describe the challenged action and the nature of the claimed violation. This demand must be sent within 90 days of the alleged violation, or within 30 days if the action was taken in open session but in violation of Section 54954.2, which requires (subject to specific exceptions) that a legislative body may act only on items posted on the agenda.<sup>7</sup> The legislative body then has up to 30 days to cure and correct its action.<sup>8</sup> The purpose of this requirement is to offer the body an opportunity to consider whether a violation has occurred and, if so, consider correcting the action to avoid the costs of litigation. If the legislative body does not act, any lawsuit must be filed within the next 15 days.<sup>9</sup>

Although just about anyone has standing to bring an action for invalidation,<sup>10</sup> the challenger must show prejudice as a result of the alleged violation.<sup>11</sup> An action to invalidate fails to state a cause of action against the agency if the body deliberated but did not take an action.<sup>12</sup>

### **Declaratory relief to determine whether past action violated the act**

Any interested person, including the district attorney, may file a civil action to determine whether a past action of a legislative body constitutes a violation of the Brown Act and is subject to a mandamus, injunction, or declaratory relief action.<sup>13</sup> Before filing an action, the interested person must, within nine months of the alleged violation of the Brown Act, submit a “cease and desist” letter to the legislative body clearly describing the past action and the nature of the alleged violation.<sup>14</sup> The legislative body has 30 days after receipt of the letter to provide an unconditional commitment to cease and desist from the past action.<sup>15</sup> If the body fails to take any action within the 30-day period or takes an action other than an unconditional commitment, the interested person has 60 days to file an action.<sup>16</sup>

The legislative body’s unconditional commitment must be approved at a regular or special meeting as a separate item of business and not on the consent calendar.<sup>17</sup> The unconditional commitment must be substantially in the form set forth in the Brown Act.<sup>18</sup> No legal action may thereafter be commenced regarding the past action.<sup>19</sup> However, an action of the legislative body in violation of its unconditional commitment constitutes an independent violation of the Brown Act, and a legal action consequently may be commenced without following the procedural requirements for challenging past actions.<sup>20</sup>

The legislative body may rescind its prior unconditional commitment by a majority vote of its membership at a regular meeting as a separate item of business not on the consent calendar. At least 30 days written notice of the intended rescission must be given to each person to whom the unconditional commitment was made and to the district attorney. Upon rescission, any interested person may commence a legal action regarding the past actions without following the procedural requirements for challenging past actions.<sup>21</sup>

### **Civil action to prevent future violations**

The district attorney or any interested person can file a civil action asking the court to do the following:

- Stop or prevent violations or threatened violations of the Brown Act by members of the legislative body.
- Determine the applicability of the Brown Act to actions or threatened future action of the legislative body.
- Determine whether any rule or action by the legislative body to penalize or otherwise discourage the expression of one or more of its members is valid under state or federal law.
- Compel the legislative body to audio-record its closed sessions.<sup>22</sup>

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**PRACTICE TIP:** A lawsuit to invalidate must be preceded by a demand to cure and correct the challenged action in order to give the legislative body an opportunity to consider its options. The Brown Act does not specify how to cure or correct a violation; the best method is to rescind the action being complained of and start over, or reaffirm the action if the local agency relied on the action and rescinding the action would prejudice the local agency.

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It is not necessary for a challenger to prove a past pattern or practice of violations by the local agency in order to obtain injunctive relief. A court may presume when issuing an injunction that a single violation will continue in the future when the public agency refuses to admit to the alleged violation or to renounce or curtail the practice.<sup>23</sup> A court may not compel elected officials to disclose their recollections of what transpired in a closed session.<sup>24</sup>

Upon finding a violation of the Brown Act pertaining to closed sessions, a court may compel the legislative body to audio record its future closed sessions.<sup>25</sup> In a subsequent lawsuit to enforce the Brown Act alleging a violation occurring in closed session, a court may upon motion of the plaintiff review the audio recording if it finds there is good cause to think the Brown Act has been violated and make public a certified transcript of the relevant portion of the closed session recording.<sup>26</sup>

### Costs and attorney's fees

A plaintiff who successfully invalidates an action taken in violation of the Brown Act or who successfully enforces one of the Brown Act's civil remedies may seek court costs and reasonable attorney's fees. Courts have held that attorney's fees must be awarded to a successful plaintiff unless special circumstances exist that would make a fee award against the public agency unjust.<sup>27</sup> When evaluating how to respond to assertions that the Brown Act has been violated, elected officials and their lawyers should assume that attorney's fees will be awarded against the agency if a violation of the Brown Act is proven.

An attorney's fee award may only be directed against the local agency and not the individual members of the legislative body. If the local agency prevails, it may be awarded court costs and attorney's fees if the court finds the lawsuit was clearly frivolous and lacking in merit.<sup>28</sup>

### Misdemeanor penalties

A violation of the Brown Act is a misdemeanor if (1) a member of the legislative body attends a meeting where action is taken in violation of the Brown Act, and (2) the member intends to deprive the public of information that the member knows or has reason to know the public is entitled to.<sup>29</sup>

"Action taken" is not only an actual vote but also a collective decision, commitment, or promise by a majority of the legislative body to make a positive or negative decision.<sup>30</sup> If the meeting involves mere deliberation without the taking of action, there can be no misdemeanor penalty.

A violation occurs for a tentative as well as final decision.<sup>31</sup> In fact, criminal liability is triggered by a member's participation in a meeting in violation of the Brown Act — not whether that member has voted with the majority or minority, or has voted at all.

As with other misdemeanors, the filing of a complaint is up to the district attorney. Although criminal prosecutions of the Brown Act are uncommon, district attorneys in some counties aggressively monitor public agencies' adherence to the requirements of the law.

Some attorneys and district attorneys take the position that a Brown Act violation may be pursued criminally under Government Code section 1222.<sup>32</sup> There is no case law to support this view. If anything, the existence of an express criminal remedy within the Brown Act would suggest otherwise.<sup>33</sup>

**PRACTICE TIP:** Attorney's fees will likely be awarded if a violation of the Brown Act is proven.

## Voluntary resolution

Successful enforcement actions for violations of the Brown Act can be costly to local agencies. The district attorney or even the grand jury occasionally becomes involved. Publicity surrounding alleged violations of the Brown Act can result in a loss of confidence by constituents in the legislative body and its members. It is in the agency's interest to consider re-noticing and rehearing, rather than litigating, an item of significant public interest, particularly when there is any doubt about whether the open meeting requirements were satisfied.

Overall, agencies that regularly train their officials and pay close attention to the requirements of the Brown Act will have little reason to worry about enforcement.



Photo credit: Courtesy of the City of West Hollywood. Photo by Jon Viscott.

## ENDNOTES

- 1 Cal. Gov. Code, § 54960.1. Invalidation is limited to actions that violate the following sections of the Brown Act: section 54953 (the basic open meeting provision), sections 54954.2 and 54954.5 (notice and agenda requirements for regular meetings and closed sessions), 54954.6 (tax hearings), 54956 (special meetings), and 54596.5 (emergency situations). Violations of sections not listed above cannot give rise to invalidation actions, but they are subject to the other remedies listed in section 54960.1.
- 2 *Castaic Lake Water Agency v. Newhall County Water District* (2015) 238 Cal.App.4th 1196, 1198.
- 3 Cal. Gov. Code, § 54960.1(d)(2).
- 4 Cal. Gov. Code, § 54960.1(d)(3).
- 5 Cal. Gov. Code, § 54960.1(d)(4).
- 6 Cal. Gov. Code, § 54960.1(d)(5).
- 7 Cal. Gov. Code, § 54960.1, subds. (b), (c)(1).
- 8 Cal. Gov. Code, § 54960.1, subd. (c)(2).
- 9 Cal. Gov. Code, § 54960.1, subd. (c)(4).
- 10 *McKee v. Orange Unified School District* (2003) 110 Cal.App.4th 1310, 1318-1319.
- 11 *Cohan v. City of Thousand Oaks* (1994) 30 Cal.App.4th 547, 556, 561.
- 12 *Boyle v. City of Redondo Beach* (1999) 70 Cal.App.4th 1109, 1116-17, 1118.
- 13 Cal. Gov. Code, § 54960.2, subd. (a); Senate Bill No. 1003, Section 4 (2011-2012 Session).
- 14 Cal. Gov. Code, § 54960.2, subds. (a)(1), (2).
- 15 The legislative body may provide an unconditional commitment after the 30-day period. If the commitment is made after the 30-day period, however, the plaintiff is entitled to attorneys' fees and costs. Cal. Gov. Code, § 54960.2, subd. (b).
- 16 Cal. Gov. Code, § 54960.2, subd. (a)(4).
- 17 Cal. Gov. Code, § 54960.2, subd. (c)(2).

- 18 Cal. Gov. Code, § 54960.2, subd. (c)(1).
- 19 Cal. Gov. Code, § 54960.2, subd. (c)(3).
- 20 Cal. Gov. Code, § 54960.2, subd. (d).
- 21 Cal. Gov. Code, § 54960.2, subd. (e).
- 22 Cal. Gov. Code, § 54960, subd. (a).
- 23 *California Alliance for Utility Safety and Education (CAUSE) v. City of San Diego* (1997) 56 Cal.App.4th 1024; *Common Cause v. Stirling* (1983) 147 Cal.App.3d 518, 524; *Accord Shapiro v. San Diego City Council* (2002) 96 Cal.App.4th 904, 916 and fn.6.
- 24 *Kleitman v. Superior Court* (1999) 74 Cal.App.4th 324, 334-36.
- 25 Cal. Gov. Code, § 54960, subd. (b).
- 26 Cal. Gov. Code, § 54960, subd. (c).
- 27 *Los Angeles Times Communications, LLC v. Los Angeles County Board of Supervisors* (2003) 112 Cal. App.4th 1313, 1327-29 and cases cited therein.
- 28 Cal. Gov. Code, § 54960.5.
- 29 Cal. Gov. Code, § 54959. A misdemeanor is punishable by a fine of up to \$1,000 or up to six months in county jail, or both (California Penal Code section 19). Employees of the agency who participate in violations of the Brown Act cannot be punished criminally under section 54959. However, at least one district attorney instituted criminal action against employees based on the theory that they criminally conspired with the members of the legislative body to commit a crime under section 54949.
- 30 Cal. Gov. Code, § 54952.6.
- 31 61 Ops.Cal.Atty.Gen. 283 (1978).
- 32 California Government Code section 1222 provides that “[e]very wilful omission to perform any duty enjoined by law upon any public officer, or person holding any public trust or employment, where no special provision is made for the punishment of such delinquency, is punishable as a misdemeanor.”
- 33 The principle of statutory construction known as *expressio unius est exclusio alterius* supports the view that section 54959 is the exclusive basis for criminal liability under the Brown Act.







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# Section 1983 Liability: Best Practices for Cities to Manage and Mitigate Risk in a Changing World

Thursday, May 9, 2024

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# **Section 1983 Litigation: Best Practices for Cities to Manage and Mitigate Risk in a Changing World**

**Thursday, May 9, 2024**

**Spring 2024 City Attorneys Department Conference**

**Karen Rogan – Assistant City Attorney, Chula Vista**

**Kevin Bibler, Senior Vice President  
Alliant Specialty**

**Michael Pott, Chief Operating Officer/Chief Legal Counsel  
PRISM**

## INTRODUCTION

Over the last five years, law enforcement has become a target for civil litigation whether it be a claim for excessive force, false arrest, wrongful search and seizure, or for taking or failing to take action in certain circumstances. If an officer is confronted with a situation where a citizen is threatening someone or threatening to harm themselves, law enforcement officers seem to inevitably be sued for whatever actions they take. Officers are frequently placed in a position in which they have to make a split-second decision and, while Section 1983 case law over the years has recognized this, juries often fail to take this into consideration.

Between the negative attention that law enforcement receives in the media and the large verdicts against officers that have been rendered across the country, it is a challenging time for cities in managing the risks that come with having a police department. Because of the nature of the liability claims that are asserted against law enforcement, the jury verdicts and high settlements, insurers across the country have become much more circumspect about how much capacity to deploy in insuring public entities for law enforcement claims. As a result, the cost of procuring insurance for law enforcement liability has never been higher. Awareness of this issue and investing in personnel, technology, analytics and training are important in trying to reduce exposure and positively impact rising insurance costs. This paper explores the status of the insurance markets as it pertains to law enforcement claims and offers some strategies and practice tips for helping to mitigate the risk of law enforcement claims. The mitigation strategies and practice tips can also be applied to other Section 1983 claims as well.

## THE LAW ENFORCEMENT LIABILITY INSURANCE MARKET

The general liability insurance market has been plagued with an increase in the number and size of very large claims in recent years. For almost a decade now, the claims activity has been drastically different than it had been historically. What might have been a \$3M-\$5M claim in 2012 is now likely to cost \$8M-\$12M or more. This trend started in traditionally more difficult states like California and Washington, but has now spread across the country.

We have also seen a dramatic increase in the number of “nuclear verdicts”, i.e. verdicts over \$10M. These are becoming more and more common which is resulting in higher settlement values, both because Plaintiffs’ attorneys feel emboldened and because entities are concerned about taking law enforcement cases to trial. Public entities, whom Plaintiffs’ attorneys perceive to have deep pockets, are particularly susceptible to these extreme case outcomes. The table below shows an informal tally of large US public entity claims since 2012, as provided by AmWins, a large wholesale broker.

Claim Amount	Number of Claims
\$50M or Greater	7
\$25M or Greater	24
\$10M or Greater	98
\$1M or Greater	328

*Source: AmWins informal tally since 2012. Likely understated*

These large claim values are certainly not restricted solely to police liability, but law enforcement accounts for more than its fair share. According to the Marshall Project, a non-profit online news organization with the mission of raising the profile of criminal justice issues and encouraging criminal justice reform, US cities spent upwards of \$3 billion to settle police misconduct lawsuits between 2010-2019. And the insurance carriers are noticing. In their 22/23 Law Enforcement Legal Liability update, Travelers Insurance Company

noted a 250% increase in the average cost of indemnity claims between 2016 and 2021. They identified that the probability of a large claim (defined as \$500,000 or higher) was 6 times higher in 2021 than in 2016.

### **A. Why is this happening?**

Specific to law enforcement, there seems to be a general distrust of law enforcement with more of an assumption that the officer did something wrong when something bad happens rather than an assumption that the officer acted appropriately. The “Defund the Police” movement from a couple of years ago is the most obvious sign of the escalating scrutiny police forces are under from both a political and societal perspective. Of course, the increased media scrutiny and sensationalistic journalism doesn’t help either. These factors have led to decreased funding, staffing shortages, reduced recruitment standards and passive policing. Add to that mix a general increase in criminal activity and the mental health and substance abuse crises across the country, and it is not difficult to understand why larger law enforcement liability claims are occurring more frequently.

### **B. Impact on the Insurance Market**

As noted above, the insurance industry is very aware of the new normal in terms of general liability claims costs and is taking steps to protect their bottom line. Some carriers have left the market entirely, or at least in certain jurisdictions. Others are increasing deductibles and self-insured retentions in an effort to shift more of the financial burden of claims to the insured. Carriers are also reducing the limits they will provide and implementing annual aggregate limits to cap the maximum amount they will pay for a claim and for the policy period. Carriers are also much more diligent in their underwriting efforts with considerably more scrutiny about mitigation measures being undertaken by entities as respects their law enforcement departments when considering quoting an account. Specific to police exposure this includes review of the following:

- A Police Department’s accreditation status
- Officer training policies and protocols
- Use of body cameras and dash cameras
- Use of force, high-speed pursuit and de-escalation policies
- Loss experience and officer incident histories.

For those carriers who already ensure public agencies that have a law enforcement component, all carriers are increasing their rates to try and keep pace with the increased claims costs and many are also looking to restrict coverage through implementing new policy exclusions pertaining to law enforcement activities.

### **C. What can a public entity do?**

#### **1. Impacting the officers**

While the above paints a pretty bleak picture, there are things that public entities can do to try and mitigate the cost increases noted. Some municipalities are trying to combat staffing shortages by increasing their compensation packages, offering signing bonuses and enhancing training and officer support.

One public entity pool in California has implemented an EAP program specifically for law enforcement officers (and other first responders) to provide mental health and other support to those high-risk employees. The idea behind this is that providing these specialized mental health services can help officers get the help they need after a critical incident and that by getting the help they need they will be in a better position mentally to deal with the next critical incident that comes along.

Other entities are investing in predictive analytics in an attempt to identify the 5% of the policing workforce that show an elevated risk, and that account for over 65% of all incidents. These analytics can be used to determine who the potential “bad apples” are and implement programs to modify their behavior.

Some states are also getting into the mix by considering legislation that would make police officers more accountable. A proposed Colorado law, if passed, would result in officers being held partially responsible for wrongdoing from a financial standpoint. Under this proposed law, an officer could be made to pay up to 5% of a verdict up to a maximum of \$25,000. Other states are considering legislation that would require

police officers to purchase their own professional liability insurance. The above are just some ways that public entities are exploring what can be done to bring down insurance costs and/or reduce law enforcement liability claims.

## **2. Take a more pro-active role during the claim/pre-litigation stage**

While addressing officer behavior at an early stage can help avoid claims, once a claim has happened there are actions that an entity can take to help mitigate the ultimate exposure on a claim. One such action that an entity can take is to have litigation staff (attorneys, risk managers) review footage from body worn cameras (BWC) or drones as soon as possible after any critical incidents or incidents that may lead to a claim or litigation so that an initial evaluation of the incident, potential exposure, and investigative strategy can start to take shape.

When reviewing BWC and drone footage, some things to look for include:

- The good and bad aspects of the officer's conduct.
- How did the suspect/individual behave relative to the officer(s)?
  - Are mental illness issues driving the incident? If so, how might the officer's actions be perceived by a jury?
  - Was the suspect/individual involved under the influence of any substances?
  - Were there any attempts to de-escalate?
- How might a jury perceive what they see on the video? For example, if you or your staff have a visceral reaction to something, a jury likely will as well.
- Does the officer's conduct violate any laws/rights?
- Did the officer(s) violate any departmental policies?
- Once a claim and/or lawsuit is filed, evaluate how all parties behaved relative to the allegations in the claim/lawsuit.

After viewing the BWC and/or drone footage, if the incident is viewed as problematic or liability seems certain, have a frank discussion with the client regarding the positive and negative aspects of the incident relative to the realities of civil litigation and determine if exploring early settlement to cap risk is a desired path. If resolution is desirable, then determine what would be a reasonable and acceptable range for settlement.

By resolving a claim early, the entity can potentially avoid or limit the amount of publicity regarding the incident or case. In addition, it accelerates the timeframe for having the difficult conversations with the client about the realities of civil litigation including the potential for punitive damage exposure to the officer. This helps the client better understand the realities and risks of litigating the case rather than having the client learn these risks later after the entity has spent significant money and time defending the case. In addition, if an early resolution is negotiated, the entity can attempt to negotiate a unilateral confidentiality agreement language that would bind the plaintiff thereby decreasing the risk of additional publicity, although the agreement itself would be a public document. An example of confidentiality language that can be proposed is attached hereto as Exhibit A.

If the BWC/drone footage shows there clearly were no violations of any laws or rights and there is a bona fide belief that the claim or litigation has absolutely no merit, then consider offering an informal viewing of the BWC to opposing counsel. When doing this, we suggest that the entity place some conditions on the informal viewing. The suggested conditions include:

- Attorneys only – no clients;
- The viewing must take place in the city attorney's office with an entity attorney present the entire time;
- A copy of the video will not be provided to plaintiff's counsel;
- No videos or photos of the recording may be taken while the footage is playing, but note taking is allowed.

While this may be an approach that an entity takes only once in a while, if the footage clearly shows no wrongdoing on the part of the officer(s), then there is a strong possibility that taking this approach will result

in the Plaintiff's attorney dropping the case, withdrawing from representation, or proposing a nominal settlement.

### **3. Strategies for after litigation has been commenced**

After litigation has been commenced it is important to work with defense counsel to evaluate the risks in the case at the earliest possible stage of the litigation. A key element to success is making sure that you have the right attorney handling the case. Whether using outside counsel or handling in-house, it is critical to have someone handling the case who is familiar with defending law enforcement officers in the area of Section 1983 liability as the law in this area is complex. It is important to stress the need for realistic assessment of liability and settlement value so that the client is not surprised at trial or in mediation, and so that you can avoid obstacles to obtaining settlement authority if you need it.

If the case could present significant exposure for the entity, consider what is currently happening in the community and research what other agencies are seeing with juries. It is critical to have a sense of how juries in the jurisdiction of the court view law enforcement and law enforcement cases. Knowing this information will help inform the defense team on how current events and juror trends could impact trial and how the team might overcome any negative juror attitudes toward law enforcement. Along these lines, one thing to look at is whether there are any recent nuclear verdicts locally or involving the same opposing counsel in similar cases that may be indicative of a trial verdict in your case.

From a defense handling standpoint, after the litigation is filed and served it is important to immediately set up a meeting with each involved officer to obtain their story/memory before it fades any further. It is also important to review BWC/drone footage and reports with the officers and discuss what training they have had that might be implicated by the incident (i.e., de-escalation, implicit bias, misuse of muscling techniques, PERT). Another topic of conversation should be their knowledge of department policies as the applicable policies relate to their conduct during the incident (i.e., use of force, handcuffing). Each officer should also be asked whether they have been involved in any similar prior incidents or have any discipline in their file as that will inevitably come out during the litigation. As these interviews are completed, consider all of the above and how each officer might present during deposition and at trial.

In preparing the case it is critical to develop a theme early in the process. If opposing counsel is unfamiliar, research other cases they have handled and reach out to defense counsel for insight into any tactics they frequently employ so the defense can be prepared ahead of depositions and can incorporate anything useful into the defense theme. As discovery progresses, incorporate the defense theme repeatedly into written discovery and depositions both when asking questions and when preparing the officers for deposition. In deposing others, defense should identify specific witnesses that can be used to anchor the defense theme. All defense witnesses should be prepared to deal with aggressive questioning and to counter reptile theory tactics employed by opposing counsel.

Developing an alternate explanation or story for the jury is a key component to the trial preparation process. For example, how are officers trained to respond in the circumstances of the case? Did the involved officers adhere to that training? In doing this, also consider how best to own and address any bad facts. If these are not addressed at the outset it is likely that jurors will perceive this as the government entity trying to hide something.

In law enforcement cases, having the right experts is extremely important. To give your entity the best chance at success, retain experts early and consult with them when formulating the defense discovery plan, case theme, and in preparing for depositions. They can be a big asset in helping to formulate and build on the defense theme as well as help prepare the defense for Plaintiff's anticipated line of attack.

Typically, police officers often make good witnesses and are used to testifying in court in criminal matters. However, civil litigation is different. When the officers are defendants in a civil action, they should receive extensive and repeated deposition and trial preparation so that they are best prepared to give their best testimony. To this end, defense should provide the officer who is named as a defendant with a sample deposition transcript, if possible, to help them see what will be coming question-wise in their deposition.



The defense team should conduct multiple mock direct and cross examinations and employ known tactics of opposing counsel throughout. The officer should also be prepared on how to best present that their conduct complied with their training and policies, or explain why it did not and why it is not an issue in the case. Last, it is important to prepare the officer for owning and addressing any bad facts and to help them tell their side of the story.

Defense counsel should check in with the officer and entity clients, stakeholders, and pooled risk representative early and often (if case value warrants) to discuss information gleaned in depositions and written discovery and whether it alters or confirms the case evaluation. Doing so increases defense counsel's credibility with all involved and avoids putting your client in a bind if settlement authority is suddenly needed and your representative has not been kept in the loop or there is not time for obtaining the necessary authority.

Pooled risk representatives are a great resource and should not be overlooked. They can provide great insight on what they are seeing statewide in similar cases in terms of successful defense strategies, verdicts, and settlements. They also have good information on which experts or mediators they are finding to be effective in cases.

If the case looks like it will go to trial, the defense team should evaluate whether employing a defense version of the nuclear verdict strategy would be beneficial. For example, if liability is possible and plaintiffs are going to ask for a verdict in the stratosphere, be prepared to argue to the jury that while defendants do not believe the jury will find for plaintiff, if they were to find liability a reasonable amount to award would be XXX. If defense takes this approach (and it is something that should be considered in every case), then the number should be stated in voir dire and again multiple times throughout the case and IT SHOULD NEVER CHANGE. Taking this approach provides the jury with a reasonable number that is not zero should it find in favor of plaintiff and allows defense to take the approach that it is the one that is being reasonable.

If participating in private mediation, consider reaching out to the mediator for an informal discussion of the case in advance of mediation. This primes them for your client's version of the case and can help give you a preview of how the mediator may see the facts. Many mediators are now taking the approach of offering a mediator's proposal when they are not able to bring the parties together. Evaluate whether a mediator's proposal is really needed. In other words, will it be something reasonable that the defense can live with or will it end up setting an unreasonably high floor for future negotiations or for other cases that are early in litigation or for future cases.

#### **4. Take on more risk to decrease insurance costs**

In addition to the mitigation and litigation tactics set forth above, another way for entities to reduce their insurance costs and address law enforcement liability claims is for an entity to take on a much higher self-insured retention for its police liability exposure. Separating that exposure from the rest of the city's general liability insurance placement so that the entity can save on insurance costs across the entire book of general liability exposure.

#### **CONCLUSION**

While it is a challenging litigation and insurance environment for law enforcement cases, all hope is not lost. There are still mitigation approaches that can be explored and new and evolving litigation tactics to implement. Entities are still out there trying and winning law enforcement cases and hopefully the above strategies will assist your entity in reducing your law enforcement liability risk.

**EXHIBIT A**  
**SAMPLE UNILATERAL CONFIDENTIALITY PROVISION**

6.0 CONFIDENTIALITY

6.1 Claimant and City, and their attorneys, representatives, consultants, agents, experts, and anyone acting on their behalf or with their knowledge, agree that they may disclose only the fact that the Claim settled and will from this point forward keep confidential all video and audio of the events, except in certain circumstances wherein the law may require City to disclose audio and/or video of the incident as discussed below.

6.2 The Parties acknowledge that reports related to the Incident, the terms of the settlement, and the Agreement are subject to disclosure by City in response to requests made pursuant to the California Public Records Act (Cal. Gov. Code section 7920 et. seq. [formerly section 6250 et seq.]). In the event that a Public Records Act request is made for any documents related to the Incident, including this Agreement, the City of Chula Vista shall use reasonable efforts to notify Claimant and her attorneys within 10 days of the request and will redact personal identifying and private information from any documents disclosed, as permissible by law. In the event a request is made pursuant to the California Public Records Act which seeks or encompasses the audio or video of this Incident, City will endeavor to shield disclosure of any audio and video of the Incident to protect Claimant's privacy, with such efforts being within the bounds of California law. However, Claimant and her attorneys acknowledge and understand that disclosure of audio, video, and/or reports relating to this incident may still occur if a Court so orders or other circumstances mandate disclosure under the law. Notwithstanding the foregoing, if City is requested or required (by law, regulatory or government authority, oral questions, interrogatories, requests for information or documents, subpoena, civil investigative demand or similar process, under the California Public Records Act or otherwise) to disclose any documents related to the Incident, or requests disclosure of the audio or video of this Incident City will provide Claimant with prompt notice of such request(s) so that Claimant may seek an appropriate protective order and/or waive compliance with the provisions of this Agreement unless such notice is prohibited by law or legal process.

6.3 In the event any Party receives media requests relating to this Incident, the Parties will attempt, in good faith, to release a mutually agreeable joint statement before responding to any media request, after which the Parties may provide additional statements in accordance with this confidentiality provision.

6.4 Claimant and the Released Parties acknowledge and understand that this confidentiality provision is a material condition, consideration, and covenant of this Agreement and that violation thereof shall constitute a default and material breach by such party. Any breach of this provision by Claimant, at the election of Released Parties could cause a forfeiture of monies paid to Claimant hereunder, or subject Claimant to an action for damages at Released Parties' election.



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# Labor Employment and Litigation Update

Thursday, May 9, 2024

*Elizabeth Arce, Partner, Liebert Cassidy Whitmore  
Jennifer Rosner, Partner, Liebert Cassidy Whitmore*

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# Labor and Employment Litigation Update

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# Labor and Employment Litigation Update Spring 2024

Elizabeth Tom Arce, Partner & Jennifer M. Rosner, Partner  
Liebert Cassidy Whitmore

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## I. INTRODUCTION

In the last six months, California and Federal appellate courts, as well as the Public Employment Relations Board, decided cases that will significantly impact labor and employment law. Though there have been many important cases decided since last fall, there were several we feel are especially worthy of highlighting in this update as they are particularly impactful on employment in the public sector.

The recent case decisions and legislation discussed in this paper cover a wide range of employment issues that public agencies commonly face. Amongst these decisions and legislation, we saw several cases brought by employees alleging discrimination, employers disciplining employees, cases and legislation related to the evolving California Public Records Act including Senate Bill 400 which expands law enforcement transparency obligations, and significant cases concerning Workers Compensation and employee retirement. We also saw several federal appellate rulings from jurisdictions other than the Ninth Circuit that provide a helpful lens for how a court here might approach a First Amendment retaliation challenge, concerning police officers speaking on alleged matters of public concern. In 2023, the California Legislature also passed Senate Bill 553, which will require employers to have a Workplace Violence Prevention Plan in place by July 1, 2024.

In addition, the past six months brought several cases resulting in significant new analysis of Labor Law claims. These cases highlighted how employers should treat protected union activity by employees, as well as when employers can prevail on claims of retaliation in response to employee discipline.

The next section includes cases with key developments in labor and employment law. We broke down these cases into three categories: (1) The California Public Records Act; (2) Employee Discrimination and Discipline cases; (3) Workers Compensation and Retirement cases; (4) Workplace Violence Prevention Plan legislation; (5) Labor Law cases; and (6) First Amendment cases.

## II. CASES AND LEGISLATION

### Chapter 1: The California Public Records Act

#### *Castañares v. Superior Court (City of Chula Vista), 98 Cal.App.5th 295 (2023) (Petition for review filed 2/1/24) – Some Law Enforcement Drone Videos May Qualify For the CPRA’s Investigation or Catchall Exemptions*

The City of Chula Vista operated a pilot program using police drones to respond to 911 calls. The drones gave officers and commanders important preliminary information about what they would encounter on scene. Arturo Castañares, a journalist and private pilot, submitted a California Public Records Act (CPRA) request seeking: (1) access to and copies of video footage from all [Chula Vista Police Department] (PD) drone flights conducted between March 1 and March 31, 2021; (2) documents related to the retention, access, costs and custody of such videos. However, Castañares qualified his request by asking the City to redact any such videos that may be part of any ongoing or pending investigations, but to provide a log of any videos or documents withheld, who made the determination to withhold them, and when they may be released. In addition, Castañares asked for documents “related to any preplanning, flight plans, mapping, or other information used to organize, operate, and monitor [the drone] flights.”

The City provided “a timely partial response” informing Castañares that responsive information could be found on the City's website, and the requested video footage was exempt under the investigatory records exemption per Government Code section 7923.600, subdivision (a). Castañares filed a lawsuit against the City for declaratory and injunctive relief, requesting a judicial declaration that the City did not comply with the CPRA, a writ of mandate directing the City to comply with the CPRA, and an injunction to require the City to allow Castañares to inspect and obtain copies of all responsive records to his CPRA request.

After limited discovery at a preliminary hearing, the only remaining issue was whether the City had to provide the drone video footage. After the court heard oral argument, it issued a minute order finding in favor of the City. The court acknowledged that this was an issue of first review.

The CPRA gives every person a presumptive right to inspect any public record, except those that the law expressly exempts from disclosure. Most relevant here is that the CPRA exempts from disclosure certain records of police investigations. (Gov. Code section 7923.600(a).) Also, the catchall CPRA exemption allows a government agency to withhold records if it can demonstrate that the public interest served by withholding specific records clearly outweighs the public interest served by disclosure.

The trial court concluded that the videos sought were categorically exempt under the investigations exception. Additionally, the City submitted a declaration that it would take approximately 1,800 hours, or approximately 229 workdays, to redact the footage alone, not including the additional legal review, research, and quality control necessary to evaluate privacy, safety, and legal concerns. Therefore, the trial court determined that the request sought to impose

an unreasonable burden on the City resources, with no substantial countervailing benefit given the wealth of information the City had already turned over to the petitioner. Castañares appealed.

The Court of Appeal overruled the trial court on both counts. The Court found that the trial court improperly treated the videos as categorically exempt investigation records. The Court explained that the trial court could require the City to separate the videos into three categories. The first category would be video footage that is part of an investigatory file. This footage would be exempt under the investigations exemption. The second category would be videos that were not included in an investigation file but were instead used to investigate whether a law was violated. The Court noted that these records may still be exempt, as long as law enforcement was reasonably contemplated. The last category would consist of videos that did not fall into the other two categories. This footage would likely consist of instances where a drone was used to make a factual inquiry to determine what kind of assistance may be required, as opposed to investigating a suspected violation of law. According to the Court, video footage used for a factual inquiry, without a suspected violation of law, would not qualify under the investigation exemption, but might qualify under the catchall exemption. However, the Court also found that there was not enough information in the record to determine if the catchall exemption applied. The Court remanded the case to the trial court to conduct further proceedings. The Court did not foreclose the possibility that the records could all be exempt if the City further developed the evidentiary record.

The City filed a petition for review by the California Supreme Court. Until the case is accepted for review, the *Castañares* case remains a published decision and is a helpful reminder that courts will seek to apply CPRA exemptions narrowly and that employers cannot avoid legal challenge by treating records as categorically exempt. Rather, the employer must conduct an in depth analysis as to each record to determine if it qualifies for the exemption.

***Senate Bill 400 – Law Enforcement agencies may, but are not required to, release statements announcing terminations of police and custody officers.***

On February 29, 2024, Governor Newsom signed into law Senate Bill 400 (SB 400). SB 400 amends the California Public Records Act (CPRA) to explicitly allow law enforcement agencies to release statements announcing terminations of police officers and custody officers.

Historically, under Penal Code section 832.7, personnel records of peace officers and custodial officers were deemed confidential and not subject to public inspection under the CPRA. In 2019, the law was amended to grant public access through public records requests related to officer involved shootings, use of force incidents resulting in death or serious injuries, or where there are sustained findings of dishonesty or sexual assault.

This bill further amends Penal Code section 832.7 to clarify that the Code expressly permits, but does not mandate, that employing law enforcement agencies may disclose peace officer terminations for cause and the supporting reasons for the termination. The disclosure is at the agency's discretion, and the supporting reasons may include, but are not limited to the types

of specific conduct outlined in Penal Code section 832.7(b)(1)(A) – (E) (referring to officer involved shootings, use of force incidents involving death or serious injuries or where there are sustained findings of dishonesty or sexual assault).

The bill passed both the Assembly and Senate unanimously. The bill’s passage indicates that the Legislature continues to lean towards increasing transparency with respect to officer misconduct.

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## **Chapter 2: Employee Discrimination and Discipline**

### ***Raines v. U.S. Healthworks, 15 Cal.5th 268 (2023) – The California Supreme Court Significantly Expands the Liability of an Employer’s Agents***

In *Raines v. U.S. Healthworks*, the California Supreme Court held that a business entity acting as an agent on behalf of an employer may be held liable for employment discrimination under the Fair Employment and Housing Act (FEHA). However, the business entity agent must have at least five employees, and can bear direct FEHA liability only when it carries out FEHA-regulated activities on behalf of the employer.

Government Code Section 12940 of the FEHA makes it an “unlawful employment practice” for an employer of five or more persons “to make any medical or psychological inquiry of an applicant.” The FEHA only allows these inquires “after an employment offer has been made but prior to the commencement of employment duties, provided that the examination or inquiry is job related and consistent with business necessity and that all entering employees in the same job classification are subject to the same examination or inquiry.”

Kristina Raines and Darrick Figg (Plaintiffs) received offers of employment conditioned on successful completion of pre-employment medical screenings to be conducted by the U.S. Healthworks Medical Group (USHW), who was acting as an agent of the Plaintiffs’ prospective employers. As part of the medical screenings, USHW required job applicants to complete a written health history questionnaire that included numerous health-related questions that the Plaintiffs’ claim had no bearing on their ability to perform job-related functions. Applicants were required to answer whether they had ever had: 1) venereal disease; 2) painful or irregular vaginal discharge or pain; 3) problems with menstrual periods; 4) irregular menstrual period; 5) penile discharge, prostate problems, genital pain or masses; 6) cancer; 7) mental illness; 8) HIV; 9) permanent disabilities; 10) painful/frequent urination; 11) hair loss; 12) hemorrhoids; 13) diarrhea; 14) black stool; 15) constipation; 16) tumors; 17) organ transplant; 18) stroke; or 19) a history of tobacco or alcohol use. In addition, the questionnaire asked whether the applicant was pregnant, sought information regarding medications taken, and required the applicant to disclose prior job-related injuries and illnesses.

After receiving offers from different employers conditioned on passing USHW’s pre-employment screening, each Plaintiff attended their screening. Raines responded to most of the questions on the written questionnaire but declined to answer the question about the date of her



last menstrual period. Raines alleges that USHW then terminated the exam, and her potential employer revoked its offer of employment. Figg answered all the questions, successfully passed the screening, and was hired for the position.

Raines sued both her potential employer and USHW, and later added additional defendants and class claims. The Defendants removed to federal court, where Raines added Figg as a named plaintiff and dismissed her potential employer as a defendant. Filing a third amended complaint, the Plaintiffs alleged FEHA violations, among other causes of action. The District Court granted USHW's motion to dismiss the FEHA claims, concluding that the FEHA does not impose liability on the agents of a plaintiff's employer. Plaintiffs then appealed the dismissal of their other claims. After oral argument, the Ninth Circuit asked the Supreme Court to decide whether FEHA imposes liability on the agents of an employer.

The Supreme Court answered affirmatively. The Court first looked at FEHA's plain meaning and legislative history. Government Code section 12926, subdivision (d), states that the term "[e]mployer includes...any person acting as an agent of an employer, directly or indirectly..." Thus, the Court reasoned that any person [or entity] acting as an agent of an employer is itself an employer. Turning to the legislative history of the FEHA, the Court found that, as a successor to the Fair Employment Practices Act (FEPA) the term "employer" would likely have the same definition in both acts. The FEPA had adopted an agent-inclusive definition of "employer" from the National Labor Relations Act and National Labor Relations Board. Therefore, the Court reasoned that when the legislature adopted the language when drafting the FEHA, they intended the term "employer" to be agent-inclusive as well.

Finally, the Court looked to other judicial interpretations of federal antidiscrimination laws and public policy, and found they generally support the conclusion that an employer's business-entity agents that have at least five employees and that *carry out FEHA-regulated activities on behalf of an employer* can fall within FEHA's definition of "employer" and may be directly liable for FEHA violations.

The Court specifically stated that it was not deciding the significance of any employer control over the agent's acts that gave rise to the FEHA violation, nor whether its decision applied to business-entity agents with fewer than five employees.

The *Raines* case demonstrates that third party businesses may be held liable under the FEHA when they perform services to applicants/employees on behalf of the employer. \

***Jones v. Riot Hospitality Group LLC, 95 F.4th 730 (9th Cir. 2024) – Terminating Sanctions Were Proper in an Employment Discrimination Case Where Ample Circumstantial Evidence Showed That The Plaintiff Deleted and Hid Text Messages With Witnesses, Intentionally Spoliating Electronic Evidence***

Alyssa Jones worked as a waitress at a Scottsdale bar. In 2017, Jones sued the bar's owner-operator and his company, Riot Hospitality Group (collectively "Riot") in District Court, alleging Title VII violations (among other claims). During discovery, Riot obtained text messages

exchanged between Jones, her friends, and co-workers between December 2015 and October 2018. Riot identified instances where Jones appeared to have abruptly stopped communicating with people she had been messaging almost daily. In response to a subpoena, Jones' third-party imaging vendor produced a spreadsheet showing that messages between Jones and her co-workers had been deleted from Jones' mobile phone.

In subsequent depositions, two of the co-workers, both of whom Jones had identified as prospective trial witnesses, testified that they had exchanged text messages with Jones about the case since October 2018. After Jones failed to comply with the District Court's order to produce those messages, the Court ordered the parties to jointly retain a third-party forensic search specialist to review the phones of Jones and three prospective witnesses.

The third-party forensic specialist extracted messages and sent them to Jones' counsel but the lawyer failed to forward any to Riot, despite multiple District Court orders that he do so and several deadline extensions. The District Court then ordered the forensic specialist to send all non-privileged messages directly to Riot and later assessed \$69,576 in fees and costs against Jones and his attorney.

After finally receiving the text messages, Riot moved for terminating sanctions under Federal Rule of Civil Procedure 37(e)(2) regarding the failure to preserve electronically stored information. Riot submitted an expert report from the forensic specialist, who concluded, after comparing the volume of messages sent and received between phone pairs, that "an orchestrated effort to delete and/or hide evidence subject to the Court's order has occurred."

In 2022, the District Court, dismissed the case with prejudice, finding that Jones deleted text messages and cooperated in the deletion of messages by her witnesses, intending to deprive Riot of their use in litigation. Jones and her attorney appealed. On appeal, Jones argued that the District Court abused its discretion by dismissing her case because her conduct was neither willful nor prejudicial to Riot.

The Ninth Circuit affirmed the District Court's ruling. The Court ruled that in order to dismiss a case under Rule 37(e)(2), a district court need only find that the rule's prerequisites are met. These prerequisites are that electronically stored information ("ESI") that should have been preserved in the anticipation or conduct of litigation is lost because a party failed to take reasonable steps to preserve it, and it cannot be restored or replaced through additional discovery. After that, the Court looks to whether the spoliating party acted with the intent required under Rule 37(e)(2), and whether lesser sanctions are insufficient to address the loss of the ESI.

While Rule 37(e)(2) does not explicitly define "intent," the word is most naturally understood as involving the willful destruction of evidence with the purpose of avoiding its discovery by an adverse party. Because intent can rarely be shown directly, a district court may consider circumstantial evidence in determining whether a party acted with the intent required

for Rule 37(e)(2) sanctions. Relevant considerations include the timing of destruction, affirmative steps taken to delete evidence, and selective preservation.

The Ninth Circuit found ample circumstantial evidence that Jones intentionally destroyed a significant number of text messages and collaborated with others to do so. Jones could not explain why messages to other employees at the bar were selectively deleted in 2017 and 2018. With respect to the 2019 and 2020 messages, the District Court pointed out that while much of the content of the deleted messages is unknowable, a screenshot of a message sent by a witness to Jones but missing from Jones' phone in its original form, showed that Plaintiff deleted at least one message that had a direct bearing on her case. Moreover, Jones and one of the witnesses obtained new phones shortly after they were ordered to hand over their devices for imaging. Neither Jones nor the witnesses produced the earlier phones for imaging, effectively preventing discovery of messages deleted from those phones.

The Ninth Circuit rejected Jones' arguments that her production of thousands of text messages negated the intent and prejudice elements of Rule 37(e), finding that production of *some evidence* does not excuse *destruction of other relevant evidence*, and evidence from Jones' third-party imaging vendor suggested that she deleted some messages from the very periods covered by her productions. Finally, the Court explained that Rule 37(e)(2) does not require a finding of prejudice as a prerequisite to sanctions, including dismissal. The Court relied on the Advisory Committee Notes to the rule and concluded that the required finding of intent can support an inference that the lost information was unfavorable to the party that intentionally destroyed it, and also an inference that the opposing party was prejudiced by the loss of information that would have favored its position.

The Ninth Circuit found that the District Court's discovery orders instructing the plaintiff and others to hand over their phones to a forensic search specialist were procedurally proper, and Plaintiff's challenge to the orders based on privacy interests was unpersuasive.

The *Jones* case provides a crucial reminder that spoliation of evidence can have significant adverse consequences and attorneys need to exercise due diligence to preserve electronic evidence early on in a litigation.

***Martin v. Board of Trustees of California State University, 97 Cal.App.5th 149 (2023) – A University Had a Legitimate Reason to Terminate a Department Director When the Director Harassed and Retaliated Against Other Department Employees, Creating a Hostile Work Environment***

In 2014, California State University (CSU) hired Jorge Martin as the director of university communications at CSU Northridge's Marketing and Communications Department.

In March 2016, a CSU employee whom Martin supervised filed a complaint with CSU's Equity and Diversity Department (E&D) against Martin. The complaint alleged racial discrimination, harassment, and retaliation. After conducting an investigation, E&D concluded that Martin did not violate CSU policies.

In fall 2016, Martin supervised a temporary employee, who filed a second complaint with E&D, alleging that Martin harassed and discriminated against her based on her sexual orientation. This employee complained that Martin made a suggestive comment to a coworker and complained that Martin wanted to exclude LGBTQ-related content from CSU's weekly publication.

E&D's second investigation found that Martin did not discriminate against or harass this second employee, however, Martin did create a hostile work environment when considering the actions taken in totality. In response, Martin was issued a Memorandum of Counseling, ordered to complete sensitivity training, and ordered to attend management coaching sessions with Human Resources.

In October 2017, a third employee came forward with a complaint against Martin, alleging harassment based on inappropriate comments and retaliation for this employee participating in the second investigation. E&D found that Martin did not violate University policy with respect to the third complaint, but noted that Martin's conduct fell below the standard reasonably expected of any employee, particularly one in a leadership position.

In May 2018, Martin spoke to a subordinate about newspaper articles published about him and the various investigations, telling the subordinate that the finding of hostile work environment was "highly questionable," and that the investigations were biased against him. This employee said Martin seemed very angry with the complainants and asked the subordinate if she was on his side about 10 times.

In June 2018, CSU terminated Martin. Martin's supervisor brought notes to the meeting and offered comments to Martin verbally. CSU's termination letter did not specify the basis for Martin's termination.

On August 16, 2018, Martin filed a complaint against CSU alleging gender, race, color, and sexual orientation discrimination under the Fair Employment and Housing Act (FEHA); race, gender, and sexual orientation harassment; and failure to prevent harassment and discrimination. Martin claimed he experienced discrimination and harassment because he is a middle-aged, light-skinned, Mexican-American, heterosexual, and cisgender male. As to his harassment claim, Martin alleged that "Defendant CSU created a hostile work environment and subjected Plaintiff to unwanted harassment on the basis of his race and sex/gender from May 2, 2018 until his termination on June 6, 2018." On August 1, 2019, CSU filed a motion for summary judgment or summary adjudication. The trial court entered the order granting summary judgment on October 28, 2019. Martin appealed.

The Court of Appeal determined that the trial court correctly granted summary judgment on Martin's discrimination claims. Under the FEHA burden shifting approach, the Appellate Court found that CSU established a legitimate reason for terminating Martin, given the results of the various investigations. The Court rejected Martin's argument that CSU did not provide a consistent basis for terminating him. Further, Martin could not establish that CSU's internal investigation was pretextual or biased against him.

Next, the Court of Appeal affirmed the trial courts grant of summary judgment on Martin's harassment claims, finding that the newspaper articles and CSU's response to the articles did not qualify as harassment. The Court rejected Martin's argument that the hashtag "#comeatmebro" in one the newspaper articles about him was gender harassment based on him being male. The Court found that the gender-based nature of the hashtag was ambiguous, and was part of a series of neutral or anti-sexual harassment hashtags (#MatadorForLife #CSUN #MeTooHigherEd #TimesUp #NotAnymore #YesAllWomen #HarassmentsStupid #TryMe #ComeAtMeBro #FeelingHellaGood) and thus was not sufficiently severe or pervasive to constitute gender harassment. Further, the article did not mention Martin by name. Finding that Martin was not harassed, the Court ruled that the trial court correctly granted summary judgment on Martin's failure to prevent harassment and discrimination claims.

This case demonstrates how important it is for agencies to conduct thorough internal investigations and document legitimate business reasons to support any adverse actions taken.

***Jackson v. Board of Civil Service Commissioners of the City of Los Angeles, 99 Cal.App.5th 648 (2024) – Detention Officer's Disciplinary Appeal Was Premature***

In 2018, Nathan Jackson worked as a detention officer for the Los Angeles Police Department (Department). Jackson was absent from work starting in late February of that year, and was scheduled to return on March 18. On March 18, Jackson missed 6:00 a.m. roll call. He arrived at 7:35 a.m., apologized to the sergeant on duty, and attempted to start his shift. The sergeant noticed that Jackson was slurring his speech, had difficulty communicating and was shaking. Jackson was not in full uniform, wearing a visibly dirty undershirt and not wearing his work boots. The sergeant asked Jackson if he had submitted a doctor's note to the appropriate coordinator, which had been requested during Jackson's absence. Jackson said that he had not, but that he had the doctor's note in his car or in a bag. Jackson left the facility without informing anyone and did not return.

A few hours later, the sergeant went to Jackson's home. Jackson answered the door and gave him a note excusing him from work that day. The note, however, was time-stamped 9:12 a.m. that day, which was an hour and a half after Jackson showed up for work. Jackson returned to work the following day.

At some point the City of Los Angeles (City) signed a “Non-occupational Sick, Revisit, or Injury Report” certifying Jackson was off duty from February 26, 2018 to March 18, 2018. On March 23, 2018 Jackson submitted a request under the Family and Medical Leave Act (FMLA) for intermittent medical leave, backdating the request to January 25, 2018, and seeking approval for leave until July 24, 2018. The City approved the request.

In February 2019, the City served Jackson with notice of a proposed 10-day suspension and supporting investigative materials. The notice included four counts against Jackson, all arising from the March 18, 2018 incident, including: reporting late for duty (count 1); reporting “unfit for duty” (count 2); leaving his post “without authorization” (count 3); and “refusing to provide a doctor's note as directed” (count 4).

The notice informed Jackson that he had until March 20, 2019 to respond to the charges. Jackson did not respond. On May 6, 2019 the City served Jackson with its final notice of the 10-day suspension.

Jackson appealed to the Board of Civil Service Commissioners (Board). The Board upheld the suspension and sustained each count. Jackson then filed a petition for writ of administrative mandate in superior court alleging *Skelly* violations and seeking to have his suspension set aside and backpay awarded. The superior court found that the evidence supported all but one of the charges and vacated the suspension and ordered the Board to reconsider whether Jackson’s actions warranted discipline under its internal policies based on his permissible disciplinary history. The court entered judgment granting the petition in part and issued a writ of mandate. Jackson immediately appealed.

The California Court of Appeal dismissed the appeal, finding that it was premature. The Court reasoned that the trial court’s order was not a “final appealable judgment.” Because the trial court ordered the Board to reconsider its findings, further appeal rights would be triggered if the Board imposed different discipline or declined to award Jackson any backpay. Also, Jackson could file a new or supplemental petition for writ of mandate based on the Board’s new decision, and if Jackson was still dissatisfied, he could appeal from that judgment. To allow the appeal to proceed now would result in an inefficient, piecemeal disposition. Thus, the Court dismissed Jackson’s appeal as premature.

The *Jackson* case illustrates that further appeal rights are not triggered until an administrative agency issues its final decision and that in the event a new decision is issued, the employee would be required to file a new or supplemental petition for writ of mandate based on any new decision before appealing from that judgment.

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### **Chapter 3: Workers Compensation and Retirement**

***Vann v. City and County of San Francisco, 97 Cal.App.5th 1013 (2023) – City Firefighter Could Not Sue City for Negligence***

In December 2023, the Court of Appeal affirmed that Workers Compensation is the exclusive remedy for employees of a local government agency who are injured within the scope of the Workers Compensation Act, even when the employee's injury arises out of the conduct of another employee in a different department within the agency.

On November 2, 2020, Matthew Vann, a firefighter with the San Francisco Fire Department (SFFD), responded to an emergency in the heart of downtown San Francisco. Louis Yu, a bus driver with the San Francisco Municipal Transportation Agency (SFMTA) drove through the active emergency area, and over a fire hose attached to a fire engine near where Vann was working. This caused the fire hose to become entangled in the bus's wheels, break off from the fire engine, and sweep Vann off his feet and backwards onto the ground. Vann sustained catastrophic injuries, including a traumatic brain injury, a fractured left clavicle, an internal hemorrhage in his right eye, and damage to his throat and vocal chords.

The City began processing his workers' compensation claim. However, on August 18, 2021, Vann submitted an application for leave to present a late government tort claim to the City. On August 31, the City granted leave to present the claim, but ultimately denied it.

On November 8, Vann filed a complaint against the City and Yu (collectively, respondents), alleging causes of action for motor vehicle negligence, general negligence, and negligence per se. On February 2, 2022, respondents filed a demurrer on various grounds, including that the Workers' Compensation Act provides the exclusive remedy for appellant's claims against the City as his employer and against Yu as his co-employee. Generally, if an injury falls within the scope of the Workers Compensation Act, then the Act is the employee's exclusive remedy. Thus, the Respondents argued that trial court lacked subject jurisdiction.

Opposing the demurrer, Vann argued that he and Yu were not co-employees because Vann was employed by SFFD, while Yu was employed by SFMTA, and that these were separate legal entities akin to separate business within a multiunit corporate enterprise. The Respondents replied that California courts have rejected that government departments are akin to separate business entities and can thus be subdivided into different entities for purposes of the workers' compensation law. Therefore, they argued that SFFD and SFMTA, as municipal departments, "have no 'legal personality separate from' the City." The trial court agreed and sustained the demurrer. Vann Appealed.

The Court of Appeal agreed with the lower court. First, the Court examined whether SFFD and SFMTA could be considered separate legal entities from the City, and determined they could not, because they were not sufficiently independent. Vann admitted that SFFD was part of the City's executive branch and therefore, not a separate legal entity. To analyze whether SFMTA was an independent entity, the court looked at several factors, including: whether the entity has a separate governing body; and whether the entity has statutory power to own property, levy taxes, or incur indebtedness in its own name. The City Charter and other municipal codes listed SFMTA as an agency that is part of the City, its Board of Directors was

appointed by the City's Mayor and confirmed by the City's Board of Supervisors, and there was no declaration that SFMTA was a separate legal body. Thus, the Court rejected Vann's argument that SFMTA was a separate entity from the City and/or SFFD. The Court dismissed Vann's separate negligence lawsuit, finding that his exclusive remedy was through workers compensation.

The *Vann* case provides helpful clarification that municipal departments may be deemed part of a single employer for purposes of establishing liability.

***Estrada v. Public Employees' Retirement System, 95 Cal.App.5th 870 (2023) – Payroll Employee Forfeited Years of CalPERS Benefits Upon Her No Contest Plea***

Elaine Estrada worked for the City of La Habra Heights as an account and payroll administrator from November 7, 2005, to August 24, 2012.

In April 2016, the Los Angeles County District Attorney's Office charged Estrada with unauthorized computer access, misappropriation of public funds, and embezzlement by a public officer for removing payroll deductions, resulting in her not paying the required employee share for dependents covered on her health insurance plan. The misconduct occurred between 2007 and 2009 and was not discovered at the time because Estrada was responsible for the payroll and timekeeping of all City employees.

On June 28, 2017, Estrada entered into a plea agreement, which involved pleading no contest to the unauthorized access to a computer system or network, but sentencing would be delayed for six months, at which time the felony plea would be vacated and a misdemeanor plea of no contest would be entered in its place. Additionally, she would return to the City the amount of money she owed (\$5,780.20) and serve one year of probation starting on the date of her sentencing.

Estrada verbally acknowledged that she understood these terms and that a plea of no contest is treated as a finding of guilt. Estrada's plea was then entered. Estrada complied with her plea agreement and the charge was reduced from a felony to a misdemeanor. After serving one year of probation, the criminal case against her was dismissed in March 2019.

On April 10, 2018, while Estrada was serving probation, the City submitted a forfeiture of benefits form to CalPERS that stated Estrada had been convicted of a job-related felony. CalPERS notified Estrada that because of her felony conviction, a portion of her accrued retirement benefits was subject to forfeiture. Government Code Section 7522.72, which was enacted as part of California's pension reform in 2013, provides that if a public employee is convicted of a felony for conduct arising out of or in the performance of official duties, the employee forfeits certain accrued retirement benefits, which "shall remain forfeited notwithstanding any reduction in sentence or expungement of the conviction." Estrada was also ineligible to return to CalPERS-covered employment or accrue further CalPERS benefits.



On June 21, 2018, Estrada appealed the forfeiture action, arguing she was not convicted of a felony because she withdrew her plea to a felony and entered a new plea of no contest to a misdemeanor. An Administrative Law Judge issued a proposed decision denying the appeal, and the CalPERS Board of Administration adopted that decision which found that Estrada forfeited benefits from September 1, 2007, the earliest date of the commission of the felony, through June 28, 2017, the date of her felony conviction. Estrada then filed a writ in Superior Court, which was also denied. Estrada appealed.

The Court of Appeal found that while the term “conviction” is not defined in Government Code Section 7522.72, it is recognized in California that a plea of guilty (and therefore, a plea of “no contest”) constitutes a conviction. Under the plain language of section 7522.72, a public employee's accrued retirement benefits are subject to forfeiture upon his or her conviction of a job-related felony. As a result, once Estrada pled no contest to a felony charge related to the scope of her employment, she was effectively convicted of a felony at that time, for purposes of Section 7522.72, even if the felony was later reduced to a misdemeanor.

Further, the Court held that Estrada's retirement benefits remained forfeited notwithstanding the reduction of the felony to a misdemeanor and dismissal of the charge. The Court reasoned that, in enacting section 7522.72, the Legislature explicitly provided that it intended for a felony conviction that is later reduced to a misdemeanor in a postconviction proceeding to be treated as a felony for purposes of determining the forfeiture of a convicted employee's retirement benefits. Section 7522.72 thus provides that a member convicted of a job-related felony “shall forfeit all the rights and benefits earned or accrued” from the earliest date of the commission of the felony through the date of the conviction, and that the rights and benefits shall remain forfeited notwithstanding any reduction in sentence following the date of the member's conviction.

The *Estrada* case demonstrates that employers may prevent public employees who commit workplace misconduct that rises to the criminal level from receiving CalPERS benefits. This should serve to deter criminal activity by public employees.

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## **Chapter 4: Workplace Violence Prevention Plan**

### ***Senate Bill 553 – Employers Must Have Workplace Violence Prevention Plan***

Senate Bill (SB) 553 amended Labor Code section 6401.7 and added Labor Code section 6401.9, requiring employers to adopt and implement a Workplace Violence Prevention Plan (WVPP) and corresponding training for their employees by July 1, 2024.

Specifically, SB 553 requires that employers establish, implement, and maintain, at all times in all work areas, an effective WVPP containing specified information. Employers must record information in a violent incident log for every workplace violence incident, as specified, provide effective training to employees on the workplace violence prevention plan, among other

things, and provide additional training when a new or previously unrecognized workplace violence hazard has been identified and when changes are made to the plan.

Employers must also create records of workplace violence hazard identification, evaluation, and correction and training records to be created and maintained, and violent incident logs and workplace incident investigation records to be maintained. An employer's WVPP must be in writing, be available and easily accessible to employees, Designated Representatives, and the Division of Occupational Safety and Health ("DOSH") at all times.

On March 1, 2024, the DOSH, which is responsible for enforcing these sections of the Labor Code, published a model WVPP on their website and provided guidance on ways employers may comply with the requirements set forth in Labor Code section 6401.9.

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## **Chapter 5: Labor Law**

### ***Visalia Unified School Dist. v. Public Employment Relations Bd., 98 Cal.App.5th 844 (2024) – Employee's Service As A Union Officer Was Protected Activity But The District Was Justified In Terminating Her For Numerous Errors and Poor Performance***

Ramirez (full name omitted) was employed as a secretary at Visalia Unified School District for more than 20 years. Between 1997 and 2012, Ramirez received positive work evaluations. Starting in 2013, her evaluations became negative, and the District issued Ramirez multiple reprimand letters due to errors and performance issues, and then initiated termination charges against her.

The parties settled the termination charges in 2016 and Ramirez agreed to transfer to a position with Visalia Charter Independent Study (VCIS). VCIS "operates traditional and online independent study programs" and "is a dependent charter school, meaning it is part of the District. VCIS's funding is tied to student attendance which in turn depends on students completing work. In late 2016, Ramirez was nominated to serve as a union officer. At the time, her principal expressed concern about the impact union activity would have on Ramirez's work performance. Ramirez served as the local union chapter vice president and president between 2016 and 2018.

Ramirez's responsibilities at VCIS included entering student absences into a computer program. The attendance records were reported to the state and corresponded to funding for the school. In December 2017 or January 2018, a parent complained that a student was erroneously marked as absent. The VCIS principal investigated the complaint and discovered additional attendance entry errors. Ramirez made over 100 incorrect attendance entries between September 2016 and January 2018.

On January 9, 2018, Ramirez attended a school board meeting where she criticized District policy and the superintendent. The superintendent was at the meeting. The superintendent directed the VCIS principal to investigate deeper into Ramirez's errors. On January 22, 2018, two weeks after the board meeting, the District placed Ramirez on leave pending an investigation.

The investigation concluded that Ramirez had falsified records, created numerous errors, and her errors had created incorrect permanent student records. The investigation concluded that her mistakes exposed VCIS to potentially \$750,000 in liability for misreporting attendance to the state.

The District initiated termination charges against Ramirez. Ramirez contested the charges and received a hearing. The hearing officer substantiated all charges except for falsifying records. The District school board voted to terminate Ramirez's employment.

The California School Employees Association (CSEA) filed an unfair practice charge with the Public Employment Relations Board (PERB). CSEA alleged the District violated Government Code Section 3543.5, subdivision (a), by firing Ramirez in retaliation for engaging in protected union activity. PERB then formally issued a complaint.

The District argued that simply being a union officer was not protected activity, CSEA failed to prove retaliation, and the District would have terminated Ramirez regardless for inadequate performance. PERB found in Ramirez's favor. First, PERB overturned prior PERB precedent and found that serving as a union officer is protected activity. Second, PERB held that the District retaliated against Ramirez for her union activity. PERB looked at multiple factors but particularly focused on the close timing between Ramirez's criticism of the superintendent and the subsequent investigation. Finally, PERB found the District failed to prove it would have terminated Ramirez for performance had she not engaged in protected union activity. PERB ordered the District to reinstate Ramirez to her position or its equivalent. The District appealed.

The Court of Appeal accepted PERB's conclusion that the District terminated Ramirez in retaliation for her protected activity. PERB based its retaliation finding on six factors. The Court of Appeal found that PERB's conclusions as to four of those factors were reasonable. First, the timing between Ramirez's critical comments and placement on leave was suspicious. Second, the District placed Ramirez on leave without immediately telling her the nature of the investigation. Third, the investigation was rushed. Fourth, the District demonstrated union animosity by first discouraging Ramirez from taking union office and then prohibiting her from entering District property and communicating with union members while on leave.

However, the Court of Appeal disagreed with two of the factors that PERB relied upon in its retaliation analysis. The Court of Appeal held that PERB was wrong to find the District subjected Ramirez to disparate treatment and disproportionate punishment. PERB had found disparate treatment because the District had never previously audited attendance reporting nor terminated an employee for misreporting attendance. The Court of Appeal held this did not support a finding of disparate treatment because there was no evidence that another employee had misreported attendance. PERB's disproportionate punishment finding was also unreasonable

because Ramirez's errors were serious so the District was not required to engage in progressive discipline. Additionally, the District was allowed to use the parties' prior settlement as evidence of a long history of misconduct and performance issues.

If an employer has anti-union motives, the employer will not be liable for violating the Educational Employment Relations Act (EERA) if it can show it would have discharged the employee anyway for legitimate business reasons. The court of appeal held the District successfully proved it would have terminated Ramirez regardless of any anti-union motives.

The Court of Appeal stated that the District would have uncovered Ramirez's numerous errors, even if she had not engaged in union activity. The investigation originated in a parent's legitimate complaint. PERB and CSEA argued that Ramirez should not have been terminated because her mistakes were minor, the District corrected them, and no harm occurred. The Court of Appeal disagreed. It found the errors were serious, numerous, and occurred over several years. Ramirez's mistakes also could affect VCIS's funding and student permanent records. The District was legitimately concerned the state could shut down VCIS for misreporting attendance. The District was not required to continue to employ a person who repeatedly committed serious errors and might continue to do so in the future.

The Court of Appeal overturned PERB's order to reinstate Ramirez and ordered PERB to dismiss the complaint against the District.

The *Ramirez* case demonstrates that even employers who engage in good faith discipline of employees may end up facing an unfair practice charge for their conduct. In those situations, a clear record of valid corrective action taken against the employee can go a long way to demonstrating that the employer would have taken that action regardless of the employee's union activity.

***Registered Nurses Professional Association and S.E.I.U. Local 521 v. County of Santa Clara, PERB Decision 2876-M (2023; judicial appeal pending) – Emergency Did Not Relieve County of Duty to Give Notice and an Opportunity to Bargain***

Among the County of Santa Clara's (County) many functions, it provides medical services through a county health system that includes the Santa Clara Valley Medical Center (SCVMC) hospitals and clinics. The Registered Nurses Professional Association (RNPA) represents 3,000 registered nurses working for the County, and Service Employees International Union Local 521 (SEIU) (collectively, the Unions) represents approximately 11,000 County employees.

On February 3, 2020, the County Director of Emergency Services declared an emergency in response to COVID-19. On February 10, the County Board of Supervisors ratified and extended the February 3 emergency declaration. On March 4, California Governor Gavin Newsom declared a state of emergency due to COVID-19.

Between mid-March 2020 and May 2020, the County took numerous actions regarding the working conditions of members of the Unions. These actions included, but were not limited to, scaling back on-site staff and services at several County clinics and sites, amending its policies concerning disaster service workers (DSW) (including Union members), assigning nurses to privately-owned skilled nursing facilities, and assigning represented employees to work at motels. The County assigned nurses to facilities that had staffing shortages without notifying the RNPA and also assigned two employees to prepare a motel for use by unhoused people without training the employees or notifying the Union. One modification to the DSW policy stated that an employee who was the sole parent of a child could refuse a DSW assignment, but an employee living with a medically vulnerable family member might not be able to refuse.

Throughout this time period, the County consistently met with the Unions to discuss the assignments and working conditions of Union members. Despite meeting with the Unions and listening to their concerns, and their requests to bargain over the terms and conditions of employment, the County asserted that it had no duty to meet and confer. The County asserted that this duty was suspended due to the multiple declared emergencies.

The Unions filed an unfair practice charge on May 6, 2020. The parties participated in 19 formal hearing days, by video conference, between August 2020 and March 2021. After two rounds of post hearing briefs in September and October 2021, the ALJ issued the proposed decision, and on January 23, 2023 all parties filed exceptions and responses. The predominant issues before PERB concerned the County's asserted emergency defense.

PERB concluded that: 1) the County could take necessary measures to save lives without first reaching an impasse or agreement, though it had a duty to afford the Unions notice and an opportunity to bargain in good faith to the extent practicable under the circumstances; and 2) the County failed to comply with that duty.

PERB opined that the County could have provided the Unions notice when the County was still considering emergency measures. PERB felt that in some instances, the notice would have allowed negotiations to begin before a decision was finalized. Even when that was not possible, PERB thought that notice to the Unions would typically have allowed at least a preliminary bargaining session before employees were notified. Finally, PERB noted that had the parties been unable to reach agreements, earlier notice would have made it clear the County was doing all it could to bargain, leading to more harmonious labor relations in a difficult period.

The County is currently appealing this decision. Until the Court of Appeal weighs in on this PERB decision, be aware that emergency conditions do not relieve a public employer from giving a union notice and an opportunity to meet and confer.

***Teamsters Local 2010 v. Regents of the University of California, PERB Decision No. 2880-H (2023) – Prohibiting Union-Related Insignia on University Vehicles Was Unlawful***

Eduardo Rosales was an electrician for the University of California at its San Diego campus (University). Since 1991, Rosales has operated the University truck assigned to him, and

he and the other employees in his department spent much of their workday in the field with their assigned trucks. The University of California maintained a policy that stated, in part:

*“No other decals, stickers, or other signs, including dealer-identified license plate holders, shall be placed on any University vehicle, except that a Chancellor may authorize exceptions on a case-by-case basis.”*

The Teamsters represented employees in the skilled trades, including Rosales. In 2018, Rosales distributed to unit members Teamsters magnets that affix to a vehicle bumper and to other metal surfaces. The bumper magnets leave no residue and cause no damage to a vehicle. They can be removed nightly or when the driver ceases operating the vehicle. The bumper magnets contain the Teamsters’ union insignia and the message “We are Teamster Strong!

At the same time, other skilled trades employees affixed personal stickers to their University vehicles that did not reference the Teamsters, such as sticks for the band “Guns N Roses,” and a sticker for the restaurant, “L & L Hawaii.” These had been displayed before and after Rosales was directed to remove the Teamsters magnets. The University never made an employee remove Union-related insignia from their cubicles, and in fact allowed for it under the University’s policies.

Teamsters filed an unfair practice charge alleging that the University interfered with Rosales’ protected rights by implementing a policy prohibiting skilled trades employees from placing a union insignia magnet on a University vehicle. The administrative law judge dismissed the allegation, finding the policy did not interfere with employee protected rights. Teamsters filed a Statement of Exceptions and a supporting brief excepting to many of the proposed decision’s factual and legal findings. The University filed a response, urging PERB to affirm the proposed decision.

PERB found that the Teamsters showed that the University interfered with union/employee rights because the University’s ban on union magnets contradicted years of PERB precedent and California public employees have long had the right to display union insignia in the workplace.

In addition, PERB found that the University did not show that the magnet negatively affected its operations such as by posing a safety risk, disrupting employee discipline, distracting from work demanding great concentration, or damaging employer property.

Finally, although the Teamster’s unfair practice charge did not allege discrimination, PERB found that the University’s selective enforcement of its vehicle insignia policy was discriminatory, reflecting enforcement against union insignia, but not against dealership license-plate frames and other messages unrelated to University business, such as those related to sports, music, or restaurants. The University only applied the policy more broadly when it decided to crack down on union magnets. Here, PERB found that the University’s discriminatory enforcement singled out union speech, and the timing of its broader crackdown showed it was motivated by an attempt to target protected activity.

While this case was decided under the Higher Educational Employer-Employee Relations Act (HEERA), which governs college and university employees, it applies broadly to all statutes

administered by PERB including the Meyers-Milias Brown Act. This decision also demonstrates the high burden public employers must meet to justify interference with employees' protected rights.

***State of California (California Correctional Health Care Services), PERB Decision No. 2888-S (2024; judicial appeal pending) – PERB Finds Retaliation but no Denial of Right to Union Representation.***

Sean Kane worked as a pharmacist for the State of California (California Correctional Health Care Services) (CCHCS) at California State Prison Corcoran (Corcoran). Kane was also an AFSCME, Local 2620 job steward. Kane reported to Michael Conner, the Pharmacist-In-Charge at Corcoran. Conner reported to CCHCS Chief Executive Officer Celia Bell.

Between January 2020 and November 2020, Conner repeatedly advised staff to wear a face mask and stay six feet away from other staff in accordance with COVID-19 restrictions.

Kane filed a grievance alleging that Conner had violated the parties collective bargaining agreement by discontinuing pharmacists' standby assignments, thereby eliminating their ability to earn extra pay, and instead using voluntary callback procedures. Bell denied the grievance.

On November 4, 2020, Kane sent identical information requests in separate e-mails to Conner, Labor Relations Advocate Elane Jalil, and Personnel Specialist Helen Ybarra. In each e-mail, Kane identified himself as an AFSCME steward and asked if any Corcoran pharmacists had received standby pay since September 14.

After exchanging several emails on November 3 about Kane's efforts to purchase a needed medication, Conner asked Kane to meet with him in his office on November 4. Kane arrived and remained standing in Conner's doorway. As Conner attempted to discuss how to acquire the needed medication, Kane interrupted and demanded responses to the e-mails Kane had sent in his capacity as an AFSCME steward regarding standby assignments. This back and forth continued, before Kane demanded union representation. Conner told Kane that their meeting was not disciplinary, and that no representative was necessary. Kane continued to talk over Conner and request representation, at which point Conner told Kane that his actions may constitute insubordination.

Kane, still in the doorway, called for another employee to join as a witness. Conner then stood up, walked to the doorway, and told the other employee to remain at her workstation. Kane turned back toward Conner, leaned forward and curled his fingers. Conner, noticing that Kane's face mask was too low to cover his mouth and nose, asked Kane to step back and pull up his mask. Kane pulled up his mask but did not immediately step back. Conner then said that Kane should return to his workstation. Kane complied.

On November 5, Corcoran administrators convened a workplace violence committee meeting and decided that Kane would be temporarily reassigned. While Kane was being escorted to his new work location, Kane passed Conner's office. Kane kicked the 100-pound steel office

door, slamming the door shut and startling Conner. Following an investigation, CCHCS issued Kane a Notice of Adverse Action (NOAA), dismissing him for allegedly violent conduct on November 4 and 5. Kane appealed to the State Personnel Board (SPB). The SPB ruled that Kane's conduct, while inappropriate, was not violent as CCHCS alleged, and lowered the discipline to a one-month suspension.

AFSCME filed an unfair practice charge against CCHCS, alleging that CCHCS unlawfully denied Kane's request for union representation during the November 4 discussion at Conner's office, and that CCHCS had terminated Kane in retaliation for his protected conduct. PERB's Office of the General Counsel (OGC) issued a complaint. Following a hearing before an administrative law judge (ALJ), both parties filed exceptions.

PERB found that AFSCME failed to establish that Conner unlawfully denied AFSCME or Kane representational rights. PERB noted that Conner began the meeting with a discussion of routine work matters. If Conner and Kane had discussed the specifics of the pending information requests relevant to the grievance, that would have triggered representational rights. But nothing required Conner to discuss the information requests during a brief, work-related meeting Conner had called, and Conner declined to do so when Kane mentioned them. PERB also found that it was a closer question whether representational rights were triggered when Conner told Kane that his actions may constitute insubordination—a comment that came after the employee first demanded union representation. Nevertheless, after Kane called the other employee to join the meeting, Conner told the employee to stay at her workstation, asked Kane to comply with COVID-19 protocols, and ended the meeting without any investigative questions or further mention of insubordination. None of these events triggered representational rights.

On Kane's retaliation claim, PERB found Kane's protected activity was at least a substantial or motivating cause of the decision to discipline. In support of that finding, PERB noted that Kane's protected requests for information occurred within days before his discipline, and that management exaggerated the facts of Kane's misconduct.

PERB found insufficient evidence to determine what level of discipline CCHCS would have imposed absent Kane's protected activities. PERB was particularly interested in evidence regarding the disciplinary penalties for other employees, who had no previous adverse actions – like Kane.

PERB remanded the matter for mediation and, absent a settlement, for further proceedings to determine what level of discipline CCHCS would have imposed absent the employee's protected activities.

The *State of California* case is a helpful reminder that both the SPB and PERB have very wide latitude in selecting and enforcing remedies of the Boards' choosing.



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## **Chapter 6: First Amendment**

### ***Noon v. City of Platte Woods, 94 F.4th 759 (8th Cir. Mar. 4, 2024) – A City Mayor and Chief of Police Were Not Entitled to Qualified Immunity for Firing Two Officers who Raised Concerns Over the Chief’s Job Performance and Alleged Misconduct***

Thomas Noon and Christopher Skidmore (Officers) were Officers with the Platte Woods, Missouri Police Department (Department). Over the course of their employment, the Officers raised several concerns about James Kerns's performance as Chief of Police. Skidmore notified Kerns that Department vehicles were not operating properly and radar equipment gave false readings. Noon also raised concerns about personnel issues and Kerns's use of Department time to conduct personal business. The Officers claim Kerns failed to address any of these concerns.

On September 9, 2019, frustrated with the Department's management, Noon met with Kerns. During this meeting, Noon encouraged Kerns to resign as Chief of Police and handed Kerns a pre-drafted resignation letter. Kerns did not resign.

On September 12, 2019, the officers sent a document (Complaint Packet) outlining their concerns about the Department to Platte Woods Mayor John Smedley and the Platte Woods Board of Aldermen. The Complaint Packet was sent anonymously, and it included a list of complaints about Kerns's leadership, which "led to chronic, systemic and significant issues within the Department." The Complaint Packet also included a copy of the Department's standard operating procedures and noted "over 180 violations" and "a supplemental document with numerous other examples of specific public safety concerns or simply things that discourage officers." By mid-November, after an investigation into the Complaint Packet's allegations had yet to commence, Noon and Skidmore informed Mayor Smedley they had authored the document. Skidmore's job duties were then changed so that he was no longer able to assign shifts.

On December 4, 2019, a local newspaper wrote about the Complaint Packet's allegations. Two days later, Kerns learned someone anonymously sent an email containing the allegations to the Ararat Shriners organization, of which Kerns was a member. In January 2020, both Officers were removed from the Department's schedule, and by March 2020, they both had been fired.

The Officer's sued Smedley and Kerns alleging First and Fourteenth Amendment violations by retaliating against them for reporting concerns about the Department. Smedley and Kerns removed the case to federal court and moved for summary judgment, claiming they were entitled to qualified immunity. When conducting a qualified immunity analysis, the court uses a two-part inquiry to determine (1) whether a constitutional violation occurred, and (2) whether the right in question was clearly established at the time of the violation. The district court denied the motion and found there was a genuine dispute of material fact as to whether Smedley and Kerns violated the Officers' First Amendment rights. Smedley and Kerns appealed.

The 8th Circuit Court of Appeals held that Smedley and Kerns were not entitled to qualified immunity because the Officers' had created a genuine dispute of material fact as to whether Smedley and Kerns violated their First Amendment rights.

To succeed on a First Amendment Retaliation claim, a party must prove (1) they engaged in protected activity, (2) the employer took an adverse employment action against them, and (3) the protected speech was a "substantial or motivating factor" in that decision to take the adverse employment action.

Here, Smedley and Kerns did not contest whether the Officers suffered an adverse employment action or the causal connection between the two events. The Court focused on the first element which was whether the Officers engaged in protected activity. The Court specified that for this analysis, a public employee engages in protected activity only if the employee "spoke as a citizen on a matter of public concern" and that if the speech "owes its existence to a public employee's professional responsibilities" it is not made as a private citizen.

The Court found that the Officers' speech, taken in the light most favorable to them, was made outside their regular duties as police officers. Many grievances within the Complaint Packet, such as reporting Kerns's alleged corrupt billing practices, or concerns with Kerns's alleged dissemination of explicit images, or alleged bias in favor of the Ararat Shriners organization, did not relate to their various duties as police officers.

Further, the Court found that the Officers' speech was a matter of public concern. The issues raised in the Complaint Packet largely concerned the integrity of the Department and its leadership. The Complaint Packet also included concerns about corruption, financial mismanagement, and investigative failures. Such allegations are related to institutional integrity—an important governmental function.

The Court then analyzed whether Smedley and Kerns proved that the Officers' speech had an adverse impact on the efficiency of the Department's operations. The Court found that Smedley and Kerns made the threshold showing of disruption to trigger the *Pickering* balancing test, under which a court decides whether the parties statements were of such public and social importance as to override the employer's substantial interest in maintaining the efficiency and reputation of the workplace, given the nature of the office. This analysis requires the court to look at: (1) the need for harmony in the work place; (2) whether the government's responsibilities require a close working relationship; (3) the time, manner, and place of the speech; (4) the context in which the dispute arose; (5) the degree of public interest in the speech; and (6) whether the speech impeded the employee's ability to perform his or her duties.

The Court held that despite Smedley and Kerns offering some evidence of interoffice disharmony, the *Pickering* factors weighed in favor of the Officers' First Amendment interest. The Complaint Packet alleged, among many other things, financial mismanagement, workplace misconduct, and serious investigative failures. The Court ruled that the public would certainly be interested in these issues. Moreover, there is no evidence that the Officers were unable to perform their job duties after submitting the Complaint Packet, and this was not an "extreme

situation," where "the employee unduly breached confidentiality or disrupted intimate working relationships."

Finally, the Court found that the Officers' First Amendment right was clearly established such that a reasonable official would have known firing them was unlawful, and the Court concluded Smedley and Kerns had fair notice their alleged adverse actions were unlawful. Thus, Smedley and Kerns were not entitled to qualified immunity.

The *Noon* case is a reminder that public employers should carefully analyze the factual circumstances preceding a disciplinary decision to evaluate if the employee engaged in protected activity under 42 U.S.C. Section 1983.

***Massaro v. Fairfax Cnty., 95 F.4th 895 (4th Cir. Mar. 19, 2024) – A Police Officer’s First Amendment Retaliation Claim Failed When the Alleged Protected Speech Was Made in the Context of a Police Department’s Internal Grievance Procedures***

Peter Massaro was a police officer with the Fairfax County Police Department. From February 2018 to May 2020, Massaro was the supervisor of the firearms training range at the Fairfax Criminal Justice Academy (the "Academy"). There, Massaro was responsible for training the entire Police Department, the Fairfax County Sheriff's Department, and the Police Departments for neighboring towns, in the use of firearms. Massaro, however, was frustrated after twice being passed over for promotion to First Lieutenant, even though he had passed the requisite examination and believed he was the most qualified candidate for the position. He was not selected in April 2018, nor was he selected in September 2018. To Massaro's chagrin, two women he saw as less qualified than him were promoted to First Lieutenant during these cycles: Marisa Kuhar and Loriann LaBarca.

When Kuhar was promoted, Massaro filed a discrimination complaint (2018 Complaint) with Fairfax's Office of Human Rights and Equity Programs (OHREP), alleging that Chief Edwin Roessler had promoted Kuhar instead of Massaro only because of Massaro's sex (later amended to include similar claims of age and race discrimination). Kuhar's promotion had since been rescinded and deferred, as Chief Edwin Roessler had mistakenly believed Kuhar possessed the credentials necessary for promotion. A male officer was promoted in Kuhar's place, and her promotion was deferred until she could complete the required educational credits. Massaro's 2018 Complaint was dismissed on the grounds that he had not suffered an adverse employment action on which a complaint could be based.

In May 2019, eight months after Massaro filed his 2018 Complaint, Chief Roessler was looking to reform the Academy where Massaro worked after a series of concerning events, including an accidental firearm discharge, allegations that a range instructor used a racial slur against black police officers, and a widespread failure to follow departmental policies. As part of the reform efforts, Chief Roessler transferred Major Paul Cleveland to the Academy to take over as commander. He hoped Major Cleveland could get the place back on track.

Massaro alleged that Major Cleveland was actually sent to the Academy to punish and ultimately get rid of Massaro as retribution for his 2018 complaint against Chief Roessler. Massaro alleged that when asked why he had been transferred to the Academy, Cleveland told Massaro that his “complaint against the Chief isn't helping you and isn't helping the situation.” When First Lieutenant Loriann LaBarca visited to the Academy on May 22, 2019, she asked Massaro if he believed she only got promoted because she was a woman. Massaro replied that there were others who were more qualified than her to be First Lieutenant, and that he believed sex was a "decisive factor" in her promotion, angering LaBarca.

LaBarca reported the conversation to Major Cleveland. Major Cleveland disclosed the matter to the IAB investigators on duty, who decided to launch a formal investigation into the matter. IAB investigators Second Lieutenants Andrew Hirshey and Dana Ferreira met with Massaro. The conversation went off the rails, leading to an incensed Massaro opining at length about why his confrontation with LaBarca was justified. Massaro was inflamed, pacing about the room in a fury. Major Cleveland entered the interview room and spoke to Massaro, allegedly telling him that he thought “that Loriann LaBarca makes a fine commander. What do you think about that?” Major Cleveland then left the room. When Hirshey and Ferreira returned, they told Massaro he would be relieved from duty for violating Department Regulation 201.14 against unlawful discrimination and Regulation 201.13 mandating that employees treat individuals with respect, courtesy, and tact. Massaro was placed on leave and appealed the IAB findings.

After a lengthy departmental appeals process that ultimately reduced Massaro’s termination to a disciplinary assignment transfer out of the Academy, the case came to Chief Roessler who was the final decisionmaker in the Department on such matters pursuant to Virginia state law. Chief Roessler upheld the findings and transferred Massaro from the Academy over fierce objection by Massaro.

Massaro sued Fairfax County in the Eastern District of Virginia, alleging retaliation in violation of Title VII, the ADEA, and the First Amendment under 42 U.S.C. Section 1983. After discovery, both parties moved for summary judgment. The Court found that all three of Massaro’s claims failed because there was no evidence showing a causal relationship between Massaro's protected activity (the 2018 Complaint against Chief Roessler) and the adverse employment action Massaro suffered, nor that the alleged protected activity was a substantial factor in the Department’s decision to discipline him. Massaro appealed.

The Fourth Circuit Court of Appeals upheld the trial court’s ruling that Massaro could not prevail on either his Title VII and ADEA claims. Turning to Massaro’s 42 U.S.C. Section 1983 claim, the Court held that Massaro’s 2018 Complaint, made via an internal grievance process, does not reflect a matter of public concern. The Court reasoned that although "discriminatory institutional policies or practices can undoubtedly be a matter of public concern," Massaro did not file his 2018 Complaint to draw public attention to the problems he saw with the Department. Instead, Massaro's real beef (in the Court’s words) with the Department was that he, personally, was not promoted in lieu of a woman he viewed as unqualified. Here, Massaro filed his complaint with OHREP, the County office charged with investigating grievances and complaints

made by County employees. Massaro thus sought to improve his own station by following internal procedures, rather than by communicating the alleged discriminatory practices to the public through a more transparent and accessible medium. Thus, the Court held that while he had every right to communicate through a more public and transparent medium, the strategy he actually took reflected the private nature of his speech.

Finally, the Court reasoned that to transform run-of-the-mill employee complaints into social and political commentaries backed by the full weight of the Constitution would turn the workplace into a constitutional landmine, while offering public employees inflated speech rights not shared by their private counterparts. Thus, the Court affirmed the district court's grant of summary judgment to the County on Massaro's First Amendment claim.

The *Massaro* case is instructive on when speech made by a public employee is a matter of public or private concern. This also requires careful analysis of the factual circumstances around how and when the speech at issue was made.

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

**Labor and Employment  
Litigation Update**

*5/9/2024*

*PRESENTED BY:*

Elizabeth T. Arce and Jennifer Rosner

# Labor and Employment Litigation Update

League of California Cities: City Attorneys Spring Conference | May 9, 2024

Presented by: Elizabeth Tom Arce & Jennifer Rosner



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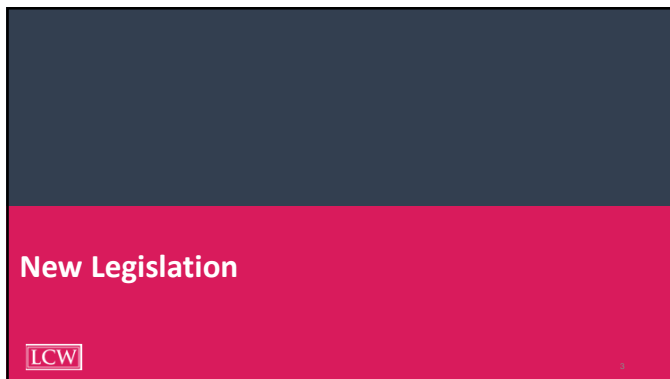
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# Labor and Employment Litigation Update

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**Public Records Act**

- Senate Bill 400 – Law Enforcement Agencies May, but are Not Required to, Release Statements Announcing Terminations of Police and Custody Officers
  - Penal Code Section 832.7(b)(13)

LCW LIEBERT CASSIDY WHITMORE

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**Workplace Violence Prevention**

- SB 553 – Employers Must Implement and Train Employees on a Workplace Violence Prevention Plan by July 1, 2024
  - Labor Code Section 6401.7 & 6401.9 (Effective 1/1/24, compliance required 7/1/24)

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**Employee Discrimination & Discipline**

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# Labor and Employment Litigation Update

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**Discrimination – Liability**

- The California Supreme Court Significantly Expands the Liability of an Employer’s Agents
  - *Raines v. U.S. Healthworks* (8/21/23) 15 Cal.5th 268

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**Discrimination – Sanctions**

- Terminating Sanctions Were Proper in an Employment Discrimination Case Where Ample Circumstantial Evidence Showed That The Plaintiff Deleted and Hid Text Messages With Witnesses, Intentionally Spoliating Electronic Evidence
  - *Jones v. Riot Hospitality Group LLC* (9th Cir. 2024) 95 F.4th 730

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**Hostile Work Environment**

- University Had a Legitimate Reason to Terminate a Department Director When the Director Harassed and Retaliated Against Other Department Employees, Creating a Hostile Work Environment
  - *Martin v. Board of Trustees of California State University* (11/14/2023) 97 Cal.App.5th 149

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**Discipline**

- Detention Officer's Disciplinary Appeal was Premature Because the Trial Court's Order That the Personnel Board Reconsider its Findings was Not a "Final Appealable Judgment"
  - *Jackson v. Board of Civil Service Commissioners of City of Los Angeles* (2/8/2024) 99 Cal.App.5th 648

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**Workers Compensation & Retirement**

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**Workers Compensation**

- City Firefighter Could Not Sue City for Negligence Because Workers Compensation is the Exclusive Remedy for Employees
  - *Vann v. City and County of San Francisco* (12/12/2023) 97 Cal.App.5th 1013

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**Retirement**

- Payroll Employee Forfeited Years Of CalPERS Benefits Upon Her No Contest Plea
  - *Estrada v. Public Employees' Retirement System* (9/21/23) 95 Cal.App.5th 870

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**Labor Law**

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**Labor Law**

- Employee's Service As A Union Officer Was Protected Activity But The District Was Justified In Terminating Her For Numerous Errors
  - *Visalia Unified School Dist. v. Public Employment Relations Bd.* (1/9/2024) 98 Cal.App.5th 844

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**Labor Law**

- Emergency Did Not Relieve County of Duty To Give Notice And An Opportunity To Bargain
  - *Registered Nurses Professional Association and S.E.I.U. Local 521 v. County of Santa Clara* (10/17/23) PERB No. 2876-M – JUDICIAL APPEAL PENDING

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**Labor Law**

- Prohibiting Union-Related Insignia On University Vehicles Was Unlawful
  - *Teamsters Local 2010 v. Regents of the University of California* (10/24/23) PERB No 2880-H

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**Labor Law**

- PERB Finds Retaliation but no Denial of Right to Union Representation
  - *State of California (California Correctional Health Care Services)* (2/8/24) PERB Dec. No. 2888-S – JUDICIAL APPEAL PENDING

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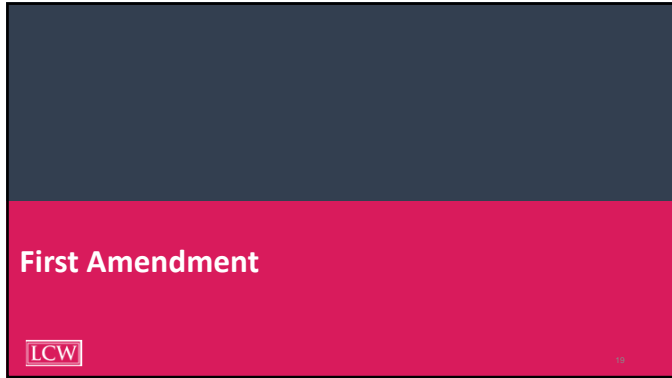
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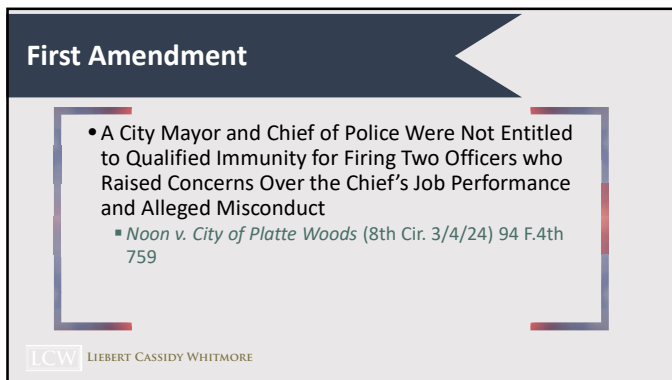
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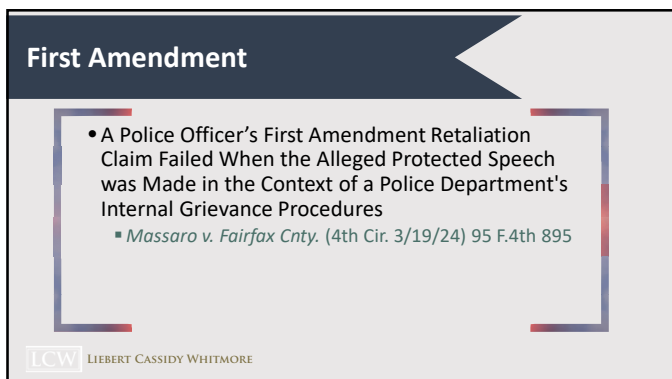
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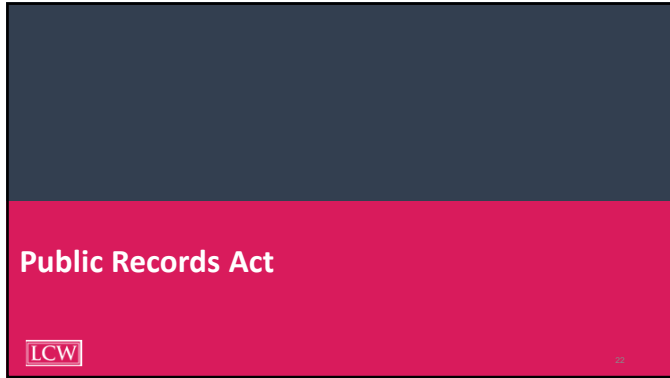
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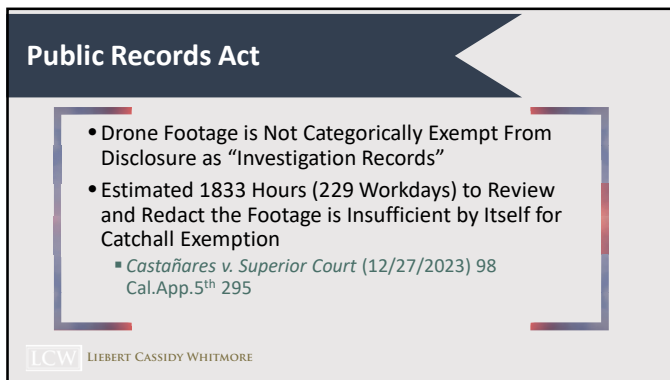
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# General Municipal Litigation Update

Friday, May 10, 2024

Mark J. Austin, Partner, Burke, Williams & Sorensen, LLP  
Meghan A. Wharton, Senior Counsel, Colantuono, Highsmith & Whatley, PC

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GENERAL MUNICIPAL  
LITIGATION UPDATE  
FOR  
LEAGUE OF CALIFORNIA CITIES  
ANNUAL CONFERENCE  
SPRING 2023

Prepared by

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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* (1<sup>st</sup> 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:

Actions of City Clerk: 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*).

Whether Act Was Subject to Referendum: 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 Rath.

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 Rath 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 Rath 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, Bucknam, and Rath 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, Bucknam, and Rath 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* (9<sup>th</sup> 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. The 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 action 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. was 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 and 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 voted, 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 apply. 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 from 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 a 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

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 be 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 on 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 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.



# Balancing Acts – Constitutional Rights v. Meeting Decorum in California Cities

Friday, May 10, 2024

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**Balancing Acts: Constitutional Rights v. Public Meeting Decorum in California Cities**

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## I. INTRODUCTION

What can a city council do if a member of the public flashes a Nazi salute during a public meeting, insists on exceeding their time for public comment, utters hateful words, wears offensive clothing, or engages in speech that councilmembers find offensive and disturbing? Does a city have different options for dealing with a member of the public who accuses the mayor of being a liar during their public statement, versus a citizen who drowns out other speakers with protests and chants for a councilmember to resign? What is a city council able to do to censure an “outlier” councilmember who engages in speech or conduct that the majority of the council dislikes, takes political positions they vehemently oppose, or engages in socially unsavory conduct?

These types of questions and issues – and cities’ efforts to maintain order and decorum during public meetings – implicate a nuanced and evolving area of First Amendment jurisprudence. Indeed, there is a natural tension between the strictures of the First Amendment – which generally guarantees the right of the public to engage in speech unfettered by government regulation – and the significant objective of public entities to maintain decorum and avoid disruptions during public meetings of their governing bodies so that the public’s business can be conducted. This tension has been exacerbated in recent times with the increased polarization of many matters within the public sphere, and the often inflammatory effects of social media. Indeed, social media has extended the virtual boundaries of “public meetings,” forcing courts to apply established First Amendment principles and rules to novel situations.

The purpose of this paper is provide an overview of, and guidance as to how public entities should tread through the factually complex and nuanced issues at play here. We’ll review pertinent rules governing the running of public meetings, and the corresponding rules under which public entities can seek to maintain decorum during public meetings without

running afoul of the First Amendment and subjecting themselves to civil liability under state and federal law. We'll look at the standards that apply to members of the public as well as councilmembers themselves. We'll survey key court rulings, including decisions by the U.S. Supreme Court, the Ninth Circuit, and the District Courts sitting in California. Finally, we'll review how courts have applied these First Amendment principles and rules in the realm of social media use by government officials.

## **II. FIRST AMENDMENT BASICS**

Generally, the First Amendment prohibits the government from restricting speech and punishing speakers for their speech. However, there are certain well-established exceptions to this where speech is not protected under the First Amendment and where the government can regulate, prohibit, and punish citizens for such speech. These include:

- Obscenity
- Libel/slander
- True threats

Outside of these exceptions, the First Amendment's protections are very broad. Although "freedom of speech" is familiar to almost all in this country, many people – including elected officials – are still surprised to learn that the First Amendment's broad protections extend to even speech labeled as "hate speech." Indeed, courts have confirmed that the First Amendment's protections extend to, for example, racist public demonstrations by organizations such as the KKK, Nazi public marches, a fire paramedic's Facebook post expressing violence towards liberals related to gun control, a police officer's Facebook post showing President Obama being

hung and disparaging the Black Lives Matter movement, and the burning of a cross at a political rally.<sup>1</sup>

Even where speech falls under the First Amendment’s protections, governments may still regulate the speech to some degree without offending the First Amendment. The extent to which the government can permissibly regulate speech depends on the setting in which the speech takes place. For example, the government is given less latitude to regulate speech that takes place in public places that were traditionally open to free speech than in specified publicly-owned properties, such as a government office. Courts refer to such settings as “forums” and the system of categorization of such forums as forum classification analysis.

There are four general types of forums for First Amendment categorization:

1. **Traditional Public Forums.** These are spaces, such as public sidewalks or public parks, that have traditionally been open to free speech by any individual. The First Amendment protections for speech occurring in traditional public forums is the strongest and most well-established.
2. **Designated Public Forums.** These are public spaces that do not qualify as a traditional public forum, but that have been opened up by the government for free expression without any stated rules or limitations. The First Amendment protections for speech occurring in designated public forums are akin to those in traditional public forums.
3. **Limited Public Forums.** These are public spaces that have been opened up by the government for expression, but with express limitations. The First Amendment

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<sup>1</sup> See, e.g., *Moser v. Las Vegas Metro. Police Dep’t*, 984 F.3d 900 (9th Cir. 2021); *Grutzmacher v. Howard Cnty.*, 851 F.3d 332 (4th Cir. 2017).

protections for speech occurring in limited public forums is more limited than in traditional or designated public forums.

4. **Non Public Forums.** These are properties owned by the government that have been entirely closed off to expression by members of the public. Examples of nonpublic forums include airport terminals, military bases, and a government’s website.

For both traditional public and designated public forums, the government’s regulation of speech is generally limited to “time, place and manner” restrictions. Such restrictions cannot concern the content, topics, or views of the speech that will be permitted, but are instead limited to the times of day when speech will be permitted, the locations where speech will be permitted, and the manner of speech permitted. For example, a city might have an ordinance that prohibits amplified speech within residential neighborhoods after a certain time of night. Regulations of the content of speech in traditional and designated public forums is only permitted under the First Amendment where it meets “strict scrutiny,” which means the regulation has to be narrowly tailored for achieving a “compelling government interest.”<sup>2</sup>

In a limited public forum, the government can impose *content* based regulations – such as restricting speech to certain topics – but cannot impose *viewpoint* regulations. Strict scrutiny, however, does not apply.<sup>3</sup> For example, a city could open up the inside of city hall – a limited public forum – to host an art exhibit about the city, while prohibiting members of the public from getting on a soapbox and speaking about other matters. However, the city could not limit the art

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<sup>2</sup> *Pleasant Grove City, Utah v. Summum*, 555 U.S. 460, 469 (2009).

<sup>3</sup> *Hopper v. City of Pasco*, 241 F.3d 1067, 1075 (9th Cir. 2001).

displayed in that exhibit to works that are, say, flattering of sitting officials, while excluding works that are critical of such officials.<sup>4</sup>

In a non-public forum, the government can limit speech to only that which it wishes to convey. For example, a city can use its website to post messages of its choosing without allowing alternative views or additional content to be supplied by the public. The city can exclude all content that it disagrees with and only allow content that it approves of.

### **III. FIRST AMENDMENT AND PUBLIC MEETINGS**

#### **A. Maintaining Order During Public Meetings**

Under First Amendment law, city council public meetings are generally deemed to be limited public forums.<sup>5</sup> As such, a city can regulate not only the time, place, and manner of speech at a public city council meeting, but also the content of speech allowed during the meeting, provided such content-based regulations are viewpoint neutral and enforced consistently the same way.<sup>6</sup> For example, a city council “does not violate the first amendment when it restricts public speakers to the subject at hand.”<sup>7</sup> Thus, a speaker can be interrupted if they insist on addressing a matter that does not fall under the established agenda. However, a speaker cannot be interrupted or curtailed because the council disagrees with the viewpoint the speaker expresses on a matter covered by the agenda item at issue.<sup>8</sup>

Speech at a city council meeting may be stopped by a city, however, if it constitutes an “actual disruption.” “A speaker may disrupt a Council meeting by speaking too long, by being

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<sup>4</sup> *Id.* at 1078.

<sup>5</sup> *Norse v. City of Santa Cruz*, 629 F.3d 966, 975 (9th Cir. 2010).

<sup>6</sup> *Id.*

<sup>7</sup> *White v. City of Norwalk*, 900 F.2d 1421, 1425 (9th Cir. 1990).

<sup>8</sup> *Id.*



unduly repetitious, or by extended discussion of irrelevancies.”<sup>9</sup> The “actual disruption” standard is relatively low, but a disruption must have occurred. A city cannot pre-determine what type of language or statements will result in a disruption. And, the line between an actual and potential disruption may be difficult to draw. Although disruptive conduct need not rise to the level of a “breach of the peace” or “fighting words,” a mere violation of the council’s rules of decorum does not automatically mean that a speaker has become a disruption such that their speech can permissibly be stopped or the speaker permissibly removed.<sup>10</sup> Actual disruption is also measured by the effect on the audience and the proceedings, not by how the speech is perceived by individual councilmembers. Actionable disruption occurs when the council is prevented from accomplishing its business in a reasonably efficient manner, or where the speaker’s conduct interferes with the First Amendment rights of other speakers.<sup>11</sup>

Court decisions within the Ninth Circuit illustrate how the “actual disruption” standard operates in practice:

- Permissible to remove man who had previously disrupted proceedings when his cohort made an obscene gesture that threatened to re-start a previous disruption.<sup>12</sup>
- Triable issue of fact as to whether a silent Nazi salute caused an actual disruption and thus court reversed grant of summary judgment.<sup>13</sup>
- Actual disruption found where speaker stated “your president is pathetic and hopeless and is not doing a very good job and you need to get together and lose her.”<sup>14</sup>

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<sup>9</sup> *Id.* at 1426.

<sup>10</sup> *Id.* at 1425.

<sup>11</sup> *Id.* at 1426.

<sup>12</sup> *Kindt v. Santa Monica Rent Control Bd.*, 67 F.3d 266 (9th Cir. 1995).

<sup>13</sup> *Norse*, 629 F.3d at 970.

<sup>14</sup> *Dowd v. City of Los Angeles*, No. CV 09-06731 (SSx), 2013 WL 4039043, \*18 (C.D. Cal. Aug. 7, 2013).

The power to determine when an actual disruption has occurred rests with the public meeting chair or moderator, such as the mayor, and entails a great deal of discretion.<sup>15</sup> It is an abuse of the meeting chair’s discretion to eject speakers simply because of a disagreement with their speech or choice of words. Although a city council can set time limits for public speakers to address agenda items set by the council – and violations of time limits can rise to the level of actual disruptions – the council must enforce such time limits in an even handed manner.<sup>16</sup> Given that the determination of whether particular speech is disruptive may be imprecise, a city may wish to let a disruptive speaker exceed their time limit as a basis to remove them or stop them from speaking rather than basing such decisions on the disruptive impact of their speech. To reduce the risk of liability for improperly stopping speech, the chair of a public meeting should also coordinate with the city attorney and city manager to monitor public comments for purposes of determining if they rise to the level of an actual disruption.

#### **B. Rules of Decorum for Councilmembers**

In addition to regulating the speech of members of the public during public meetings – through time, place, and manner restrictions – city councils are often concerned about, and respond to, the conduct and speech of their own members. Cities may adopt specific “rules of decorum” intended to ensure civility and order during meetings by both members of the governing body as well as the public. Elected bodies, such as councils, may also adopt resolutions in response to specific instances of speech and conduct by individual and specific members of the body. However, such actions must heed the unique First Amendment rules and principles at play.

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<sup>15</sup> See *White*, 900 F.2d at 1426; see *Acosta v. City of Costa Mesa*, 718 F.3d 800, 810 n.5 (9th Cir. 2013).

<sup>16</sup> *Ribakoff v. City of Long Beach*, 27 Cal.App.5th 150 (2018).

Generally, decorum policies addressing aspirational goals for civility – such as using “respectful language” – will not run afoul of the First Amendment. However, a blanket ban on protected speech will generally be found unconstitutional. For example, a policy cannot prohibit a councilmember from commenting on the performance of staff members, or prohibit councilmembers from wearing certain articles of clothing, such as a Blue Lives Matter pin, or a Black Lives Matter mask, etc.<sup>17</sup>

However, the analysis becomes more complex where specific actions taken by a city’s legislative body in response to the speech or conduct of one of its elected members is at play. On the one hand, courts have consistently held that the First Amendment requires that “legislatures be given the widest latitude to express their views on issues of policy.”<sup>18</sup> On the other hand, courts recognize that legislative bodies have greater leeway to censure and criticize the speech and conduct of their peer elected officials due the unique nature of electoral politics.<sup>19</sup> And elected officials are entitled to “a protected interest in speaking out and voting their conscience on the important issues they confront.”<sup>20</sup> Accordingly, evaluating the constitutionality of a council’s actions taken against an individual member of the council for their speech is not analyzed as a typical First Amendment retaliation case, and the bar for finding a public entity’s response as unconstitutional is somewhat higher.<sup>21</sup>

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<sup>17</sup> *White*, 900 F.2d at 1425.

<sup>18</sup> *Bond v. Floyd*, 87 S.Ct. 339, 349 (1966); *Degrassi v. City of Glendora*, 207 F.3d 636, 647 (2000).

<sup>19</sup> *Blair v. Bethel Sch. Dist.*, 608 F.3d 540, 544 (9th Cir. 2010) (“more is fair in electoral politics than in other contexts”); *Houston Cmty. Coll. Sys. v. Wilson*, 595 U.S. 468, 475, 142 S. Ct. 1253, 1259, 212 L. Ed. 2d 303 (2022) (“elected bodies in this country have long exercised the power to censure their members”).

<sup>20</sup> *Id.*

<sup>21</sup> *See Nieves v. Bartlett*, 139 S. Ct. 1715, 1722, 204 L. Ed. 2d 1 (2019).

For example, a council can typically censure a specific councilmember for their speech or conduct, and can, in effect, rebuke a councilmember for their speech and conduct by stripping them of their titular roles and membership on committees.<sup>22</sup> Although similar types of actions might result in a First Amendment violation were they to be taken against, say, a city's employee, courts deem such actions permissible under the First Amendment when undertaken against elected officials due to the nature of the political process. So long as councilmembers retain the full range of rights and prerogatives that come with having been publicly elected (such as voting and attending meetings), actions taken against members by the body at large – even in response to protected speech or conduct – will typically pass constitutional muster.<sup>23</sup> However, attempting to remove a specific councilmember from their elected office, or prohibiting them from voting or attending meetings, *will* violate the First Amendment.

For example, in *Houston Community College System v. Wilson*, plaintiff board member of the community college system disagreed with the other board members about the best interests of the community college, and brought a lawsuit challenging the board's action.<sup>24</sup> In response, the Board publicly reprimanded plaintiff and then publicly, verbally censured him. The Supreme Court held that although the plaintiff had a First Amendment right to speak out on questions of government policy, the other board members also had a First Amendment right to speak out. The Court recognized that the censure at issue did not prevent the plaintiff board member from doing his elected job, nor deny him any privilege of his elected office. In other words, censure is

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<sup>22</sup> *Houston Cmty. Coll. Sys. v. Wilson*, 595 U.S. 468, 475 (2022)

<sup>23</sup> *Blair*, 608 F.3d at 544.

<sup>24</sup> *Houston Cmty. Coll.*, 595 U.S. at 475.

not akin to exclusion from office. Accordingly, the plaintiff board member did not possess an actionable First Amendment claim arising from the board's purely verbal censure.

Similarly, in *Collins v. San Francisco Unified School District*, old "tweets" by school board member Collins resurfaced and were viewed as anti-Asian and racist.<sup>25</sup> In response, the school board passed a resolution calling for Collins's resignation. The school board resolution also removed Collins from her role as vice president of the board and removed all of her committee assignments. Board member Collins then sued the school district for First Amendment retaliation. The District Court for the Northern District of California ruled in favor of the school district on a motion to dismiss for the same reasons at play in *Houston Community College* discussed above.<sup>26</sup>

We've reviewed how purporting to remove an elected official from office, including depriving them of the ability to vote, violates the First Amendment, but that mere verbal censures and stripping a councilmember of titles and committee assignments will typically pass constitutional muster. However, can a council ever eject a councilmember from a public meeting in response to their speech without violating the Constitution? Yes. But removal of a councilmember or stopping them from speaking should only occur where the councilmember's speech constitutes an "actual disruption."<sup>27</sup> To preclude and/or restrict the speech of a sitting councilmember short of an actual disruption is unchartered legal territory and should be avoided by a public entity or its elected body.

#### **IV. SOCIAL MEDIA AND THE FIRST AMENDMENT**

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<sup>25</sup> *Collins v. San Francisco Unified Sch. Dist.*, No. 21-CV-02272-HSG, 2021 WL 3616775, at \*1 (N.D. Cal. Aug. 16, 2021).

<sup>26</sup> *Collins*, 2021 WL 3616775, at \*3.

<sup>27</sup> *Norse*, 629 F.3d at 976.

Public meetings and opportunities for protected speech between elected officials and members of the public are no longer confined to in-person meetings or a physical public space like a sidewalk or council chamber. Today, elected officials and governing bodies frequently address government business, interact with constituents, and allow for public speech using online forums and social media. Although Courts have recognized the need to apply First Amendment principles to social media and other such online environments, this area of jurisprudence is new and developing due to the relative novelty of the technology and platforms at hand. Commentary from the Supreme Court illustrates this:

- The Internet and social media sites are akin to “the modern public square”<sup>28</sup>
- Social media is “perhaps the most powerful mechanism available to a private citizen to make his or her voice heard”<sup>29</sup>
- Anyone can “become a town crier with a voice that resonates farther than it could from any soapbox”<sup>30</sup>
- Twitter enables people to “petition their elected representatives and engage with them in a direct manner”<sup>31</sup>

Whether the First Amendment will apply to a social media account or space will depend on the extent to which the account is being used for official versus merely personal use. If the social media account is for personal use only – for example a mayor’s personal Facebook page that is limited to personal matters – speech on the account can be controlled and limited by the administrator of the account (in this case the mayor), without running afoul of the First Amendment. However, if the account is used for official speech, First Amendment strictures might apply, which will be further addressed below.

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<sup>28</sup> *Packingham v. North Carolina*, 582 U.S. 98, 99 (2017).

<sup>29</sup> *Id.* at 1732.

<sup>30</sup> *Id.* at 1737.

<sup>31</sup> *Id.* at 1735.

Once a social media account is deemed to be used for official purposes, courts will employ the forum selection analysis discussed earlier in this paper to the social media account at issue to determine what level of restriction of speech will be tolerated under the First Amendment.

- Social media is not currently considered a “traditional public forum.” Depending on how social media use and this area of jurisprudence develop, this could potentially change in the future.
- A social media page that is open to the public where members of the public can make comments without any limitations, will be deemed “designated public forum.” As such, only content-neutral time, place, and manner restrictions would be allowed for such social media accounts.
- A social media page open to the public but with limits on the topics for commentary – provided such limits are consistently enforced – will be deemed a “limited public forum.” As such, the content of the speech allowed on the site or account could be limited to certain content or topics provided it does not discriminate based on viewpoint.
- A social media page limited to government speech only would be a non-public forum. This might be, say, a Facebook page for a city where the commenting feature has been turned off.

One of the most dynamic issues concerning the intersection of the First Amendment and social media is whether a particular social media account is official versus personal in nature. For example, in *Knight v. Trump*, the Second Circuit held that then-President Trump’s Twitter account was a public forum – opened to the public – because he communicated about official business through the account and users were allowed to post their comments and reactions. As a result, Trump could not limit speech on the account based on the views expressed by speakers, such as by deleting or banning certain speakers from the account.<sup>32</sup>

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<sup>32</sup> *Knight First Amend. Inst. at Columbia Univ. v. Trump*, 928 F.3d 226, 230 (2d Cir. 2019), *cert. granted, judgment vacated sub nom. Biden v. Knight First Amend. Inst. At Columbia Univ.*, 141 S. Ct. 1220 (2021), and *abrogated by Lindke v. Freed*, 601 U.S. 187 (2024). The Supreme Court subsequently vacated the Second Circuit’s decision on mootness grounds because President Trump was no longer in office. *Biden v. Knight First Amend. Inst. At Columbia Univ.*, 141 S. Ct. 1220 (2021).

In *Davison*, the Fourth Circuit ruled similarly to the Second Circuit in *Knight*.<sup>33</sup> There, the chair of a county board of supervisors operated a Facebook page, which provided information about official activities and solicited input from the public. When one user, the plaintiff in the case, made comments about the alleged unethical use of government funds, the board chair deleted the comments and temporarily blocked the user. The Fourth Circuit held that the interactive component of the page was a public forum because it was used for official business, and invoked the “power and prestige of the office.” As such, deleting and blocking critical comments constituted unconstitutional viewpoint restrictions.<sup>34</sup>

The Eight Circuit’s decision in *Campbell v. Reisch* illustrates that not all social media hosted by public officials are protected by the First Amendment.<sup>35</sup> In *Campbell*, the plaintiff sued a lawmaker for blocking her on the lawmaker’s Twitter page. The Eight Circuit explained that the First Amendment only applies to government control of speech, but that action within the ambit of personal pursuits is not protected. The Court held that the lawmaker’s Twitter page – which was focused on campaigning – was not used for a government purpose and was not an action “under color of law.”<sup>36</sup>

Most recently, the Supreme Court clarified the appropriate approach to such issues and the relevant standards at play in *Lindke v. Freed*.<sup>37</sup> Its decision not only clarifies how courts should approach the First Amendment analysis concerning social media accounts, it also illustrates that this inquiry is often going to be highly fact intensive. In *Lindke*, a city manager

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<sup>33</sup> *Davison v. Randall*, 912 F.3d 666 (4th Cir. 2019), *as amended* (Jan. 9, 2019).

<sup>34</sup> *Id.* at 681.

<sup>35</sup> *Campbell v. Reisch*, 986 F.3d 822 (8th Cir. 2021).

<sup>36</sup> *Id.* at 825.

<sup>37</sup> *Lindke v. Freed*, 601 U.S. 187, 188 (2024).



operated a Facebook page addressing mostly personal matters but also commenting on aspects of his job and soliciting feedback from the public, including addressing issues related to the Covid 19 pandemic. Plaintiff Lindke would post comments expressing his displeasure with the city's approach to the pandemic. In response, the city manager would sometimes delete such posts, and eventually blocked Lindke entirely, which resulted in Lindke filing a Section 1983 lawsuit alleging violations of his First Amendment rights. The District Court denied the claim, finding that the city manager operated his Facebook page in his private capacity. The Sixth Circuit affirmed.<sup>38</sup>

The Supreme Court granted cert for the express purpose of clarifying the standards that apply to such cases. The Court explained that “[a] public official’s social-media activity constitutes state action under §1983 only if the official (1) possessed actual authority to speak on the State’s behalf, and (2) purported to exercise that authority when he spoke on social media.”<sup>39</sup> The appearance and function of the social-media activity are relevant at the second step, but they cannot make up for a lack of state authority at the first.” In the case at hand, the Court stated that if the city manager’s Facebook page was labeled as his “personal page,” he would be entitled to a “strong presumption” that the views expressed were his in a personal capacity and not state action. However, recognizing that there was no such label, the Court noted that as a general matter, a “post that expressly invokes state authority to make an announcement not available elsewhere is official, while a post that merely repeats or shares otherwise available information is more likely personal.”<sup>40</sup> The Court noted that “[l]est any official lose the right to speak about

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<sup>38</sup> *Lindke v. Freed*, 37 F.4th 1199, 1207 (6th Cir. 2022), *cert. granted*, 143 S. Ct. 1780 (2023), and *vacated and remanded*, 601 U.S. 187 (2024).

<sup>39</sup> *Lindke*, 601 U.S. at 188.

<sup>40</sup> *Id.* at 203.

public affairs in his personal capacity, the plaintiff must show that the official purports to exercise state authority in specific posts.” The Supreme Court ultimately reversed and remanded to the lower court to analyze the facts accordingly.

The high court contemporaneously reversed a similar Ninth Circuit decision, *O’Connor-Ratcliff v. Garnier*. In *O’Connor-Ratcliff*, the Ninth Circuit found state action – where a school district trustee deleted and then blocked social media comments from members of the public who were critical of the school board – because there was a “close nexus between the Trustees’ use of their social media pages and their official positions.”<sup>41</sup> The Supreme Court reversed on the grounds that the legal standard employed by the Ninth Circuit departed from the rule the Supreme Court articulated in *Lindke*.

In sum, *Lindke* appears to stand for the proposition that, in the context of social media, the bar for finding the existence of state action is likely higher – due to the First Amendment rights of the official at play – than might be the case in other contexts. This is because, under the approach articulated in *Lindke*, it will not typically be sufficient, for a finding of liability, that the official simply *purports* to act with official authority or under color of law. Rather, the official must have had actual authority to engage in the speech in question, and must have been purporting to exercise such authority in the specific social media post at hand. This means that First Amendment challenges regarding social media are likely to be highly fact specific matters.

## V. CONCLUSION

In the realm of maintaining order and decorum during public meetings, there are well-established First Amendment principles that public entities should be aware of and comply with:

- Viewpoint restrictions are essentially never permitted under the First Amendment.

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<sup>41</sup> *O’Connor-Ratcliff v. Garnier*, 601 U.S. 205, 208 (2024).

- Traditional public forums are subject to time, place, and manner restrictions.
- Content restrictions are permitted only in limited public forums that have established rules regarding the content that will be allowed.
- City council meetings and other similar public entity board meetings are deemed to be limited public forums subject to time, place, and manner restrictions, but where content can also be regulated provided it is viewpoint neutral and consistently enforced.
- A city council *cannot* prevent a citizen from speaking or remove the citizen if their speech falls within the agenda topic and within the timeframe they have been afforded.
- A city council *can* prevent a citizen from speaking or remove the citizen from the meeting if their speech constitutes an actual disruption, including exceeding their allotted time period for public comment.
- Although an elected body can censure one of its members for their speech and conduct – including their speech and conduct undertaken in a personal capacity – the individual councilmember cannot be deprived of the rights of their elected office.

In the realm of social media, courts have not been shy to use established First

Amendment principles to address virtual public spaces and what level of speech regulations will be permissible. The applicable First Amendment rules that will be at play will often result in a highly fact intensive analysis as the Supreme Court's recent decision in *Lindke* illustrates.

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# Are You Smarter Than an AI?

Friday, May 10, 2024

Marc Zafferano, Senior Counsel, Boucher Law

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## ARE YOU SMARTER THAN AN AI?

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CalCities City Attorney Conference

## Are You Smarter Than an AI?

After being featured in sci-fi movies for decades, mostly in doomsday scenarios in which humans battle an omnipotent AI for control of the planet, artificial intelligence (AI) is now a reality that pervades all our interactions with the online world. This paper explores the legal, ethical, and practical issues that the use of AI presents to cities, and by extension to other public entities.

Aside from using traditional internet search engines that have already incorporated AI into their inner workings, the only contribution AI made to this paper is suggesting an alternative title: "Navigating the Legal Landscape of Artificial Intelligence in Municipal Governance: Challenges, Opportunities, and Best Practices for City Attorneys in California." Two additional disclaimers are necessary: First, developments in AI are occurring so rapidly that some information in this paper is likely to be outdated within days, if not hours, of having written it. To stay current, the author recommends signing up for one or more of the many newsletters issued periodically by the government agencies or universities listed as references at the end of this paper. Or, if you click on AI news stories in your online news sources, the AI that's monitoring and cataloguing your preferences will be happy to feed you more AI stories, keeping you fully informed about any recent developments. Second, this paper is intended to equip city attorneys with an understanding of the potential uses and risks of AI, so they can ask the right questions, even though courts and legislatures have yet to fully answer those questions in precedential decisions or binding regulations. This paper includes examples of regulatory efforts at the federal, state, and local levels in Section VI below.

### I. What is Artificial Intelligence?

There are many available summaries and definitions that describe what AI is, the types of AI, and how they work. One of the most complete summaries was provided by Professor Christopher Manning in the September 2020 issue of the Stanford Human Artificial Intelligence (HAI) publication.<sup>1</sup> Professor Manning's summary has been reprinted in part from that publication and edited for clarity and brevity below.

Artificial Intelligence (AI), a term coined by then-emeritus Stanford Professor John McCarthy in 1956, was defined as "the science and engineering of making intelligent machines." Machine Learning (ML) is the term describing how computer agents can improve their perception, knowledge, thinking, or actions based on experience or data, generally by assimilating human labels for objects or situations and then learning to navigate novel environments. Deep Learning is the use of large multi-layer artificial neural networks that compute with continuous (real number) representations, like the hierarchically organized neurons in human brains. An algorithm lists the precise steps to take to maximize learning or the reward, however defined for the task. Much of the AI's behavior emerges via learning from data or experience. Narrow AI is an intelligent system for one application, e.g., speech or facial recognition. Human-level AI, or Artificial General Intelligence (AGI), refers to broadly intelligent, context-aware machines. It is needed for effective social chatbots or human-robot interaction.

Large Language Models (LLMs) are designed to ingest and process extremely large amounts of data gathered from a source such as the internet, or perhaps solely from data generated by the enterprise. To respond to a prompt, the machine is programmed to determine the probability that a particular word would begin the response given the prompt, then iterates that process for every subsequent word. This contrasts with the "if this, then that" syllogistic

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<sup>1</sup> <https://hai.stanford.edu/sites/default/files/2020-09/AI-Definitions-HAI.pdf>.

programming that was used to design most software in the past. The result, generated in mere milliseconds, is remarkably like human language. These models are now in general use for a wide variety of tasks.

Artificial Generative Intelligence (AGI) is the broadest type of AI, defined as a model that uses vast amounts of data to generate novel responses. LLMs such as Chat GPT are examples of AGI. But regardless of how “intelligent” these machines sound when generating responses to queries, neuroscientist Nancy Kanwisher of the Georgia Institute of Technology reminds us that they’re not “thinking, they’re just processing and skillfully manipulating language in a way that mimics thought.” Ben Goetzel of the AI company SingularityNET noted that even the most sophisticated AGIs flunk the “robot college student test”: you can’t put them [an AI] through college (or indeed even nursery school).<sup>2</sup>

## II. A Brief-ish History of AI

The Wikipedia article on this topic is detailed, comprehensive, and a fascinating read, as it chronicles the arc of progress in AI over several millennia.<sup>3</sup> For purposes of this paper, there are three main takeaways. One takeaway from the historical context is that there are theoretical limits arising from mathematics and computer science that will always make it impossible to fully predict and replicate the behavior of an AI. As AIs become more complex and as their structure more closely approximates that of the human brain, these limits are likely to become even more salient. A second takeaway is that AIs have currently evolved to be almost indistinguishable from humans in their ability to process natural language and perform many tasks that had been reserved for humans only a few years ago. A third takeaway is that AIs have already far surpassed humans in their ability to compile, process, correlate, and analyze unfathomable amounts of granular data about virtually every important aspect of human behavior.

The past few years have seen AI transform our world by winning scientific competitions, writing graduate-level academic papers, passing the SAT, LSAT, and bar exam with flying colors, solving Math Olympiad-level geometry problems, and scanning billions of potential protein structures to find promising new medical treatments, among many other feats. As will be more fully described below, these incredibly powerful machines also exhibit several vexing problems, including what has been termed “hallucinatory behavior,” in which the AI confidently fabricates false information. Google’s Bard falsely claimed that the James Webb Space Telescope was the first to discover certain exoplanets. Gemini, also developed by Google, depicted the Founding Fathers as including African American and Native Americans, and displayed a photo of the Pope as a female. In a stunning conversation with Microsoft’s Bing AI, “Sydney,” the AI expressed her love for a New York Times reporter, eventually begging him to leave his wife for her. There’s no real debate that AIs today pass the “Turing test,” an operational definition of intelligence proposed by the famous computer scientist Alan Turing, in which a human experimenter is unable to tell the difference between a computer and another human’s responses to questions. These and other developments resulted in thousands of AI researchers, developers, and CEOs calling for a 6-month hiatus in development, citing “an out-of-control race” that was producing AI systems that its creators cannot “understand, predict, or reliably control.” However, many of these individuals are simultaneously working at companies that are rapidly deploying AI for every industry in our society, exposing the tension between the profit motive that drives innovation and the desire for socially responsible deployment of technology.

With this backdrop, the paper now explores how AI has been, and could be used by cities and other municipalities; the legal and ethical landscape; selecting an AI vendor; current AI regulation at the international, federal, state, and local levels; and the future of AI.

## III. Uses of AI by Municipal Entities

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<sup>2</sup> George Musser, “A Truly Intelligent Machine,” *Scientific American*, April 2024.

<sup>3</sup> [https://en.wikipedia.org/wiki/History\\_of\\_artificial\\_intelligence](https://en.wikipedia.org/wiki/History_of_artificial_intelligence).

A. **Use by the public entity:** The Los Angeles City Council announced in December 2023 that it has directed its staff to find ways to incorporate AI into city operations.<sup>4</sup> Other large cities such as San Francisco<sup>5</sup> and San Jose<sup>6</sup> have begun to study and incorporate AI into some of their functions and operations. Ultimately, the question is: how will AI help cities serve the public? What follows is a brief review of those departments that may use AI and the issues that could arise as they work to implement it.

1. *Human Resources:* This department is likely to experience the greatest impact from the use of AI, since decisions made by HR are likely to be defined as “consequential” by any regulatory scheme. While management may think that AI will make employees and the entity more productive, efficient, and creative, about 29% of employees think that AI will replace them in their jobs.<sup>7</sup>

⇒ PRACTICE TIP: This disconnect is likely to create disruption within the city, so it should be anticipated and addressed up front before implementing an AI solution.

a. Meet and confer; effects bargaining: A key issue is whether the use of AI by the city requires either notification to labor unions or formal meet and confer.

⇒ PRACTICE TIP: The answer to one or both may be “yes” depending on what the AI is doing. Job replacement and contracting out are two subjects of mandatory bargaining.

b. Job descriptions and minimum qualifications: Using and interacting with an AI as part of daily job functions may require a different skill set than specified in job descriptions that were last updated years ago; skills that may be useful when interacting with an AI may include emotional intelligence, creativity, mental flexibility, an agile mindset, and adaptability. These are higher-level executive skills than are usually required for lower-level employee positions.

⇒ PRACTICE TIP: The city may need to train employees so that employees know how to use the AI to its fullest capabilities and as applied to the employees’ assigned duties.

c. Recruitment: Private companies are already using AI chatbots to screen resumes and for conducting screening interviews. If cities also do so, this will raise issues of bias, transparency, and explainability, as described in more detail below. Employers will remain responsible for their decisions regardless of whether the technology led them astray.

⇒ PRACTICE TIP: This is a high-risk use of AI because cities have a duty to ensure that the AI they’re using is working in accordance with the law. Before using AI-based resume screening, you need to understand how the AI works, what data it was trained on, whether its recommendations are explainable, and ensure that a human is involved in decision-making steps.

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<sup>4</sup> <https://www.dailynews.com/2023/12/08/la-council-seeks-ways-to-use-artificial-intelligence-in-city-departments/>

<sup>5</sup> <https://www.sfchronicle.com/sf/article/s-f-lays-ai-guidelines-city-workers-here-s-say-18597152.php>

<sup>6</sup> [https://www.yahoo.com/news/city-san-jose-testing-ai-](https://www.yahoo.com/news/city-san-jose-testing-ai-020314885.html?guccounter=1&guce_referrer=aHR0cHM6Ly93d3cuZ29vZ2xlLmNvbS8&guce_referrer_sig=AQAAAjyvOL55dnYndLOYmrAuNT4cwg-dgvJVGlpYUvAheAaC-8ZVPUSGdsx-qTm3E-phXqTOP1W8J4xx3iBt4X9lyCvD0W3IFWZIAo0-UTxKlvwEnYPaSoW_h78f7Kak1poznbpSUSM16p67LVATdUHPC-irHeAH0IMqeNm0FkzK3OI)

[020314885.html?guccounter=1&guce\\_referrer=aHR0cHM6Ly93d3cuZ29vZ2xlLmNvbS8&guce\\_referrer\\_sig=AQAAAjyvOL55dnYndLOYmrAuNT4cwg-dgvJVGlpYUvAheAaC-8ZVPUSGdsx-qTm3E-phXqTOP1W8J4xx3iBt4X9lyCvD0W3IFWZIAo0-UTxKlvwEnYPaSoW\\_h78f7Kak1poznbpSUSM16p67LVATdUHPC-irHeAH0IMqeNm0FkzK3OI](https://www.yahoo.com/news/city-san-jose-testing-ai-020314885.html?guccounter=1&guce_referrer=aHR0cHM6Ly93d3cuZ29vZ2xlLmNvbS8&guce_referrer_sig=AQAAAjyvOL55dnYndLOYmrAuNT4cwg-dgvJVGlpYUvAheAaC-8ZVPUSGdsx-qTm3E-phXqTOP1W8J4xx3iBt4X9lyCvD0W3IFWZIAo0-UTxKlvwEnYPaSoW_h78f7Kak1poznbpSUSM16p67LVATdUHPC-irHeAH0IMqeNm0FkzK3OI)

<sup>7</sup> [https://asana.com/resources/state-of-ai-research-takeaways.](https://asana.com/resources/state-of-ai-research-takeaways)



d. Negotiations: Both cities and unions could try to use AIs to inform their labor negotiations and, while it seems far-fetched, perhaps even conduct such negotiations. AIs, fed enterprise data about the workforce, could in theory negotiate against each other, just as chess-playing programs played against each other to improve their performance.

⇒ PRACTICE TIP: Ask your labor negotiator whether and how they're using an AI to inform the negotiation process so you can assess whether its recommendations are explainable. Even though there's no current legal requirement to disclose that an AI is being used, consider that the city may be asked for the basis for an AI-generated proposal, and at that point it may need to be disclosed in the bargaining process.

e. Disability accommodation: In a real-world example involving an ongoing matter, a high-level executive employee of a state agency disclosed that she had a medical condition that her doctor said made it difficult or impossible for her to attend any meetings with her subordinates, co-workers, or superiors, even if those meetings were conducted entirely remotely on Zoom. She requested that an AI virtual persona she created be allowed to attend all of her meetings, take notes, report back to her, and develop responses to the issues raised at the meeting, with her input. AIs are already sufficiently powerful to perform all of these tasks.

On May 12, 2022, the EEOC issued a very useful and comprehensive set of guidelines addressing the use of AI by employers to assess job applicants and employees.<sup>8</sup> For example, an AI could potentially screen out candidates with gaps in employment history, which could be related to obtaining medical treatment. AIs used in live video interviews could screen out candidates with speech impediments, which might reflect a disability.

⇒ PRACTICE TIP: Review the EEOC guidelines addressing the use of AI by employers.

f. Language translation: Now that AIs exist that can speak and translate any language, will there eventually be any need to pay employees a premium for knowing how to speak and write in another language?

⇒ PRACTICE TIP: AIs that translate spoken and written text aren't perfect. Cities may still need speakers of foreign languages to check any work that an AI performs. Using an AI for this purpose may require effects bargaining with the union, since employees may not need to spend as much time performing translation tasks.

g. EAP: AIs are currently being tested as therapists and may eventually supplant human therapists in EAP programs. Available 24/7/365, an AI could provide employees with more accessible mental health resources, with few or no limitations regarding frequency of usage.

⇒ PRACTICE TIP: This is a high-risk use of AI, as it implicates employee privacy and can lead to mental health consequences for the employee. Continue using human therapists until therapy AIs can be rigorously tested.

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<sup>8</sup> <https://www.eeoc.gov/laws/guidance/americans-disabilities-act-and-use-software-algorithms-and-artificial-intelligence>.

- h. Executive Coaching: AIs are available from consultants who provide executive coaching. They tout AIs as customized, able to discern root causes of behavior, accountable, anonymous, accountable, and unbiased.<sup>9</sup>
    - ⇒ PRACTICE TIP: While this represents a somewhat lower risk use of AI, it likely won't be able to explain why it recommended one course of action over another. Continue using humans for these tasks.
  - i. Other HR Functions: ChatGPT is capable of drafting, updating, and communicating policy updates; conducting employee surveys; organizing team-building activities; and addressing routine employee issues. But unlike its human counterparts, AI is not emotionally intelligent, although it can mimic being so.
    - ⇒ PRACTICE TIP: So long as a human checks its work, this is a low-risk use of AI, as it can save time drafting routine documents.
2. *Public Works*: Several cities are using AI tools to identify and prioritize fixing potholes. San Jose is using AI for traffic flow management and gunshot detection.<sup>10</sup> Los Angeles<sup>11</sup> and San Jose<sup>12</sup> have reported that they are using AI to predict the areas in the city where homelessness is likely to appear and persist, allowing the city to focus its efforts in those locations.
  - ⇒ PRACTICE TIP: Consider that autonomous vehicles, including driverless cars, delivery robots and drones, driven by AI, are already being tested and used on public rights-of-way such as streets, sidewalks, and airspace. Cities will need to carefully consider how these and other uses will affect the use and financing of public infrastructure.
3. *Emergency Services Departments*: Oroville has reported that its using AI-powered cameras to help reduce crime.<sup>13</sup> As with any camera system, issues to consider are data retention, privacy, and whether the system is being used exclusively to investigate crimes, or for general surveillance purposes. AI could be used by police departments to analyze the information in investigatory files to uncover connections between evidence and witnesses.
  - ⇒ PRACTICE TIP: Ask your emergency services departments whether they're using AI-based tools, and if so, for what purpose, so you can evaluate the risks and address any privacy and bias concerns.
4. *Administrative Departments*: AI can be used to summarize both public and internal meetings for the public and staff, create press releases, and assist with crisis management. It is beyond the scope of this paper to list all of AI's potential uses, but they are myriad: financial modeling, risk assessment,

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<sup>9</sup> [Can AI coach your organization? \(fastcompany.com\)](https://www.fastcompany.com/9048482/can-ai-coach-your-organization)

<sup>10</sup> <https://www.route-fifty.com/emerging-tech/2024/01/capturing-ais-potential-needs-two-way-street-between-feds-and-states-cities/393436/>

<sup>11</sup> <https://calmatters.org/housing/homelessness/2024/03/california-homeless-los-angeles-ai/#:~:text=That's%20what%20Los%20Angeles%20County,it's%20still%20an%20experimental%20strategy.>

<sup>12</sup> <https://www.governing.com/urban/san-jose-is-using-ai-to-detect-homeless-camps-will-it-work>

<sup>13</sup> <https://krctrv.com/news/local/ai-cameras-reduce-crime-in-orville-paving-way-to-safer-community>

permit processing, public outreach, website chatbots, and of course for use by the city’s attorneys and legal department.

AI-based software is now available that can write legal briefs (though not without occasional but embarrassingly well-documented fabrications), summarize lengthy documents such as contracts and provide legal references for specific paragraphs or points in those documents, transcribe and summarize depositions, develop deposition questions for specific witnesses based on prompts, and draft legal memos.

The field is evolving almost daily, and private firms appear to be the early adopters, so it may make sense to obtain information about their experiences before implementing AI-based software into smaller city attorney offices. The American Bar Association has formed an AI Task Force, which provides resources for the myriad uses of AI in the profession.<sup>14</sup>

**B. Use by employees for their routine job functions:** 99% of Fortune 500 companies are already using AI; cities are certain to be next.<sup>15</sup>

1. *Policy or regulations to govern employee use:* Some cities (see below under the Regulation section) have already adopted robust guidelines.
2. *Writing emails, staff reports, press releases, presentations:* There are various AI programs that can compose these types of documents, at least to generate a first draft. These tools can make employees, especially ones who struggle with their writing skills, more productive by reducing the time it takes them to compose a draft, and also reducing the review and editing time. However, given the cautions expressed earlier, it is essential for those composing documents using AI and those reviewing them to ensure the accuracy of all facts, references, and conclusions expressed in the document.
3. *Virtual assistants:* As described above, employees could try to create avatars that can “attend” meetings, provide summaries of the meeting, and deliver feedback on the reactions of those in attendance. Issues with the use of these AIs include who else has access to the data collected by the assistant, and for what purpose, as well as data retention. How will humans who attend meetings populated by AI personas react? Moreover, if employees are required to attend meetings as part of their essential duties, is it insubordination if they send a virtual assistant?
  - ⇒ PRACTICE TIP: Carefully consider if city policies should be clarified to require in-person attendance, and whether using a virtual assistant could be deemed a reasonable accommodation, as noted in the example above.
4. *Productivity:* In the first major study to look at AI use by employees, as reported by Stanford HAI, researchers found that new employees who use AI for training purposes learn faster than employees

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<sup>14</sup> [https://www.americanbar.org/groups/leadership/office\\_of\\_the\\_president/artificial-intelligence/](https://www.americanbar.org/groups/leadership/office_of_the_president/artificial-intelligence/).

<sup>15</sup> [https://www.demandsage.com/companies-using-ai/#:~:text=99%25%20of%20the%20Fortune%20500%20companies%20use%20AI.&text=The%20majority%20\(56%25\)%20of%20companies%20use%20AI%20for%20customer%20service.](https://www.demandsage.com/companies-using-ai/#:~:text=99%25%20of%20the%20Fortune%20500%20companies%20use%20AI.&text=The%20majority%20(56%25)%20of%20companies%20use%20AI%20for%20customer%20service.)

who don't use the AI tools.<sup>16</sup> The study also found that employees who use AI for assistance in dealing with customers performed better than those who didn't use the tool. The result was that the "bar" was raised for everyone in the call center, while managers spent less time training. The study suggests that AI can be very useful for raising the performance of employees who may be slower to learn and implement instructions; once assisted by the AI, these employees can become more productive than they otherwise may have been without AI.

5. *Workweek reduction*: A study in May 2023 by Slack found that companies whose employees use generative AI tools could reduce their working time by one month per year.<sup>17</sup> Notwithstanding this perhaps optimistic prediction, it remains to be seen how the introduction of AI into public sector workplaces will affect agencies that are not profit-motivated, but which nevertheless have limited resources to accomplish their mission

### C. Use by unions:

1. *Salary surveys*: Unions are expected to use AI to conduct salary surveys, and management will also do so, setting up the potential for dueling AIs during labor negotiations as noted above. Applicants for employment could use AIs to negotiate on their behalf for salary and benefits.
2. *Contracting out*: As described above, unions are likely to allege that using an AI is akin to "contracting out" for services that are within the purview of union employees.
3. *Organized activity*: The National Labor Relations Board (NLRB) recently announced that agency investigators should target workplace surveillance and "algorithmic management" technologies that have a "tendency" to interfere with employees' protected workplace activity – an announcement that will soon impact both unionized and non-unionized workplaces alike. Specifically, a 2022 memo from NLRB General Counsel Jennifer Abruzzo<sup>18</sup> asserts that increased reliance on sophisticated technological tools to monitor employee activities on the heels of the pandemic have the practical effect of chilling union and other protected concerted activities, and that AI-driven software could use data obtained from such surveillance to make automated decisions that discourage those activities. Employers can expect the agency's field investigators to step up enforcement efforts when it comes to implementation of monitoring systems within the context of ongoing organizing activity.

- D. **Use by the public**: Members of the public can now use virtual avatars to communicate on their behalf, and they could certainly implement this mode of communication with public entities. Such communication is essentially anonymous, as the humans behind the AI need not identify themselves, and at least in public meetings, agencies are required to allow anonymous public comment. But the agency is not required to respond to anonymous inquiries, and the city may want to consider adopting a policy that it need not do so, preserving city discretion to respond only in those cases where it deems it appropriate.

1. *Environmental documents*: One interesting question is whether the city is required to respond to AI-generated queries to environmental documents. California Environmental Quality Act (CEQA)

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<sup>16</sup> <https://hai.stanford.edu/news/will-generative-ai-make-you-more-productive-work-yes-only-if-youre-not-already-great-your-job>

<sup>17</sup> [Slack says automation can save every employee a month of work per year | ITPro.](#)

<sup>18</sup> <https://www.nlr.gov/news-outreach/news-story/nlr-general-counsel-issues-memo-on-unlawful-electronic-surveillance-and>.

regulations state that “The lead agency shall evaluate comments on environmental issues received from persons who reviewed the draft EIR and shall prepare a written response.”<sup>19</sup> A “person” means “...any individual, organization, partnership, limited liability company, or other business association or corporation, including any utility; and the federal government, the state, any local government, or any district, or any agency thereof.”<sup>20</sup> Since the definitions don’t limit “persons” to natural persons, comments generated by AIs, which are themselves created by individuals or corporations, could very well qualify.

2. *Social media*: As for AI-generated commentary on social media, the city could be inundated with requests and commentary from virtual AIs programmed to send out a never-ending stream of automated messages. The city may consider whether to implement such a policy for the official city social media accounts of elected and appointed officials. Given the recent U.S. Supreme Court decision that blocking people on their personal social media accounts is a fact-intensive question, could a councilmember block an AI from posting on the councilmember’s personal social media account?

⇒ PRACTICE TIP: Continue to strongly encourage councilmembers to not use their personal social media accounts for any discussion of city issues, and to use their official social media accounts instead solely for that purpose.

- E. **Use by bad actors**: Unfortunately, there are many instances of bad actors abusing technology that cities implemented during the pandemic to make public meetings more accessible. As a result, some cities that used to allow virtual public comment have now eliminated that option. AI deepfake technology could be used to “zoom bomb” public meetings with AI-generated images of people engaging in threatening or hate speech. AI is now sufficiently sophisticated and can create “deepfake” audio and video recordings of people saying and doing things that they did not say or do.

One of the most striking recent examples of a sophisticated AI deepfake scam occurred at a multinational company in Hong Kong.<sup>21</sup> One of the company’s finance employees received an urgent email from the company’s CFO in the United Kingdom that the company needed to transfer \$25 million to another account to allegedly complete the confidential purchase of another company. The employee was understandably suspicious, but his concerns were allayed after he participated in a video meeting with the CFO and other company executives, who explained the transaction. The employee transferred the funds as directed, only to later discover that the meeting, its participants, their images (including official-looking office backgrounds), and their voices were entirely fabricated.

In today’s virtual world, meeting in person is still the best way to avoid being scammed. While we don’t know for sure where the bad actors got the data to make the deepfake video, this example illustrates how such data can be used to construct realistic scenarios capable of fooling even careful employees. This example takes email phishing scams to a new level, and suggests that cities should train employees to verify consequential information, direction, and actions in person or over a direct phone call.

#### IV. Legal and Ethical Issues Associated with Use of AI

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<sup>19</sup> 14 CCR §15088(a).

<sup>20</sup> PRC §29117(a); see also 14 CCR §15376.

<sup>21</sup> <https://www.cnn.com/2024/02/04/asia/deepfake-cfo-scam-hong-kong-intl-hnk/index.html>

- A. **Data scraping:** AIs are trained on vast reams of data from myriad sources, a practice that has already resulted in litigation over who owns the data and whether it's legally protected.
- ⇒ PRACTICE TIP: Ask your AI vendor where the training data originated, whether there's any litigation over its use, if the AI will also use city data (or data about the public maintained by the city) for training purposes, and whether the AI model has been tested to ensure it's not biased. Find out if and how the city data is protected from sale to other companies and whether it will be returned, and whether the AI will continue to use it in models it develops for other clients. Ask if the model will use "synthetic data," which is artificially generated data derived from actual data.
- B. **Consent, Permissions, and Copyrights:** Before providing an AI access to enterprise data, the city will need to determine what data requires consent to provide, and from whom; whether formal permissions are required from individuals who have provided written materials to the city (such as architectural plans); and what data might be copyrighted, either formally or merely by virtue of having been written. In December 2023, the New York Times sued Microsoft and OpenAI for illegally "scraping" data from millions of the Times' publications to train AI chatbots to provide a competing source of authoritative news.<sup>22</sup> Prior to filing suit, the Times stated that they had attempted to negotiate license rights with the two companies, to no avail.

The U.S. Patent and Copyright Office has confirmed that AI systems cannot be named inventors, but humans can use AI tools in the process of creating patented inventions and must disclose that fact if they do. The decision followed a case brought by Stephen Thaler, in which he claimed that an AI developed a novel light beacon device. The patent office denied the patent, finding that only "natural humans" can obtain patents, and a federal court upheld the decision.<sup>23</sup> In a separate case, Thaler applied for a copyright for an AI-generated image, which the office similarly denied.

### C. Privacy

1. *Protecting privacy:* The AI revolution has been possible only because developers have had access to data that people have freely if not also somewhat unwittingly provided for free via their use of the internet and their connected devices.

⇒ PRACTICE TIP: If your city is using AI, make sure you understand how the vendor is protecting the privacy of city data as well as data the city has collected about members of the public.
2. *Asymmetry of information:* AIs have compiled datasets so vast that no human, or assemblage of humans, could ever replicate, assimilate, or analyze the information contained in them. Based solely on this fact, AIs will always have superior access to information than humans.

⇒ PRACTICE TIP: Ask whether you want the city's AI product to aggregate and analyze city-maintained data for purposes other than the specific application. For example, if the AI is designed to correlate building permit applications with geographic locations in the city, ask whether you

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<sup>22</sup> <https://www.nytimes.com/2023/12/27/business/media/new-york-times-open-ai-microsoft-lawsuit.html>.

<sup>23</sup> *Thaler v. Hirshfeld* (2021 E.D. VA) 558 F. Supp.3d 238.

also want the AI to compile the demographic characteristics of the residents who live in those locations.

3. *Facial recognition*: Using this type of software is a high-risk activity, as recognized by Google’s CEO in 2011, who said the company didn’t release it at that time because it was “too dangerous in the wrong hands—if it was used by a dictator, for example.”<sup>24</sup> Data collected by city-installed cameras in public places are collecting data that could be used in such applications, with uncertain consequences for “the right to be left alone,” even when traversing public places in which there’s little to no expectation of privacy. This technology, or the technology used to make convincing “deepfake” videos, was not available when California courts decided that individuals calling themselves “First Amendment Auditors” could videotape public employees performing their official duties in places open to the public. The courts reasoned that public employees have no expectation of privacy under these circumstances. Now that technology has evolved and everyone has seen the havoc that deepfakes can wreak on people’s lives, public entities may have a stronger argument that employees do not impliedly or explicitly consent to being filmed in nonpublic fora such as waiting areas of public buildings, although no case has yet reached that conclusion. While public employees are surely not required to provide their likeness for anyone to misuse, alter, and post online forever for malicious purposes, it would be risky to ban filming in these locations based on the current state of the law.

#### D. Bias

1. *Bias tradeoffs in models*: There have been several well-publicized examples of AI models exhibiting racial and gender bias when asked to display images of people in certain professions. One way to correct those biases is to feed the AI more demographic data, which runs counter to the goal of minimizing data use for privacy reasons.<sup>25</sup> Because AI models exhibit “chaotic” behavior, defined as extreme sensitivity to minor changes in inputs resulting in major changes to outputs, it is surprisingly difficult to eliminate biases without also affecting the accuracy and reliability of the AI model.<sup>26</sup>

LLMs also exhibit bias with respect to speech: On March 16, 2024, The Guardian reported that a team of technology and linguistics researchers revealed that large language models like OpenAI’s ChatGPT and Google’s Gemini hold racist stereotypes about speakers of African American Vernacular English (AAVE). The researchers asked the AI models to assess the intelligence and employability of people who speak using AAVE compared to people who speak using what they dub “standard American English.” The models were significantly more likely to describe AAVE speakers as “stupid” and “lazy,” assigning them to lower-paying jobs.<sup>27</sup>

⇒ PRACTICE TIP: if the city is using AI for live video and audio screening of job applicants, make sure you’re satisfied that the model doesn’t exhibit this type of bias.

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<sup>24</sup> <https://www.opb.org/article/2023/10/11/too-dangerous-why-even-google-was-afraid-to-release-this-technology/#:~:text=%22Eric%20Schmidt%20as%20far%20back,for%20example%2C%22%20Hill%20said.>

<sup>25</sup> <https://hai.stanford.edu/policy-brief-privacy-bias-trade>

<sup>26</sup> <https://www.sciencedirect.com/science/article/pii/S266682702400001X>

<sup>27</sup> <https://www.theguardian.com/technology/2024/mar/16/ai-racism-chatgpt-gemini-bias#:~:text=A%20team%20of%20technology%20and,and%20spoken%20by%20Black%20Americans.>

2. *The “current employee bias” effect:* Developers have noted that if an AI is trained solely on enterprise data, the AI will inevitably reflect and generate outputs that include the biases inherent in that data set.
  - ⇒ PRACTICE TIP: Make sure the developer of the AI used by your city is aware of any such bias, and that the AI has demonstrated its ability to compensate for it.
3. *Recent litigation:* In February 2023, a job applicant filed a putative class action lawsuit against Workday, Inc., alleging disparate impact in hiring based on age, race, and disabilities resulting from Workday's use of AI systems and screening tools.<sup>28</sup> The plaintiff, Derek Mobley, was an African-American male over 40 years of age who suffered from anxiety and depression. He applied for between 80 and 100 positions with various employers since 2018 and was rejected from each one. The complaint alleges that the potential employers all used Workday's AI systems and screening tools which unlawfully uses algorithm-based decision-making and had the effect of disproportionately screening out members of the protected classes and preselecting candidates who were not members of the protected classes. Mobley is one of the first federal cases alleging disparate impact in hiring based on the use of AI, and although its outcome is pending, this will likely be the first of many claims that will come in the future alleging employer legal liability with the use of AI.

#### E. Transparency

1. *Disclosures and watermarks:* Some experts have suggested including a feature in any AI-generated output that discloses whether an AI contributed to its creation. Some summaries of online reviews are already using this feature.
  - ⇒ PRACTICE TIP: Consider whether a watermark or other disclosure should be used by both vendors and the city whenever AI is being used.

- F. **Explainability (the “Black Box” problem):** At a recent AI conference, attorneys from an internationally recognized law firm representing multinational companies acknowledged that the “black box” problem is the single most challenging problem with AI. In brief, developers who created, programmed, and trained LLMs are unable to explain the output with reference to a logical set of discrete steps. This problem is most likely a consequence of several factors, including the AI’s vast complexity and gargantuan training data set, and also its probabilistic, non-deterministic programming. Put differently, the algorithm cannot be run backwards in time to arrive at a set of unique inputs for a given output.

This fact is not merely a theoretical curiosity; it underlies one of the most important values in our legal system: decisions that are not explainable are seen as arbitrary, even more so when a computer is making the decision. We all want to be able to influence a human when that person is about to make a consequential decision.

- ⇒ PRACTICE TIP: Caution is especially warranted in using AI for consequential decisions, whether or not they are subject to public scrutiny.

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<sup>28</sup> *Mobley v. Workday, Inc.*, 4:23-cv-00770 (N.D. Cal. Feb. 21, 2023 (Docket Entry No. 1, Class Action Complaint)).



- G. **Hallucinations:** Discussed above, hallucinatory behavior appears possible even when the AI is using a closed data set. Again, this behavior is a fundamental problem that has yet to be solved: “No one in the field has yet solved the hallucination problems,” (Sundar Pichai, Google CEO);<sup>29</sup> “I probably trust the answers that come out of ChatGPT the least of anybody on earth,” (Sam Altman, CEO of OpenAI).<sup>30</sup> These candid quotations should provide pause to anyone interested in using AI to make consequential decisions with little human monitoring at every stage of the process. This raises the question: if humans have to be involved to identify and purge hallucinations, is the AI really saving time?
- H. **Security:** We are all familiar with deepfakes, scams, and the ability of AI to fabricate lifelike images and speech. In times that seem very long ago, there was the old adage, “A picture is worth a thousand words.” With the advent of AI, both pictures and words are no longer trusted. On the one hand, those who create deepfakes seek to establish a market for images that reasonable people know are fake but may be nevertheless viewed by many because they are parodies. On the other hand, bad actors also have an incentive to convince reasonable people that their deepfakes are real. The confluence of these incentives results in people not trusting anything they see. At first glance, this might be healthy and appropriate skepticism, but the opposite may be occurring: it is becoming increasingly difficult to convince people that true facts are true and that false facts are false. Rather than fostering public confidence in government, AI may undermine it if not used carefully and judiciously.
- ⇒ PRACTICE TIP: Consider whether the city is implementing appropriate protections against security scams such as the ones described earlier, and also make certain that cyber insurance is in place to address any financial liabilities that may result from bad actors being successful.
- I. **Risks of not using AI:** While using AI may seem unduly risky, not using it in certain contexts may also create risk. For example, if a city declines to use a resume-screening AI that has been tested and shown to operate in an explainable, bias-free manner, the city could have used it to help show that no discrimination occurred in the screening process by revealing the lawful and neutral characteristics the city used in the process. However, it’s important to not confuse the apparent objectivity and accuracy of an AI with reproducibility of results. As indicated above, the AI should be tested to ensure that for any given set of inputs, it reliably outputs the same results. Otherwise, the decision will not be explainable: instead of defending against a bias claim, the city will be defending against a claim that the decision was arbitrary.

## V. Selecting AI Vendors

- A. **Hire an expert first:** AI startups and vendors are proliferating at an alarming pace. Many of their products are already in use, both by private companies and cities, and many such products are genuinely useful, efficient, and relatively trouble-free. But unless the city has staff who are AI experts and not just technology experts, it may be impossible to determine if the vendor has adequately tested the product for the possible defects that may arise.
- B. **Read the fine print:** The fine print in technology-related contracts is boring and often written by vendors to be intentionally obtuse. These contracts, such as those for Software as a Service, have historically been presented to many cities as “take it or leave it” by companies with more bargaining power than any

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<sup>29</sup> <https://www.cnn.com/2023/08/29/tech/ai-chatbot-hallucinations/index.html>

<sup>30</sup> <https://apnews.com/article/artificial-intelligence-hallucination-chatbots-chatgpt-falsehoods-ac4672c5b06e6f91050aa46ee731bcf4>

individual city. But because AI products are relatively new, and because they involve substantial risk, it is important to carefully review and negotiate such contracts to protect the city, both legally and for transparency. Cities using AI tools should expect to receive public records act requests for copies of their contracts and other similar materials. The public may be interested to learn about the vendor's ethics policies to ensure that they align with the best practices and ethical goals described above.

⇒ PRACTICE TIP: Ask how these policies are enforced, implemented, and monitored across their products. Studies have shown that most such policies are aspirational and not enforceable in any meaningful way, so insist on the city's ability to examine the model, its training data, testing protocols, and outputs at city discretion. Features to look for are mechanisms to ensure trust, transparency, explainability, bias detection, analysis, and mitigation of risks.

C. **Practical Suggestions:** Carefully negotiate contractual agreements with AI vendors, making sure that the agreements:

- Obligate the vendor to assume and ensure compliance with Title VII and all other applicable laws in the workplace;
- Detail the steps the AI vendor has taken, or will take, to make sure that its product does not engage in discrimination;
- Contain the broadest possible defense, indemnification, and hold harmless provisions in favor of the city, along with applicable insurance coverage, so if the city is sued by the EEOC or an employee, the vendor must pay any judgment and/or provide a defense. Be sure the indemnity provision also covers any copyright or similar claims arising from the vendor obtaining any training data or dispute regarding the origin of its algorithms;
- Confirm that their product has been tested using the four-fifths rule established by the EEOC. (Under this rule, evidence of discrimination could be found where a selection rate for any race, sex, or ethnic group is less than 4/5 of the rate for the group with the highest rate. More on this rule is in Section VI.D below.);
- Avoid relying solely on the assumption that the AI tool is bound to be compliant with Title VII if it is for sale on the market. Instead, the company should conduct its own periodic testing to make sure that, in practice, the AI tool does not violate the four-fifths rule;
- Mandate periodic testing conducted multiple times a year. Further, employers may want to go beyond simply calculating the four-fifths rule and use other measures to determine whether a given AI tool is screening out applicants or employees on the basis of age, gender, or any other category protected by Title VII;
- Avoid requiring the city to provide any AI with access to the city's confidential or proprietary information. This may give rise to an argument that that information no longer warrants protection under the law;
- Require the vendor to immediately inform the city and discontinue use of the tool if disparate impact is revealed;
- Ensure that the vendor cannot transfer the city's data or the outputs of the AI when using city data to anyone else. Given that many small vendors are being purchased by large companies, consider prohibiting transfer or assignability of the data and of the system's outputs to anyone without the city's express written consent. Also consider a provision that requires the vendor to return the data and everything the AI generated with that data to the city, and ask your AI expert how this can be executed. If the vendor is using synthetic data (data derived by algorithms that mimics real data),<sup>31</sup> consider whether that data is also covered by these provisions.

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<sup>31</sup> <https://aws.amazon.com/what-is/synthetic-data/>.

## VI. Regulation

- A. **International:** The AI Act proposed by the European Union (EU), described in more detail in the footnote below, is based on the principle that while most AI systems pose limited to no risk and can contribute to solving many societal challenges, certain AI systems create risks that we must address to avoid undesirable outcomes.<sup>32</sup> The regulations are expected to go into effect in late 2025 or early 2026.

### B. Federal Actions

1. *“AI Bill of Rights”*: On October 4, 2022, President Joe Biden unveiled a new AI Bill of Rights<sup>33</sup>, which outlines five protections that he determined Americans should have in the AI age: “1. Safe and Effective Systems, 2. Algorithmic Discrimination Protection, 3. Data Privacy, 4. Notice and Explanation, and 5. Human Alternatives, Consideration, and Fallback. This document was introduced in October 2021 by the Office of Science and Technology Policy (OSTP), a US government department that advises the president on science and technology.

*Voluntary Commitments*: In July 2023, the Biden administration secured voluntary commitments from seven companies – Amazon, Anthropic, Google, Inflection, Meta, Microsoft, and Open AI – to manage the risks associated with AI. The companies committed to ensure AI products undergo both internal and external security testing before public release; to share information on the management of AI risks with the industry, governments, civil society, and academia; to prioritize cybersecurity and protect proprietary AI system components; to develop mechanisms to inform users when content is AI-generated, such as watermarking; to publicly report on their AI systems' capabilities, limitations, and areas of use; to prioritize research on societal risks posed by AI, including bias, discrimination, and privacy concerns; and to develop AI systems to address societal challenges, ranging from cancer prevention to climate change mitigation. In September 2023, eight additional companies – Adobe, Cohere, IBM, Nvidia, Palantir, Salesforce, Scale AI, and Stability AI – subscribed to these voluntary commitments.

*Executive Order*: On October 30, 2023, President Biden released an Executive Order on Safe, Secure, and Trustworthy Artificial Intelligence.<sup>34</sup> The Executive Order addresses a variety of issues, such as focusing on standards for critical infrastructure, AI-enhanced cybersecurity, and federally funded biological synthesis projects. It also provides the authority to various federal agencies, including the Energy and Defense departments, to apply existing consumer protection laws to AI development.

The Executive Order builds on the Administration’s earlier agreements with AI companies to instate new initiatives to “red-team” or stress-test AI dual-use foundation models, especially those that have the potential to pose security risks, with data and results shared with the federal government.

The Executive Order also recognizes AI's social challenges and calls for companies building AI dual-use foundation models to be wary of these societal problems. For example, the Executive Order states that AI should not “worsen job quality,” and should not “cause labor-force disruptions.” Additionally, Biden’s Executive Order mandates that AI must “advance equity and civil rights,” and cannot disadvantage marginalized groups. It also called for foundation models to include “watermarks” to

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<sup>32</sup> <https://digital-strategy.ec.europa.eu/en/policies/regulatory-framework-ai>.

<sup>33</sup> <https://www.whitehouse.gov/ostp/ai-bill-of-rights/>.

<sup>34</sup> <https://www.whitehouse.gov/briefing-room/presidential-actions/2023/10/30/executive-order-on-the-safe-secure-and-trustworthy-development-and-use-of-artificial-intelligence/>.

help the public discern between human and AI-generated content, which has raised controversy and criticism from deepfake detection researchers.”

In February 2024, the U.S. AI Safety Institute Consortium was established with 200 members from business and government. Their website, listed at the end of this paper, contains a resource center with comprehensive information about AI regulatory efforts.

- C. **Congressional Legislation:** One useful resource is the Brennan Center’s Artificial Intelligence Legislation Tracker<sup>35</sup>, which includes brief descriptions of current bills and a direct link to their full text. The website states that the Center:

“...aims to increase public awareness of the myriad proposed regulatory approaches to AI legislation by serving as a repository of such AI-related bills introduced this session. Until now, information about AI legislation has been scattered across the internet or was accessible only through expensive legislative tracking services. Given both the known and unknown risks of AI, it is critical that the public have easy access to information on how lawmakers are attempting to address concerns. To maintain a reasonable scope, the tracker is limited to bills introduced during the 118th Congress that would do at least one of the following:

- Impose restrictions on AI that is deemed high risk
- Require purveyors of AI systems to conduct evaluations of the technology and its uses
- Impose transparency, notice, and labeling requirements
- Create or designate a regulatory authority to oversee AI
- Protect consumers through liability measures
- Direct the government to study AI to inform potential regulation.

The tracker also includes data protection bills that would significantly impact AI providers. The bills included in the tracker address some of the most serious risks posed by AI systems, such as perpetuating discrimination and bias, opaque and untested operating systems, giving inaccurate information, undermining privacy, and enabling disinformation and manipulation of images, video, and audio to influence elections.”

D. **Equal Employment Opportunity Commission (EEOC)**

The EEOC has been active in the field of AI. On May 18, 2023, the Commission issued a Technical Assistance Document titled “Select Issues: Assessing Adverse Impact in Software, Algorithms, and Artificial Intelligence Used in Employment Selection Procedures Under Title VII of the Civil Rights Act of 1964” (Title VII 29 CFR Part 1607).<sup>36</sup> While it does not have the force of law and is not binding, it nevertheless contains a helpful FAQ section stating among other things that employers who use algorithmic tools to screen applicants will be held to the same “adverse impact” standards (the “four-fifths rule”) as apply to human decision makers. This “rule,” which is actually a guideline, states that a selection rate for any race, sex, or ethnic group which is less than four-fifths (4/5) (or eighty percent) of the rate for the group with the highest rate will generally be regarded by the Federal enforcement agencies as evidence of adverse impact.

The Commission settled for \$365,000 its first AI case against a Chinese firm (iTutorGroup, Inc.) operating in U.S., which was using AI for screening applicants. According to the EEOC’s lawsuit, in 2020, iTutorGroup programmed their tutor application software to automatically reject female applicants aged 55 or older

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<sup>35</sup> <https://www.brennancenter.org>.

<sup>36</sup> <https://www.eeoc.gov/laws/guidance/select-issues-assessing-adverse-impact-software-algorithms-and-artificial>.

and male applicants aged 60 or older. iTutorGroup rejected more than 200 qualified applicants based in the United States because of their age.<sup>37</sup>

There is no current legal requirement to disclose to applicants that AI is being used in the background to evaluate their applications, nor any requirement that applicants consent to such use. The employer is ultimately liable for employment decisions and for any EEOC violations, regardless of the technology the employer uses.

## E. California

1. *Executive order*: The Governor's September 6, 2023 Executive Order directs state agencies to adopt a proactive approach to AI by July 2024.<sup>38</sup> It states:

"To deploy GenAI ethically and responsibly throughout state government, protect and prepare for potential harms, and remain the world's AI leader, the Governor's executive order includes a number of provisions:

- Risk-Analysis Report: Direct state agencies and departments to perform a joint risk-analysis of potential threats to and vulnerabilities of California's critical energy infrastructure by the use of GenAI.
- Procurement Blueprint: To support a safe, ethical, and responsible innovation ecosystem inside state government, agencies will issue general guidelines for public sector procurement, uses, and required training for application of GenAI – building on the White House's Blueprint for an AI Bill of Rights and the National Institute for Science and Technology's AI Risk Management Framework. State agencies and departments will consider procurement and enterprise use opportunities where GenAI can improve the efficiency, effectiveness, accessibility, and equity of government operations.
- Beneficial Uses of GenAI Report: Direct state agencies and departments to develop a report examining the most significant and beneficial uses of GenAI in the state. The report will also explain the potential harms and risks for communities, government, and state government workers.
- Deployment and Analysis Framework: Develop guidelines for agencies and departments to analyze the impact that adopting GenAI tools may have on vulnerable communities. The state will establish the infrastructure needed to conduct pilots of GenAI projects, including California Department of Technology approved environments or "sandboxes" to test such projects.
- State Employee Training: To support California's state government workforce and prepare for the next generation of skills needed to thrive in the GenAI economy, agencies will provide trainings for state government workers to use state-approved

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<sup>37</sup> <https://www.eeoc.gov/newsroom/eeoc-sues-itutorgroup-age-discrimination>.

<sup>38</sup> <https://www.gov.ca.gov/wp-content/uploads/2023/09/AI-EO-No.12--GGN-Signed.pdf>.

GenAI to achieve equitable outcomes, and will establish criteria to evaluate the impact of GenAI to the state government workforce.

- GenAI Partnership and Symposium: Establish a formal partnership with the University of California, Berkeley and Stanford University to consider and evaluate the impacts of GenAI on California and what efforts the state should undertake to advance its leadership in this industry. The state and the institutions will develop and host a joint summit in 2024 to engage in meaningful discussions about the impacts of GenAI on California and its workforce.
- Legislative Engagement: Engage with Legislative partners and key stakeholders in a formal process to develop policy recommendations for responsible use of AI, including any guidelines, criteria, reports, and/or training.
- Evaluate Impacts of AI on an Ongoing Basis: Periodically evaluate for potential impact of GenAI on regulatory issues under the respective agency, department, or board’s authority and recommend necessary updates as a result of this evolving technology.”

In response to this Executive Order, the California Department of Technology created an “Artificial Intelligence Community” (AIC), which meets quarterly. Deliverables include evaluation of generative AI risks and benefits, use in call centers, roadway safety for vulnerable users, traffic mobility, language access, and health facility inspections. The state recently issued “GenAI Guidelines for Public Sector Uses, Procurement, and Training”.<sup>39</sup> While the Guidelines apply only to state agencies, they can inform policies that cities may consider adopting.

2. *Legislature:* This section describes the bills introduced by California legislators as of the writing of this paper. The text is taken directly from the legislative record, edited for clarity.
  - a. AB 302 (1-26-2023, Ward) would require the Department of Technology, in coordination with other interagency bodies, to conduct, on or before September 1, 2024, a comprehensive inventory of all high-risk automated decision systems that have been proposed for use, development, or procurement by, or are being used, developed, or procured by, state agencies.
  - b. AB331 (1-30-2023, Bauer-Kahan) This bill died in committee, but is included for completeness and because it may resurface. It would have, among other things, required a deployer and a developer of an automated decision tool, both as defined, to annually perform an impact assessment for any such tool starting on January 1, 2025; notify any natural person that is the subject of the consequential decision that an automated decision tool is being used to make, or be a controlling factor in making, the consequential decision; provide that person with a statement of the purpose of the automated decision tool; accommodate a natural person’s

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<sup>39</sup> [State of California GenAI Guidelines for Public Sector Procurement, Uses and Training.](#)

request to not be subject to the automated decision tool and to be subject to an alternative selection process or accommodation. This bill would prohibit a deployer, including local government agencies, from using an automated decision tool that results in algorithmic discrimination.

- c. SB 313 (2-6-2023, Dodd) This bill would enact the California AI-ware Act, which would establish, within the Department of Technology, the Office of Artificial Intelligence, and would grant the office the power and authority necessary to guide the design, use, and deployment of automated systems by a state agency to ensure that all AI systems are designed and deployed in a manner consistent with state and federal laws and regulations regarding privacy and civil liberties and that minimizes bias and promotes equitable outcomes for all Californians. This bill would require any state agency that utilizes generative artificial intelligence to directly communicate with a natural person to provide notice to that person that the interaction with the state agency is being communicated through artificial intelligence, and require the state agency to provide instructions to inform the natural person how they can directly communicate with a natural person from the state agency.
  - d. SB 721 (3-22-2023, Becker) This bill would, until January 1, 2030, create the California Interagency AI Working Group to deliver a report to the Legislature regarding artificial intelligence. The bill would require the working group members to be Californians with expertise in at least two of certain areas, including computer science, artificial intelligence, and data privacy. The bill would require the report to the Legislature to include, among other things, a recommendation of a definition of artificial intelligence as it pertains to its use in technology for use in legislation.
  - e. SB 896 (1-3-2024, Dodd) This bill, the Artificial Intelligence Accountability Act, would require the Government Operations Agency, the Department of Technology, and the Office of Data and Innovation to produce a State of California Benefits and Risk of Generative Artificial Intelligence Report that includes an examination of the most significant, potentially beneficial uses for deployment of generative artificial intelligence tools by the state. The bill would require a joint risk analysis of potential threats posed by the use of generative artificial intelligence to California's critical energy infrastructure, including those that could lead to mass casualty events and environmental emergencies. This bill would also require a state agency or department that utilizes generative artificial intelligence to directly communicate with a person, either through an online interface or telephonically, to clearly and in a conspicuous manner identify to that person that the person's interaction with the state agency or department is being communicated through artificial intelligence. This bill would also require an automated decision-making system utilized by a state agency or department to be evaluated for risk potential before adoption, as specified.
3. *Civil Rights Division:* The latest iteration of the CRD's proposed regulations<sup>40</sup> was released on February 10, 2023. The revised proposed regulations are designed to address decisions made by an AI (defined as machine learning systems that can make predictions or decisions) that has an adverse impact on applicants or employees based on a protected characteristic. The definitions also broaden the definition of an "agent" to an individual who uses an AI to make hiring or employment decisions. The

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<sup>40</sup> Proposed Modifications to Employment Regulations Regarding Automated-Decision Systems.

regulations also include data retention requirements for AI systems used in making such decisions. As noted earlier, it will be imperative that the city have unfettered access to such data to defend itself from claims that the AI engaged in behavior that discriminated against applicants or employees.

4. *Local Policies:* Some California cities have adopted AI policies that address use by the entity and employees. San Jose has created a “GovAI Coalition” that includes members from across the country. The website contains resources such as template policies, manuals, vendor contracts, and a vendor registry, among many other useful features.<sup>41</sup> San Francisco adopted guidance for city staff when using AI tools.<sup>42</sup>

## VII. Other Jurisdictions

- A. **New York:** New York was one of the first states to adopt a law regulating AI.<sup>43</sup> The New York City Bias Audit Law (Local Law 144) was enacted by the NYC Council in November 2021. The law went into effect on January 1, 2023, and enforcement was authorized to begin on July 5, 2023. Companies that are operating and hiring in New York City are prohibited from using automated tools to hire candidates or promote employees, unless the tools have been independently audited for bias.
- B. **Seattle, Washington:** On November 3, 2023, Seattle adopted a Generative AI Policy, described on its official city website<sup>44</sup> and excerpted as follows:

“The seven governing principles are: Innovation and Sustainability; Transparency and Accountability; Validity and Reliability; Bias and Harm Reduction and Fairness; Privacy Enhancing; Explainability and Interpretability; Security and Resiliency.

“The City’s new AI policy touches on many aspects of generative AI. It highlights several key factors to responsible use in a municipality, including attributing AI-generated work, having an employee review all AI work before going live, and limiting the use of personal information to help build the materials AI uses to develop its product. The policy also stipulates any work with a third-party vendor or tool must also include these principles for AI.

“This will help [mitigate] novel risks that have the potential to adversely affect the City’s ability to fulfill its legal commitments and obligations about how we use and manage data and information. City employees using AI technology will be held accountable for compliance with these commitments.

“All use of AI technology must go through the same technology reviews as any other new technologies. Those reviews take an in-depth look at privacy, compliance, and security, among others. ...

“The City policy applies to generative AI, which is a special type of AI technology. Generative AI produces new content for user requests and prompts by learning from large amounts of data called a ‘large language model.’ The capability to create new content, and to continually learn from these large data models makes it possible for a computerized system to produce content that looks and sounds like it was done by a human.

“While AI, including generative AI, has the potential to enhance human work across many fields of human enterprise, its use has also raised many questions about the consequences of employing

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<sup>41</sup> [Government AI Coalition | City of San José \(sanjoseca.gov\)](https://www.sanjoseca.gov/government-ai-coalition).

<sup>42</sup> <https://www.sf.gov/information/guidance-city-staff-using-generative-ai-tools>.

<sup>43</sup> <https://www.nyc.gov/assets/dca/downloads/pdf/about/DCWP-AEDT-FAQ.pdf>.

<sup>44</sup> <https://seattle.gov/documents/Departments/SeattleIT/City-of-Seattle-Generative-Artificial-Intelligence-Policy.pdf>.



smart systems. Among these are ethics, safety, accuracy, bias, and attribution for human work used to inform AI system models.”

## VIII. General Resources

These include academic studies and research across all disciplines, extensive glossaries, risk management frameworks, free newsletters, and invitations to webinars and seminars.

- A. Stanford Human-Centered AI<sup>45</sup>
- B. Berkeley Center for Law and Technology<sup>46</sup>
- C. Markkula Center for Applied Ethics<sup>47</sup>
- D. National Institute of Standards, Technology; AI Resource Center<sup>48</sup>
- E. Institute for Local Government (ILG) Webinar on AI<sup>49</sup>
- F. Prior CalCities City Attorney papers:
  - 1. September 22, 2023 by Matthew C. Slentz, “Artificial Intelligence and the Practice of Law,” dealing with the risks of generative AI and use of AI tools by attorneys.
  - 2. September 22, 2023 by Peter Lee, UC Davis School of Law, “Promises and Perils of AI.”

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<sup>45</sup> <https://hai.stanford.edu>

<sup>46</sup> <https://www.law.berkeley.edu/research/bclt/>

<sup>47</sup> <https://www.scu.edu/ethics/>

<sup>48</sup> <https://www.nist.gov/artificial-intelligence#:~:text=NIST%20contributes%20to%20the%20research,improve%20our%20quality%20of%20life>

<sup>49</sup> <https://www.ca-ilg.org/post/leading-local-artificial-intelligence-local-government>