General Municipal Litigation Update

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Notes:

General Municipal Litigation Update

Cases Reported from April 5, 2014
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I. NATURE OF MUNICIPAL CORPORATIONS

Statutory Authority to Contract Out for Services

***Service Employees International Union, Local 1021 v. County of Sonoma* (2014) 227 Cal.App.4th 1168** [see also Personnel Update]

Take-Away: The Health & Safety Code authorizes community development commissions to contract out for housing inspection services.

Facts: The County created the Community Development Commission (Commission) to operate the County's housing authority and redevelopment agency. Health & Saf. Code § 34143(c) authorizes the Commission to "[m]ake and execute contracts and other instruments necessary or convenient to the exercise of its powers." In 2009, the Commission entered an agreement with a private entity (Sterling) for housing inspection services during periods of high workload (overflow work). In 2012, the Commission decided to contract out non-overflow work and to eliminate three existing staff positions. The County Board of Supervisors authorized the Commission to contract out housing inspection services to Sterling. The Commission sent 90-day layoff notices to three of SEIU's members. SEIU filed suit seeking a writ of mandate and injunctive relief. The Superior Court sustained the Commission's demurrer. The Court of Appeal affirmed.

Holdings & Analysis:

1. Health & Saf. Code §§ 34144 and 34145 authorize the Commission to contract out these services.

    a. Section 34145 provides that "the commission may hire, employ or contract for staff, contractors, and consultants …." Section 34144(a) states that the "commission may select, appoint, and employ such permanent and temporary officers, agents, counsel, and employees as it requires …."

    b. The plain language is unambiguous and legislative intent is clear. The Commission has "free reign in contracting for the services in question …." Any other reading, e.g., that the Commission may only contract out with other public agencies, would be absurd.

2. Gov. Code § 53060 does not limit the Commission's authority to contract out these services.

    a. Section 53060 provides that "[t]he legislative body of any public or municipal corporation or district may contract with and employ any persons for the furnishing of the corporation or district special services and advice in financial, economic, accounting, engineering, legal or administrative matters if such

persons are specially trained and experienced and competent to perform the special services required."

b. The specific provisions of the Health & Safety Code control over this general provision of the Government Code. Thus, the Court did not need to determine whether the subject services were special services. (Compare *Costa Mesa City Employees' Assn. v. City of Costa Mesa* (2012) 209 Cal.App.4th 298, 311 (section 53060 limits city authority to contract out to private entities for special services), which was not discussed in this First District case.)

3. The County did not improperly delegate authority to the Commission. The Legislature authorized the County to enter the subject contract, which the Commission properly did as authorized by the Board of Supervisors.

LAFCO

City of Patterson v. Turlock Irrigation District (2014) 227 Cal.App.4th 484

Take-Away: The LAFCO statutes do not authorize a city to apply to LAFCO to extend special district boundaries for the sole purpose of granting voting rights to consumers who receive extraterritorial service from the district.

Facts: Irrigation District provides extraterritorial retail electrical service, including to City residents. The City submitted an application to Stanislaus LAFCO for extension of the District's boundaries for continued electrical service only (no water service) so that the customers would have voting rights. The District adopted a resolution requesting LAFCO to terminate its proceeding, pursuant to Gov. Code § 56857. The City filed a writ petition challenging the District's resolution. The Superior Court denied relief. The Court of Appeal affirmed.

Holdings & Analysis:

1. The Cortese-Knox-Hertzberg Local Government Reorganization Act was enacted to encourage orderly growth and development. It authorizes an “affected local agency” to apply to LAFCO to change another agency’s organization (e.g., annexation of land in the City’s jurisdiction into a special district). If the agency that is the subject of the application (e.g., the district) opposes the proposal, it may adopt a resolution requesting LAFCO to terminate the proceedings. The resolution must be based on findings supported by substantial evidence of financial or service related concerns.

2. Gov. Code § 56653 provides for the LAFCO applicant to submit a plan for services to be provided to the affected territory. The City's application asserted that a plan for services need not be submitted because the District was already providing retail electrical service and was not being asked to extend any service (e.g., water service). The Court held that the application was defective for absence of a plan for extended services and that the City's writ petition could not provide any meaningful relief.

II. OPEN GOVERNMENT AND ETHICS

Conflicts

***City of Montebello v. Vasquez* (2014) 226 Cal.App.4th 1084,** petition for reviewed filed (June 5, 2014)

Take-Away: City Manager's negotiation of contract and councilmembers' voting on contract were not protected activity under anti-SLAPP statute, and defendants were thus not shielded from Gov. Code § 1090 suit.

Facts: Refuse hauler (Contractor) has had an exclusive contract to provide residential services since 1962. Defendant Councilmember Urteaga, while running for his seat, suggested to Contractor that it submit a proposal to become the exclusive commercial and industrial waste hauler in the city. Contractor later contributed to Urteaga's campaign. Defendant City Administrator Torres negotiated with Contractor regarding terms for improved residential services and exclusive commercial and industrial services. Contractor agreed to a $500,000 payment to the City in exchange for exclusivity. Contractor submitted a proposal. The Council approved the contract by a 3-2 vote, with Urteaga and two other Defendant Councilmembers, Vasquez and Salazar, voting in favor. Vasquez signed the contract as the Mayor Pro Tem when the Mayor refused. Contractor contributed to (1) Vasquez's unsuccessful reelection campaign, (2) the unsuccessful campaign against the Mayor, and (3) the unsuccessful campaign against the recall of Vasquez and Salazar.

The City sued these three Councilmembers as well as the City Administrator (Defendants), alleging they violated Gov. Code § 1090 because they were financially interested in the contract. The City sought to void the contract on the ground that at least one of the Defendants was financially interested and to disgorge to the City any money they received from Contractor. The Defendants filed an anti-SLAPP motion. The Defendants declared they had no financial interest in the contract and that they voted for it because they thought it best for the City. Contractor's executive vice president declared Contractor made no promise to make any contribution in exchange for a vote. The Superior Court denied the motion. The Court of Appeal affirmed.

Holdings & Analysis:

1. A party may move under CCP § 425.16 for dismissal of "certain unmeritorious claims that are brought to thwart constitutionally protected speech or petitioning activity." The defendant must make a threshold showing that the action arises from protected activity. If the defendant does, the plaintiff must show a probability of success on the merits. If the action arises from protected activity and lacks minimal merit, it may be stricken.

2. The City asserted that its suit was exempt from the anti-SLAPP motion under section 425.16(d), which provides that the statute "shall not apply to any enforcement action brought in the name of the people of the State of California by the Attorney General, district attorney, or city attorney, acting as public prosecutor" (the "public

enforcement exemption). A prior panel of this Second District Court of Appeal ruled that the exemption applied to all civil actions to enforce consumer or public protection. A Fourth District panel disagreed, holding that the exemption only applied to actions brought in the name of the people. This Second District panel agreed with the Fourth District because the text of the statute limits the exception to actions brought "in the name of the people of the State of California," not to any enforcement action.

3. The anti-SLAPP motion was properly denied because the Defendants did not meet their burden to show the challenged actions arose from protected activity.

    a. The Defendant Councilmembers asserted that their votes were protected activity. The Court rejected their arguments. A legislator casts his or her vote as a political representative. He or she has no personal right in the vote. Thus, the votes of Councilmembers Vasquez, Urteaga and Salazar were not protected activity, and they participated in making a city contract in which they had a financial interest.

    b. The Defendant City Administrator asserted his negotiations were protected activity. "Nothing about Torres's acts to negotiate a routine city contract as part of his job as City Administrator implicated his exercise of free speech or right to petition."

4. Because the Defendants did not meet their burden, the Court "need not reach the second prong of the anti-SLAPP analysis."

Public Records

***Long Beach Police Officers Association. v. City of Long Beach (Los Angeles Times Communications LLC*) (2014) 59 Cal.4th 59** [see also Personnel Update]

Take-Away: Names of officers involved in on-duty shootings are generally subject to disclosure under the Public Records Act.

Facts: Two police officers responded to a call about an intoxicated man brandishing a "six-shooter." The man pointed an object at them. The officers fatally shot him. The object was a garden hose spray nozzle with a pistol grip.

A Los Angeles Times reporter submitted a Public Records Act (PRA) request for the names of the officers as well as the names of other "officers involved in officer-involved shootings" for a six-year period. The Police Officers Association (Union) filed suit to enjoin disclosure, alleging the City stated it would disclose absent judicial intervention. The City supported the Union in the suit. The Los Angeles Times intervened.

The Union's president, Lt. Steve James, submitted a declaration stating that the release of the names could result in harassment of the officers and their families because harassment has happened in the past and because an anonymous post in the Internet wished an officer's family would experience Christmas without their father. The City submitted a declaration of Lt. Lloyd Cox who stated that every officer-involved shooting is investigated,

and the results of the investigations are treated as confidential personnel records. The Cox declaration also asserted that disclosure could result in harassment.

The lower courts found that the names were not exempt from disclosure and denied a preliminary injunction, without prejudice. The Supreme Court affirmed.

Holdings & Analysis:

1. The PRA, which broadly defines public records, includes multiple exemptions. The public entity claiming an exemption bears the burden to show an exemption applies. The California Constitution, as amended in 2004, directed the courts to narrowly construe exemptions. However, "the constitutional provision excludes from the requirement of narrow construction those statues that protect the privacy interests of peace officers, such as Government Code section 6254(c) [the exemption for personnel and similar files if disclosure would constitute an unwarranted invasion of personal privacy] and the *Pitchess* statutes," which are applicable pursuant to Gov. Code § 6254(k).

2. The *Pitchess* statutes do not exempt the names from disclosure.

    a. Evid. Code § 832.7 protects disclosure of a peace officer's "personnel records." Section 832.8 defines "personnel records" to include records of employee "appraisal[] or discipline." The legislative concern "'appears to have been with *linking a named officer to the private or sensitive information listed in section 832.8. …* It seems unlikely that the Legislature contemplated that the identification of an individual as a peace officer, *unconnected to any of the information defined as part of a personnel record*, would be rendered confidential be section 832.8.'" [Citing *Commission on Peace Officer Standards*, italics added by the Court.]

    b. The Court rejected the Union and City's argument that disclosing the names necessarily links the officers to private or sensitive information in their personnel files. The names are just factual information. The Legislature distinguishes between factual information about an incident (which generally must be disclosed) and records generated by an internal investigation into an incident (which generally are confidential). Notably, the *Pitchess* statutes are silent about whether names of officers involved in shootings are "personnel records." Further, Pen. Code § 830.10 requires uniformed officers to display their names or identification numbers. While the officers may be investigated, disclosing their names does not imply they are subject to disciplinary action.

3. The Court distinguished *Copley Press, Inc. v. Superior Court*, in which the records were exempt because they were linked to a confidential disciplinary action.

4. Nor does Gov. Code § 6254(c) preclude disclosure. Merely providing the names would not constitute an unwarranted invasion of privacy in these circumstances. The public has a significant interest in the conduct of peace officers which "diminishes and counterbalances" the officers' privacy interests. But this would not

necessarily be true in every case, e.g., if it were important to keep an officer, such as an undercover officer, anonymous for security reasons.

5. Nor does Gov. Code § 6254(f) preclude disclosure. Records of an administrative or criminal investigation are not at issue.

6. Finally, Gov. Code § 6255(a), the "catchall exemption" that allows an agency to withhold records if it shows "on the facts of the particular case the public interest served by not disclosing the record clearly outweighs the public interest served by disclosure," does not apply. The vague safety concerns articulated "are insufficient to tip the balance against disclosure …." But, the Court did "not hold that the names of officers involved in shootings have to be disclosed in every case, regardless of the circumstances." Rather, the Union and City failed to make a "particularized showing" that the public interest in disclosure is clearly outweighed by the public interest against disclosure. The Union and the City may try to satisfy this standard upon return to the Superior Court.

***St. Croix v. Superior Court (Grossman)* (2014) -- Cal.App.4th --, 2014 WL 3704275**

Take-Away: A city charter that establishes an attorney-client relationship creates an exemption for the disclosure of public records notwithstanding a sunshine ordinance provision that purports to waive exemptions.

Facts: Allen Grossman, a San Francisco resident, submitted, pursuant to the Public Records Act and the City's Sunshine Ordinance, a request for documents pertaining to the development of certain regulations of the San Francisco Ethics Commission. The Commission's Executive Director, St. Croix, produced more than 120 documents but withheld 24 communications between the Commission and the City Attorney's Office. Grossman petitioned for a writ, asserting that the attorney-client privilege did not apply because the Sunshine Ordinance requires disclosure of documents "notwithstanding any exemptions otherwise provided by law." The Superior Court held that the City's Sunshine Ordinance required disclosure. St. Croix and the Commission (collectively, the City) petitioned for a writ in the Court of Appeal. The Court of Appeal granted the City's petition.

Holdings & Analysis:

1. The attorney-client privilege applies to written communications.

    a. The attorney-client privilege "'has been a hallmark of Anglo-American jurisprudence for almost 500 years,'" as the California Supreme Court has emphasized. It may result in the suppression of some evidence, "but these concerns are outweighed by the importance of preserving confidentiality in the attorney-client relationship."

    b. The scope and availability of the privilege are governed by statute. With respect to the PRA, the statute exempts from disclosure documents covered by privileges set forth in the Evidence Code, which includes attorney-client privilege.

c. The Supreme Court has held that even though the Brown Act abrogates the privilege (with some exceptions) in the context of public meetings, it does not abrogate the privilege with respect to documents.

2. The City Charter establishes an attorney-client relationship between the City Attorney's Office and the Commission and its officers.

   a. The courts have recognized the importance of retaining confidential communications between an attorney and his or her clients.

   b. The attorney-client relationship established by the Charter should not be narrowly construed by the provision of the Constitution that requires narrow construction of statutes that limit the people's rights of access. "The charter necessarily incorporates state law attorney-client privilege as part of that attorney-client relationship," which "conclusion does not result from a broad construction of the charter's provisions … and would not be altered by adopting a narrower construction …."

   c. The Charter should not be narrowly construed to avoid a conflict with the Sunshine Ordinance. The rule regarding avoiding conflicts between statutes does not apply here because the Charter controls.

   d. The limited, and inapplicable, partial exemption of the Brown Act (re: public meetings) does not support a conclusion that the attorney-client privilege is less important in the public sector. '"Public sector entities need confidential legal advice to the same effect as do private citizens,'" the Supreme Court has written.

3. The Charter supersedes the Sunshine Ordinance.

   a. "Because the charter incorporates the attorney-client privilege, an ordinance cannot eliminate that privilege for a class of communications between the city attorney and his or her clients."

   b. The voters' adoption of the Sunshine Ordinance did not waive the privilege. Only an amendment to the Charter could.

Council Meeting Conduct

***Schwarzburd v. Kensington Police Protection & Community Services District* (2014) 225 Cal.App.4th 1345** [see also Personnel Update]

Take-Away: Board members are engaged in protected activity, pursuant to the anti-SLAPP statute, when they participate in a board meeting which a plaintiff alleges could not proceed.

Facts: The Community Services District Board agendized discussion and action on the Police Chief's compensation package. The Board commenced discussion at 7:45 pm. The Board Policy and Procedures Manual provides that meetings should adjourn at 10:00 pm, and that at 9:45 pm, the Board shall stop the meeting to consider what to discuss in the

remaining 15 minutes or whether to extend the meeting. At 9:45 pm, the Board considered whether to extend the meeting, but a motion failed to secure the necessary four-fifths vote. At 10:00 pm, the Board unanimously voted to extend the meeting. Thereafter, the Board approved a compensation package for the Police Chief which included a retention and merit bonus. Plaintiffs filed a writ petition alleging the Board and the Board Members (Defendants) failed to give proper notice of the action taken and violated the Board's Policies and Procedures Manual. The Board and Board Members filed an anti-SLAPP motion. The trial court denied the motion. The Court of Appeal reversed.

Holdings & Analysis:

1. Anti-SLAPP statute standards.

    a. Two-step analysis: Pursuant to CCP § 425.16, the court first determines if the challenged cause of action arises from protected activity (constitutional right of petition or free speech). If the defendant makes this showing, the burden shifts to the plaintiff to establish, with admissible evidence, a reasonable probability of success on the merits.

    b. Public Interest Exception: the statute does not apply to an action brought solely in the public interest or on behalf of the general public.

2. Plaintiffs did not show the public interest exception applied. "[T]heir claims do not operate to enforce an important right affecting the public interest." In addition, they asserted that they were enforcing the Brown Act, but the Brown Act does not apply to the District. Further, enforcing a policy to terminate discussion at a public meeting does not benefit the public.

3. Under the first prong of the analysis, the Board Members established that they were engaged in protected activity. Plaintiffs sued the Board Members "based on *how* they voted and expressed themselves at the Board meeting." [Italics in original.] Thus, the trial court erred by denying the anti-SLAPP motion as to the Board Members. However, as to the Board itself, allegations that it violated its policies and procedures do not implicate protected activity.

4. Under the second prong, Plaintiffs cannot establish that their suit has any merit. The Board did not violate its own policies when it voted, at 10:00 pm, to continue the meeting. In addition, the agenda notice properly informed the public that the Board would be considering the Police Chief's compensation package. Plaintiffs claimed that the bonus was an improper retroactive payment, but "it is clear" that the bonus was actually an incentive to encourage the Chief to extend his tenure. Thus, the trial court erred by denying the anti-SLAPP motion as to the Board.

Council Meeting Invocations

***Town Of Greece, New York v. Galloway* (2014) 134 S.Ct. 1811**
[discussed at May 2014 City Attorney's Conference]

Take-Away: Invocations at council meetings are constitutional absent a discriminatory selection policy.

Facts: The Town invited volunteers to open council meetings with prayer. The stated purpose was to put councilmembers in a solemn, deliberative state of mind. The Town, which is predominately Christian, compiled a list from a local directory. All volunteers were Christian from 1999 through 2007. The Town did not review or edit the prayers. Plaintiff was offended when she attended a council meeting. She complained. The Town invited a Jew and a Wiccan priestess to do the invocation. The Second Circuit held the practice was unconstitutional. The Supreme Court reversed.

Holdings & Analysis:

1. In *Marsh v. Chambers*, the Court upheld invocations before legislative sessions based on history and tradition. This standard—review of invocations based on history and tradition—applies to local agency meetings.

2. There is a long history and tradition of invocations at public meetings. The Town's history of invocations falls within this tradition. The Town did not police or edit the content, and there was not a pattern of proselytizing or denigrating comments. In addition, the Town did not engage in a discriminatory selection policy. "That nearly all of the congregations in town turned out to be Christian does not reflect an aversion or bias on the part of the town against minority faiths."

3. In addition, the invocations had a ceremonial, non-coercive purpose, unlike a high school graduation prayer that is conducted before a captive audience. (*Lee v. Weisman*.)

4. The case is in accord with the recent Ninth Circuit decision in *Rubin v Lancaster*.

Councilmember Qualifications

***Rando v. Harris* (2014) -- Cal.App.4th --, 2014 WL 3854418**

Take-Away: The Attorney General has considerable discretion to deny quo warranto applications.

Facts: Councilmember Quintero did not run for reelection. Meanwhile, a sitting Councilmember won election as City Treasurer and gave up his seat. The Council appointed Quintero to fill the vacancy and serve the remainder of the term. Petitioners applied to the Attorney General for leave to sue quo warranto, claiming that the appointment violated a City Charter provision. The Attorney General found that the provision was ambiguous, but that the better interpretation was that it prohibited a Councilmember from

using his or her influence to gain non-elective City employment and did not impose term-limits for elective office. Petitioners sought unsuccessfully sought writ relief in the trial and appellate courts.

Holdings & Analysis:

1. Quo warranto ("by what authority"), which is codified at CCP § 803, is the exclusive procedure by which one may challenge any person who usurps, intrudes into, or unlawfully holds public office. Only the Attorney General or a person authorized by the Attorney General can bring such an action.

2. The courts will only issue a writ to reverse the Attorney General's decision on a quo warranto request if it constitutes an abuse of discretion.

3. The Attorney General did not abuse her discretion. It was debatable whether the Charter created term limits for elective office. However, the Attorney General retains discretion not to sue when the issue is debatable.

III. ELECTIONS

***Jauregui v. City of Palmdale* (2014) 226 Cal.App.4th 781**, petition for review filed (July 8, 2014)

Take-Away: If at-large council elections result in minority vote dilution, the courts may issue injunctive relief, even against charter cities.

Facts: The Charter City of Palmdale holds at-large elections for city council. According to the complaint, the City's population is approximately 55% Latino and 15% African American. In the last ten years, only one Latino has been elected to the city council and no African American has. Plaintiffs alleged the at-large elections have resulted in vote dilution in violation of the California Voting Rights Act. After trial, the Superior Court issued a statement of decision finding vote dilution. The Court issued a preliminary injunction prohibiting the City from certifying the results of the upcoming November 2013 election pending implementation of a final plan to require district elections. The City separately appealed the preliminary injunction and the approval of the final plan. Only the preliminary injunction is now at issue. The Court of Appeal affirmed.

Holdings & Analysis:

1. The City did not challenge the Superior Court's findings of vote dilution. Instead, the City asserted that its status as a charter city precluded application of the California Voting Rights Act (Act). The Court of Appeal rejected the argument.

    a. Elec. Code § 14207 provides that at-large elections "may not be imposed or applied in a manner that impairs the ability of a protected class of candidates of its choice or its ability to influence the outcome of an election." "'Protected class' means a class of voters who are members of a race, color or language minority

group" per the federal Voting Rights Act. (Elec. Code § 14026(d).) "'Racially polarized voting' means voting in which there is a difference … in the choice of candidates or other electoral choices" between the voters in the protected class and the rest of the electorate." (Elec. Code § 14026(e).) There are many methodologies that may be employed to determine whether at-large elections impair a protected class' voting rights. Proof of intent to discriminate is not a factor.

b. A four-step analysis applies to the question of whether a charter city's law conflicts with a state statute: (i) whether the local law regulates a "municipal affair;" (ii) whether there is an "actual conflict;" (iii) whether the state law addresses a "statewide concern;" and (iv) whether the state law is "reasonably related … to resolution" of the issue of statewide concern and is "narrowly tailored to avoid unnecessary interference in municipal governance."

c. Section 14207 (precluding at-large elections that impair a protected class' rights) applies to charter cities.

   i. "[H]ow city council members are elected is the essence of a municipal affair."

   ii. "[I]f there is a dilution of a protected class's voting rights, then defendant's at-large electoral system actually conflicts with section 14207."

   iii. "Given the history of our nation and California, there is a convincing basis for the Legislature to act in what otherwise be a local affair." The purpose of the Act is to protect the integrity of elections and implement the equal protection and voting guarantees of the California Constitution.

   iv. The subject provisions of the Act are narrowly tailored and do not unnecessarily interfere with municipal governance. They "apply *only* if there is dilution of protected classes' votes." [Italics in original.]

d. Charter cities do not have plenary authority over their elections.

   i. Article XI, section 5, of the California Constitution provides that "'*plenary authority is hereby granted, subject only to the provisions of this article*'" to city elections as well as to the hiring, firing and conditions of the employment of city personnel. [Italics added by the Court.]

   ii. But this provision is not absolute. For example, the Supreme Court has ruled that charter cities do not have absolute control over employment matters; they must comply with the Meyers-Milias-Brown Act. (*Seal Beach Police Officers Assn. v. City of Seal Beach*.) Thus, charter cities do not have absolute authority regarding their elections.

2. The Superior Court had authority to enjoin certification of the election results.

a. The City asserted that CCP § 526(b)(4) and Civ. Code § 3423(d) prohibit the preliminary injunction. These sections state that an injunction cannot prevent the execution of a statute by officers of the law for the public benefit.

b. Elec. Code § 14209 trumps the foregoing statutes. It authorizes a court to "'implement *appropriate remedies*, including the imposition of district-based elections ….'" [Italics added by the Court.] "What constitutes 'appropriate remedies' is ambiguous." The Court determined that legislative intent was to authorize an injunction of the type at issue in this case. Reasons included that section 14209 is more recent and specific and that the Legislature intended to expand the protections of the federal Voting Rights Act, which act allows for similar injunctive relief. Moreover, remedial legislation should be liberally and broadly construed. Thus, the Superior Court was authorized "to defer certification of the election results while a final plan is promptly prepared" to implement district voting.

***Chula Vista Citizens for Jobs and Fair Competition v. Norris* (9th Cir. 2014) 755 F.3d 671**

Take-Away: Elections Code requirement that initiative proponents disclose their identities to would-be signatories at the time of circulation of an initiative petition violates the First Amendment.

Facts: Unincorporated associations (Associations) sought to place an initiative on the ballot to preclude public works contracts where there was a requirement to use only union employees. Two Association members agreed to serve as proponents of the initiatives (Proponents). The Proponents submitted a notice of intent, which they signed pursuant to the Elections Code. The Proponents circulated the Petition and gathered signatures, but the City Clerk rejected the petition because the Proponents had not signed the circulated sections of the petition. Instead, the circulated sections of the petition identified the Associations' PACs. The Proponents submitted a second notice and petition that complied with the requirements, and the voters approved the initiative.

In the meantime, the Associations and Proponents filed this action to challenge (1) the requirement that initiative proponents be electors (the "elector requirement") and (2) the requirement that the Proponents sign the sections of the petition circulated for signature (the "petition-proponent requirement"). The District Court ruled for the City and the State, which had intervened. The Court of Appeals reversed with respect to the second issue.

Holdings & Analysis:

1. The elector requirement: the Associations claimed that they have First Amendment rights to promote an initiative, e.g., to serve as a proponent, without depending upon their members to act as proxies. The Court disagreed.

    a. The initiative power is a legislative power, and only natural persons can legislate. The act of placing an initiative before the voters is a component of this legislative power.

b. The restrictions on this legislative activity do not violate the Associations' right to free speech. The legislative power "is not personal to the legislator but belongs to the people." Thus, just as a legislator has no right of free speech allowing him or her to vote despite a conflict of interest, the Associations have no right of free speech to serve as a proponent of an initiative.

c. In addition, while the Associations have the right to engage in expressive activity, that right does not confer a right to share legislative power. Otherwise, individuals would have unfettered rights to engage in free speech activity irrespective of the context (e.g., to participate in debates on the floor of the state legislature).

2. The petition-proponent requirement: the Proponents claimed that the compelled disclosure of their identities at the point of contact with the signatories (i.e., identification on the sections of the petition being circulated) violates their rights to free speech. The Court of Appeals agreed.

   a. The parties agreed that the petition-proponent requirement is regulation of political speech. Thus, the Court assumed that the requirement is a "direct regulation of the content of speech subject to First Amendment scrutiny."

   b. "Exacting scrutiny" applies to the review of the petition-proponent requirement. This requires more than "the mere assertion of a connection between a vague interest and a disclosure requirement." The requirement does not survive exacting scrutiny.

      i. The State does not have a strong interest in informing the electors of the proponent's identity at the signature gathering stage. The signatories can learn the identity of the proponents by inquiring about who signed the notice of intent to circulate. Moreover, preserving the anonymity of the proponents at the time of contact with voters is valuable, as it ensures that the focus is on the content of the speech, not who is speaking. Accordingly, the Supreme Court has invalidated laws that require circulators to wear badges, and this Court similarly concluded that the State does not have a strong interest in compelling disclosure at this point of contact.

      ii. The State also asserted an interest in preserving the integrity of the electoral process. But the State could not show that compelled disclosure provided any benefit (e.g., against fraud).

IV. PERSONNEL

[See Personnel Update]

V. FINANCE AND ECONOMIC DEVELOPMENT

Taxes and Fees

***City of San Diego v. Shapiro* (2014) -- Cal.App.4th --, 2014 WL 3795956**

Take-Away: A city may not adopt the procedures of the Mello-Roos Act to limit the electorate to specified property owners for a vote on special taxes.

Facts: The City adopted an ordinance (Ordinance) authorizing the City to create a Convention Center Facilities District (CCFD) to help fund expansion of the Convention Center through the imposition of a special tax. The Ordinance provides that the CCFD encompasses the entire City but that only hotels would be taxed, based on room revenues. The Ordinance incorporates and modifies provisions of the Mello-Roos Community Facilities Act of 1982 (Act). The Act provides that, re: special taxes, the legislative body may limit the vote to the landowners subject to the tax (except for apportioned taxes on residential property). (Gov. Code § 53326(c).) The Ordinance incorporates and modifies this provision, providing that the vote shall be by (1) the fee owner of land underlying a hotel or (2) the owner of the hotel if the fee is owned by the government (Landowners).

The City Council adopted resolutions (1) forming the CCFD and a methodology for calculating the tax based upon room revenues, (2) authorizing the issuance of bonds to be repaid by the taxes, and (3) setting a special election for a vote on the special tax by the Landowners. The Landowners approved the tax.

The City filed a validation action regarding the special tax. An individual and San Diegans for Open Government answered the Complaint. After briefing and hearing, the Superior Court ruled for the City. The Court of Appeal reversed.

Holdings & Analysis:

1. The special tax is invalid because it was not approved by two-thirds of the qualified electors, as required by Propositions 13 and 218.

    a. Textual Analysis:

        i. Proposition 13 and Proposition 218 provide that special taxes must be approved by two-thirds of the qualified voters and two-thirds vote of the electorate, respectively. (Cal. Const., art. XIIIA, § 4, Cal. Const., art. XIIIC, § 2.)

        ii. The terms “qualified voters” and “electorate” are effectively synonyms. Reasons include that the Propositions 13 and 218 are related measures designed to achieve similar goals (e.g., to limit taxation authority). Thus, much of the analysis applies equally to each provision.

        iii. “Qualified voter” has been described as a natural person who is qualified and registered to vote. (See, e.g., *Neilson v. City of California City* (nonresident

landowner's challenge to parcel tax failed; the registered voters properly adopted the tax, irrespective of who must pay).) Qualifications for voting are set forth in the Constitution. The City did not cite, and the Court did not find, authority suggesting there could be other qualifications.

iv. With respect to Proposition 218, section 4 of Article XIIID provides for property owners to approve assessments (as opposed to taxes). This shows an intent to distinguish between qualified voters, who can vote on taxes, and property owners, who have the right to vote on assessments. Moreover, subdivision (g) expressly contrasts electors with property owners, explaining that this distinction should be deemed constitutional because the purpose is to allow property owners to vote on property assessments for which their properties receive special benefits.

b. Legislative History: The ballot materials for both propositions discuss approval of taxes by voters. They do not discuss or suggest that local governments could "exclude large numbers of registered voters from voting in a special tax election by limiting who would be deemed 'qualified electors.'"

c. Voter Intent: The voters who approved Propositions 13 and 218 intended to limit government authority to impose or raise taxes. The Court's interpretation is consistent with this intent.

d. Policy: The City suggested that the vote was proper because only the Landowners will have to pay the tax. But the voters expected that the general electorate would vote on taxes, irrespective of who paid. Moreover, it is glib to assert that the Landowners are the party who actually bear the burden to pay the taxes.

e. The Legislature's adoption of a property-owner voting mechanism does not save the City.

i. The subject constitutional language is not ambiguous.

ii. There is no indication that the Legislature considered whether a landowner election would be comply with Proposition 13, which had been adopted four years prior.

iii. In any event, the Act could not trump the Constitution.

2. The special tax violates the City Charter. The City Charter similarly requires taxes to be approved by registered voters.

***Sipple v. City of Hayward* (2014) 225 Cal.App.4th 349**, review denied (July 23, 2014) [discussed at May 2014 City Attorney's Conference]

Take-Away: Business has standing to seek refunds of improperly collected taxes on behalf of customers to whom it is obligated to remit refunds by judicially-enforceable settlement agreement.

Facts: New Cingular improperly charged customers local taxes for internet access. New Cingular settled federal court class action, agreeing to seek refunds. New Cingular submitted refund claims and then filed state court lawsuits. The Superior Court sustained Cities' demurrers on the grounds that local ordinances prohibited class claims and require taxpayers to file individual claims. In *McWilliams v. City of Long Beach*, the Supreme Court held that class claims were permitted by the Government Claims Act. On appeal, Cities now contend that New Cingular cannot proceed because it has not refunded the taxes and that it lacks standing. The Court of Appeal reversed.

Holdings & Analysis:

1. Gov. Code § 910 governs class claims for refunds, and it preempts a local ordinance which seeks to require the service provider to have actually refunded the taxes as a precondition to presenting a claim to the city. New Cingular's claims complied with section 910.

2. New Cingular has standing.

    a. A party must be beneficially interested and have a special interest or right at stake.

    b. The courts of appeal have issued mixed rulings regarding whether a business that remits taxes to a local agency has standing to seek refunds on behalf of customers. The better reasoned and more recent cases hold that the businesses have standing. The businesses have interests because they are legally responsible for the taxes, had remitted them and could be adversely affected. Moreover, the local agencies should not be unjustly enriched by being permitted to retain illegal local taxes.

    c. "Although the issue of standing is a close one, we find that under the unique circumstances presented by this case, New Cingular has a beneficial interest and is a proper plaintiff." New Cingular seeks to recover taxes it actually remitted, and it is obligated to pay its customers the refunds pursuant to the judicially-enforceable settlement agreement. Moreover, Cities should not be unjustly enriched.

3. However, the demurrers to the individual plaintiffs' claims were properly sustained because they had not alleged the particular cities to which they had paid taxes.

VI. MUNICIPAL SERVICES AND UTILITIES

[No reported cases]

VII. PUBLIC CONTRACTING

[No reported cases]

VIII. PUBLIC PROPERTY

Streets and Sidewalks: ADA and Curb Ramps

***Cohen v. City of Culver City* (9th Cir. 2014) 754 F.3d 690**

Take-Away: A city may violate the ADA if it allows third parties to obstruct disabled access points (e.g., sidewalk ramps).

Facts: Plaintiff, an elderly man who uses a cane and suffers from dementia, walked through an outdoor car show on City streets. A vendor's display blocked a curb ramp that provided access to the sidewalk. Plaintiff tripped while trying to walk around the display and step up on the sidewalk. He filed an action alleging violations of the federal ADA and seeking damages. The District Court granted the City's motion for summary judgment. The Court of Appeals reversed.

Holdings & Analysis:

1. Title II of the federal ADA requires local government to provide equal access to city programs, e.g., sidewalks, to disabled persons. To prove an ADA violation, the plaintiff must prove he or she is a qualified individual with a disability; he or she was excluded from, or denied access to, an agency program; and the exclusion or denial was by reason of the disability. 28 CFR § 35.150 governs existing facilities, requiring, for example, agencies to implement a plan to install disabled access curb ramps at intersections. 28 CFR § 35.151 requires that facilities public agencies begin to build or alter after January 1992 be readily accessible unless it would be structurally impracticable.

2. The District Court erred by granting summary judgment.

    a. The District Court reasoned that Plaintiff could have accessed the sidewalk by a nearby curb ramp and thus was not denied access to the sidewalk. The District Court relied on precedents concerning public agencies' obligations when they modify existing facilities. (28 CFR § 35.150.) However, the cases are inapposite

because the City was in compliance with the ADA but allowed elimination of the disabled access it had built.

b. 28 CFR § 35.151 is more applicable than section 35.150 because this matter involves alteration of existing sidewalks. "When the City has already built a direct route that is accessible to disabled persons, it is reasonable to require the City not to force disabled persons to look for and take even a marginally longer route."

c. The City allowed the sidewalks to be used by private vendors but failed to take action to ensure continued ADA compliance (e.g., to prevent blockage or to provide temporary signage directing pedestrians to the nearby ramp). Thus, the jury could conclude that the City violated the ADA, including provisions requiring facilities to be readily accessible and to be kept free of obstructions.

Regulating Activity on Streets and Highways

***People v. Goldsmith* (2014) 59 Cal.4th 258**

Take-Away: Red light camera photographs are presumptively authentic if based on an automated system adopted pursuant to the Vehicle Code.

Facts: Defendant was cited for failing to stop at a red light in the City of Inglewood based on photographs from an automated red light camera. Defendant claimed the photographs lacked foundation and were hearsay. The trial court overruled the objections and found Defendant guilty. The Supreme Court affirmed.

Holdings & Analysis:

1. The Vehicle Code authorizes local governments to install automated traffic enforcement systems (ATES). Section 21455.6 requires the city council or board of supervisors to conduct a public hearing before entering a contract for the installation of an ATES. Section 21455.5 requires notice prior to enforcement at intersections. It also requires the local agency to establish procedures for the operation of an ATES and to maintain ultimate control and supervision of the system.

2. An investigator with the City's police department testified regarding the operation of the ATES, the City's contract with a private company to maintain the system, and the photographs at issue which showed the Defendant ran the red light.

3. The testimony laid a sufficient foundation for the ATES-based evidence. The investigator established that the photographs were obtained in the normal course of the City's operation. Under Evid. Code §§ 1552 and 1553, this created a presumption that the photographs were authentic, which presumption was not rebutted.

4. The photographs were not hearsay. Hearsay evidence must be offered by a person. The photographs were automatically generated by the computer controlling the system and were thus not hearsay statements offered by a person.

5. There is no basis to impose stricter evidentiary requirements on red light camera cases. The standard rules of evidence properly apply in these infraction cases.

California Tow Truck Assn. v. CCSF **(2014) 225 Cal.App.4th 846**
[discussed at May 2014 City Attorney's Conference]

Take-Away: State law only permits regulation of tow companies and drivers who maintain principal place of business or employment in the local jurisdiction.

Facts: San Francisco requires tow truck businesses and drivers operating in its jurisdiction to obtain permits. The Regulations impose permit application and operation requirements to protect against illegal and untoward conduct. California Tow Truck Association alleged San Francisco's regulations were preempted by federal and state law. The City removed the case to federal court. The federal courts ruled that federal law did not preempt the local regulations. (693 F.3d 847, 928 F.Supp.2d 1157.) The case was remanded back to state court. The Superior Court ruled that the Vehicle Code did not preempt the local regulations. The Court of Appeal reversed.

Holdings & Analysis:

1. The Vehicle Code generally preempts tow truck regulations, but reserves for local jurisdictions authority to regulate "tow truck service or … drivers whose principal place of business or employment" is within the jurisdiction of the local authority. (Veh. Code § 21100(g)(1).) San Francisco asserted this permitted it to regulate based on "substantial or consequential business." The Court disagreed.

    a. The plain text of "principal place of business or employment" is clear, and it cannot reasonably be interpreted to mean a nebulous standard as proposed by San Francisco.

    b. The Legislature authorizes local regulation of taxis "operated within the jurisdiction" (Gov. Code § 52075.5), which shows the Legislature has elsewhere permitted more expansive local regulation in an analogous context.

    c. The legislative history does not support a contrary conclusion. While the Legislature expressed concerns about tow truck operations, it did not express a desire to permit greater regulation than provided for in the statute.

    d. The interpretation will not lead to absurd results. To require tow companies and drivers to apply for permits in multiple jurisdictions could be overly burdensome. Local agencies retain extensive authority to regulate tow companies and drivers who principally operate in their jurisdictions, and if they lack authority, the Vehicle Code provides extensive regulations to address local agencies' concerns.

2. Local agencies retain authority under the Rev. & Taxation Code to impose regulatory fees to recover the costs of regulating tow companies and drivers.

IX. REGULATING BUSINESSES AND PERSONAL CONDUCT

Rent Control

***218 Properties, LLC v. City of Carson* (2014) 226 Cal.App.4th 182**

Take-Away: Cities shall evaluate the level of support among residents for an application to convert a mobilehome park to a resident-owned park.

Facts: 218 Properties LLC owned a 26-plot mobilehome park where the coach owners do not own the plots and enjoy the benefits of rent control. 218 Properties applied to the City to convert the park into a resident-owned park, pursuant to the Subdivision Map Act (SMA). In order to prevent sham conversions, Gov. Code § 66427.5(d) provides that the applicant must present, and the local agency must consider, a tenant survey gauging support for the conversion. The survey showed that 20 residents opposed the conversion and did not wish to purchase their plots. Five of the remaining six lots were owned by 218 Properties. The City Council determined that the proposed conversion was not bona fide based on lack of support by the residents.

Imperial Avalon owned a 225-unit mobilehome park. It also applied to convert the park into a resident-owned park. Only 86 residents responded to the survey. Eighteen supported the conversion. Forty-six opposed the conversion. The other ballots were blank or submitted too late. The City Council determined that the conversion was not bona fide based on lack of support.

The Superior Court ruled that the City erred in each instance, including because rent control benefits would remain in place for non-purchasers (either because the owner had promised to extend rent control or because low-income rent control provisions would kick-in), and the City improperly gave tenants veto authority over the proposal. The Court of Appeal reversed as to 218 Properties but affirmed as to Imperial Avalon.

Holdings & Analysis:

1. Local agencies must consider the results of the tenant survey when determining, at the public hearing required by the SMA, if the conversion is bona fide.

    a. Prior to 2014, subdivision (d) of Gov. Code § 66427.5 vaguely provided that the local agency shall "consider" the results of the tenant survey at the requisite public hearing. Subdivision (e) provides, in turn, that the local agency shall merely determine whether the applicant complied with the requirements of the section 66427.5. In 2009, the First District Court of Appeal ruled that subdivision (e) constrained local agencies from evaluating the survey. Since then, other courts "have concluded that the better view is to allow the local agency" to take the survey results into account, and not to treat as "a mere ministerial task to be checked-off a list of pro forma steps." These decisions best account for legislative intent.

    b. As of January 1, 2014, subdivision (d) has been amended to provide that the agency "may disapprove the map if it finds that the results of the survey had not

demonstrated the support of at least a majority of the park's homeowners." Thus, the SMA has been clarified to require local agencies to consider tenant preferences going forward. But it also suggests that the Legislature always intended local agencies to evaluate tenant support.

2. The near-unanimous opposition of the 218 Properties tenants to the conversion supports the City's rejection of the application.

3. The same is not true with respect to Imperial Avalon. The only evidence against its bona fide intent was the survey, and only 46 of the 225 residents opposed the conversion. "This low response was insufficient to show the conversion was a sham."

4. The City also asserted that it properly rejected Imperial Avalon's application based on an inadequate Tenant Impact Report (TIR). The argument failed. The City's review of the TIR is limited to whether it complies with the statutory requirements. The City lacked a reasonable basis to claim the report was incomplete. Moreover, the City had not requested supplemental information.

Camping/Loitering

Desertrain v. City of Los Angeles (9th Cir. 2014) 754 F.3d 1147

Take-Away: An ordinance that prohibits use of vehicles as living quarters, without providing clear standards, is unconstitutionally vague.

Facts: A City ordinance (Ordinance) prohibits use of a vehicle on a City street or parking lot "as living quarters either overnight, day-to-day, or otherwise." A 2008 internal memo directed police officers to make an arrest only after observing a suspect occupying a vehicle for more than one night or three consecutive days. In 2010, the City created a task force to step up enforcement of the Ordinance. PD supervisors instructed officers to look for possessions normally found in a home (e.g., food, bedding, clothing, medicine) and that sleeping in a vehicle was not necessary to violate the Ordinance.

Police officers arrested Plaintiffs, each of whom was homeless, for violating the Ordinance irrespective of whether they were sleeping in their vehicles on City streets. For example, they cited and arrested a plaintiff who had tried to comply with the ordinance, after having been issued a warning, by parking his car, with permission, in a church parking lot when he slept. The officers found personal belongings and bottles of urine in his car but did not see him sleeping in it when he was arrested. Similarly, police officers arrested a plaintiff who was waiting in his car to get out of the rain. They found food, clothing and a bottle of urine in the car. The plaintiff had been sleeping on the sidewalk after having been warned about sleeping in his vehicle.

The District Court granted summary judgment for the City. The Court of Appeals reversed.

Holdings & Analysis:

1. The District Court improperly ruled that the City was entitled to summary judgment on the ground that Plaintiffs had failed to raise a void-for-vagueness challenge in their pleadings. Plaintiffs had put the City on notice of this claim and should have been granted leave to amend their pleadings.

2. The Ordinance violates the Due Process Clause because it is "so vague and standardless that it leaves the public uncertain as to the conduct it prohibits."

    a. The Ordinance fails to provide adequate notice of the conduct it criminalizes.

        i. The fair notice requirement ensures that an ordinary citizen can conform his or her conduct to the law.

        ii. The Ordinance provides no guidance as to what it actually prohibits. "Is it impermissible to eat food in a vehicle? Is it illegal to keep a sleeping bag? Canned food? Books? What about speaking on a cell phone? Or staying in a car to get out of the rain?" Plaintiffs tried to comply with the Ordinance, "but there appears to be nothing they can do to avoid violating the statute short of discarding all of their possessions or their vehicles, or leaving Los Angeles entirely."

        iii. The Ordinance is similar to an anti-loitering ordinance invalidated by the Supreme Court in 1999 because it vaguely prohibited "remaining in any one place with no apparent purpose." (*City of Chicago v. Morales*.)

    b. The Ordinance promotes arbitrary enforcement targeting the homeless.

        i. A statute is also unconstitutionally vague if it encourages arbitrary or discriminatory conduct.

        ii. "Arbitrary and discriminatory conduct is exactly what happened here." The Ordinance is so broad it could cover any driver who eats food in his or her vehicle, yet it only appears to have been applied to the homeless.

        iii. The City has legitimate health and safety concerns, e.g., regarding dumping of waste, but the concerns do not "excuse the basic infirmity of the ordinance," and "the record plainly shows that some of the conduct plaintiffs were engaged in when arrested … mimics the everyday conduct of many Los Angeles residents."

X. LAND USE

[See CEQA and Land Use Update]

XI. PROTECTING THE ENVIRONMENT

[No reported cases]

XII. CODE ENFORCEMENT

[No reported cases]

XIII. LIABILITY AND LITIGATION

Government Claims Act

***Gong v. City of Rosemead* (2014) 226 Cal.App.4th 363**, petition for review filed (June 30, 2014)

Take-Away: Claims presentation requirements of Government Claims Act apply to allegations of intentionally tortious conduct by an elected official.

Facts: According to the Complaint, the City issued Plaintiff approvals to construct an office building. When Plaintiff went to the City to pull a building permit, Mayor John Tran approached Plaintiff and proposed she develop a mixed-used project. Plaintiff opted to try and purchase the additional property. City officials and staff encouraged Plaintiff, and she believed the Mayor's assurances that the plan would work. The plan required additional land acquisition and discretionary approvals. Plaintiff submitted applications for a general plan amendment, zoning change, design review and conditional use permit.

The Mayor requested and received loans totaling $38,000 from Plaintiff. He did not repay them. The Mayor sought romance. Plaintiff declined. The Mayor retaliated, including by causing the final decision on the mixed-use plan to be tabled.

Plaintiff submitted two Government Code claims. Each asserted that that prior city managers and employees made her purchase the additional property, that Mayor Tran delayed project, and that the City then denied it.

The City denied the claims. Plaintiff filed suit against the City and Tran. The Superior Court sustained the City's demurrer without leave to amend. The Court of Appeal affirmed.

Holdings & Analysis:

1. The Government Claims Act eliminated all common law liability. Public entities are liable for damages only to the extent declared by statute or required by the federal or state Constitutions.

a. Gov. Code § 815.2(a) provides that a public entity is liable for the acts or omissions of its employees within the scope of employment if the acts or omissions would give rise to liability against the employee.

b. The Government Claims Act provides many immunities, including for misrepresentations, and requires the submission of a claim.

2. Gov. Code § 815.3 (added in 1994) provides, inter alia:

a. Unless the elected official and the public entity are codefendants, the entity is not liable for the official's intentional tort (does not apply to defamation).

b. If the elected official is held liable for an intentional tort (other than defamation), "the trier of fact in reaching the verdict shall determine if the act or omission … arose from and was directly related to" the official's performance of official duties, in which case the entity will be liable.

c. If the act or omission did not arise out of the performance of official duties, the plaintiff shall first seek recovery of the judgment against the official's assets. If the assets are insufficient, the court may authorize recovery from the public entity.

3. Section 815.3 does not create a separate cause of action against a public entity. The statutory language and legislative history show legislative intent was to ensure elected officials bear the liability for tortious conduct that does not directly relate to their public service. Only if the assets are insufficient may the plaintiff look to the entity for compensation. Thus, section 815.3 does not create a substantive cause of action.

4. Plaintiff's Government Code claim did not support the cause of action against the City. The Complaint alleges the Mayor fraudulently promised the City would approve the mixed-use project, extorted $38,000, sexually harassed her, and threatened to kill her. None of these allegations are included in the Government Code claim. The facts alleged in a complaint, including the alleged damages, must be consistent with the Government Code claim. (If the complaint alleges compliance with the claims requirements, the entity may seek judicial notice to show otherwise.) Plaintiff's Government Code claim was thus an insufficient basis to plead tort claims against the City.

5. The City is immune from the promissory estoppel claim pursuant to Gov. Code § 818.4, which precludes liability for decisions on discretionary permits.

Municipal Liability for Damages and Immunities

***Martinez v. County of Ventura* (2014) 225 Cal.App.4th 364**, review denied (July 16, 2014)

Take-Away: Design immunity does not apply unless the government proves the design received the requisite discretionary approval.

Facts: Plaintiff was paralyzed when he crashed his motorcycle into an asphalt berm abutting a raised drain (top-hat drain system). The drain had a steel cover over three legs elevated 8-10 inches off the ground, with a sloped asphalt berm to channel water. Plaintiff alleged a dangerous condition of public property. The County alleged design immunity. The County did not offer evidence of engineering design plans. The evidence showed that in 1990 its road maintenance division had converted the drain inlets to the top-hat design, which has been in common use based on hydraulic efficiency and safety. The jury found for Plaintiff. The Superior Court found the evidence insufficient as a matter of law. The Court of Appeal reversed.

Holdings & Analysis:

1. Gov. Code § 835 provides that a public entity is liable for a dangerous condition if (1) the property was dangerous, (2) the dangerous condition proximately caused the injury, (3) the condition created a foreseeable risk of this kind of injury, and (4) a public employee acting within the scope of employment negligently or wrongfully created the dangerous condition or the public entity had sufficient notice to have protected against it. However, section 830.6 provides for design immunity if (1) the design was adopted by a discretionary approval, (2) there is a causal relationship between the design and the accident, and (3) substantial evidence supports the reasonableness of the design.

2. Design immunity did not apply because the City did not show it adopted the design by a discretionary approval.

    a. The agency must show the design was approved "in advance" by the governing body or an employee exercising discretionary authority.

    b. The County showed that the top-hat drain system was standard, but it did not show that the design was subject to a discretionary approval. Instead, maintenance workers installed the drains in the field as they saw the need for them. A road maintenance engineer testified that he approved the design, but the County did not show that he had any discretionary approval authority. The County claimed that discretionary approval should be implied from longstanding, consistent use based on efficiency and safety. But there is no authority for an implied discretionary approval, and this theory would improperly expand the scope of this statutory immunity.

***Heskel v. City of San Diego* (2014) 227 Cal.App.4th 313**

Take-Away: In a dangerous condition case, constructive notice requires the plaintiff to establish that the condition was of such an obvious nature that the entity, in the exercise of due care, should have discovered the condition.

Facts: Plaintiff tripped over a hollow metal post protruding from the sidewalk, injuring his wrist and back. He claimed that the condition was dangerous, and that the City had constructive notice of the dangerous condition. The trial court granted the City's motion for summary judgment. The Court of Appeal affirmed.

Holdings & Analysis:

1. A public entity is liable for a dangerous condition of property if the plaintiff establishes (1) the property was dangerous at the time of the injury, (2) the injury was proximately caused by the condition, (3) the condition created a reasonably foreseeable risk of the kind of injury suffered, and (4) the public entity had actual or constructive notice for a sufficient time to prevent it to take protective measures. (Gov. Code § 835.) Constructive notice requires the plaintiff to establish that the condition was of such an obvious nature that the entity, in the exercise of due care, should have discovered the condition. (Gov. Code § 835.2(b).)

2. The City's declarants established that they had systems for tracking complaints and events associated with dangerous conditions and that there were no records associated with the subject condition. Plaintiff's declarants showed that the condition had existed for at least a year, and that a sign was subsequently installed in the hollow metal post, but they did not establish that the condition was either obvious or dangerous.

***Biron v. City of Redding* (2014) 225 Cal.App.4th 1264**, petition for review filed (June 10, 2014)

Take-Away: A rule of reasonableness applies to a city's action or inaction to install or upgrade a storm drain system, which system was inadequate to protect against flooding to plaintiff's property, under inverse condemnation and dangerous condition law.

Facts: Plaintiffs own an apartment building in downtown Redding. Plaintiffs' property is near a natural watercourse. Prior to Plaintiffs' purchase of the apartment building, the adjacent property owner installed a brick wall and floodgates because storm water had previously caused flooding. In addition, the City had installed a storm drain system on and around Plaintiff's property. The City prepared a storm drain study (Study) to recommend upgrades to its storm drain system for storms of various magnitudes (e.g., 25-year storm and 100-year storm). The City prioritized its needs and adopted a capital improvement program (CIP). Plaintiffs' neighborhood received the lowest priority based and a recommended level of protection for a 25-year storm. The City lacked sufficient funds for the CIP, which required $7.5 million in Plaintiffs' neighborhood and $14.5 million elsewhere.

Plaintiffs' property was flooded in a 100-year storm. The storm system was sufficiently maintained but inadequate to protect against the flooding. Plaintiffs alleged the City was liable for inverse condemnation and dangerous condition of public property. After a court trial, the Superior Court ruled for the City. The Court of Appeal affirmed.

Holdings & Analysis:

1. The City is not liable for inverse condemnation.

    a. Standard: a rule of reasonableness applies.

        i. Plaintiffs argued that the City was strictly liable. Plaintiffs relied on outdated case law. A rule of reasonableness applies to a government's alterations or

improvements to upstream property, whether to a natural or unnatural watercourse, which cause downstream damage due to increased water flow. This standard avoids punishing governments for installing and maintaining storm water systems and balances public needs and private harms. "[S]trict and open-ended liability for the failure of a project whose overall design, construction, operation and maintenance was reasonable would unduly deter the development of these vital bulwarks against common disaster."

ii. Six factors are most probative: (1) the public purpose of the project, (2) the degree to which the plaintiff's loss is offset by reciprocal benefits, (3) the availability of feasible, better alternatives, (4) the severity of the damage in relation to risk-bearing capabilities, (5) the extent to which the damage is a normal risk of property ownership, and (6) the degree to which the damage is peculiar to the plaintiff.

b. The City acted reasonably under these standards. First, there was a public benefit to providing some storm drain capacity to prevent some flooding. Second, Plaintiffs received some benefits from the storm drain system, even though it was insufficient for the 100-year storm. Third, the needs for Plaintiffs' neighborhood were less than for other neighborhoods, and even if the upgrades had been made, they would have been insufficient. Fourth, Plaintiffs could have purchased insurance or installed floodgates. Fifth, Plaintiffs incurred the risk of flooding by purchasing property near a watercourse. Sixth, there was no evidence that the City consciously flooded Plaintiffs' property.

c. In addition, Plaintiffs failed to prove that the storm drain system was a substantial cause of their damage. "[T]he storm drain system did not fail, it was simply overwhelmed by the amount of water the storm deposited …."

2. The City is not liable for a dangerous condition of public property.

a. Standard: Gov. Code § 835 provides that a public entity is liable for a dangerous condition if (1) the property was dangerous, (2) the dangerous condition proximately caused the injury, (3) the condition created a foreseeable risk of this kind of injury, and (4) a public employee acting within the scope of employment negligently or wrongfully created the dangerous condition or the public entity had sufficient notice to have protected against it. However, section 835.4 provides that the entity is not liable if the act or condition that created the condition was reasonable, or the action the entity took or failed to take against the risk was reasonable.

b. The City acted reasonably in installing the storm drain system and in not taking action to upgrade it. Reasons include that the risk of injury was small in relation to the cost of repairs.

Taxpayer Standing

***Wheatherford v. City of San Rafael* (2014) 226 Cal.App.4th 460**, petition for review filed (June 26, 2014)

Take-Away: Limitation of taxpayer standing under CCP § 526a to payers of property tax is not a wealth-based classification that violates equal protection.

Facts: Plaintiff, challenging the enforcement practices of the City of San Rafael and County of Marin with respect to the impoundment of vehicles, claimed she had standing to bring the action as a resident taxpayer because she had paid sales tax, gasoline tax, and water and sewage fees in the City and County. Plaintiff conceded that she had not paid any property taxes. The trial court dismissed the action. The Court of Appeal affirmed.

Holdings & Analysis:

1. The Court affirmed *Torres v. City of Yorba Linda* (1993) 13 Cal.App.4th 1035 and *Cornelius v. Los Angeles County etc. Authority* (1996) 49 Cal.App.4th 1761, which held that payment of property taxes is required for taxpayer standing under CCP § 526a.

    a. The plain language of the statute gives standing to two classes of persons who have been "assessed" taxes: (1) those who are liable to pay an assessed tax but who have not yet paid, and (2) those who paid an assessed tax within one year before the filing of the lawsuit.

    b. While courts need not look to legislative intent when a statute is clear on its face, Plaintiff presented (and the Court found) no evidence of legislative intent to suggest a broader interpretation of section 526a.

2. The Court rejected the claim that section 526a creates a wealth-based classification thereby raising constitutional concerns subject to strict scrutiny.

    a. Contrary to Plaintiff's assertions, the Court found that there was no clear correlation between wealth and home ownership (some wealthy may choose to rent, some lower income individuals may have purchased homes when their incomes were higher or inherited property from family members).

    b. Assuming, without deciding, that Plaintiff is similarly situated to taxpayers who had standing under section 526a, the rational basis test would apply.

        i. The statute must be sustained if the court finds its classification is rationally related to the achievement of a legitimate state purpose. Any conceivable governmental purpose or policy may be considered by the court. The burden falls on the challenger to demonstrate invalidity.

        ii. Plaintiff does not contend that the statute serves no conceivable governmental purpose. Further, courts have noted that it is not irrational to limit standing in taxpayer lawsuits. (*Cornelius,* 49 Cal.App.4th at 1778-79.)