



PASADENA

# GENERAL MUNICIPAL LITIGATION UPDATE

League of California Cities  
2017 Annual Conference

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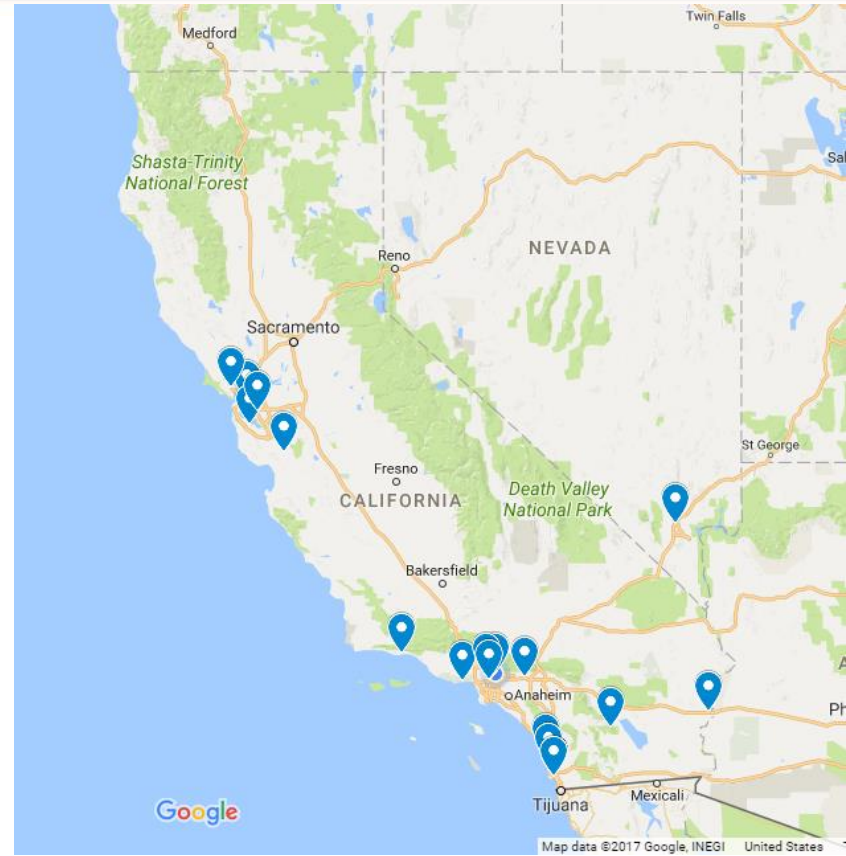
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# General Themes

## General Municipal Litigation Update – September 2017

- 11-9 in favor of positions favoring public entities
  - Civil Rights 3-2
  - Torts 2-1
  - Land Use/Env. 2-2
  - Taxpayer Actions 1-1
  - Employment 1-0
  - Finance 1-2
  - Public Records 0-2
  - Miscellaneous 1-0





# Civil Rights

General Municipal Litigation Update – September 2017

- *Lowry v. City of San Diego* - police dog
- *Brewster v. Beck* - vehicle impound
- *County of Los Angeles v. Mendez* - police use of force
- *Santopietro v. Howell* - solicitation
- *Recycle for Change v. City of Oakland* - donation bins



# Lowry v. City of San Diego

858 F.3d 1248 (9th Cir. 2017) (*en banc*)

General Municipal Litigation Update – September 2017



- Use of police dog does not violate Fourth Amendment where
  - > Dog is off-lead
  - > Police investigating burglary call
  - > At office suite

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# *Brewster v. Beck*, 859 F.3d 1194 (9th Cir. 2017)

General Municipal Litigation Update – September 2017

- Vehicle Code provision requiring 30-day impound (for unlicensed driver) violates Fourth Amendment



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# *Brewster v. Beck (cont.)*

## General Municipal Litigation Update – September 2017

- *Brewster* – 30-day impound required by Vehicle Code violates Fourth Amendment
- *Sackman v. City of Los Angeles*, No. 15-55846 (9th Cir. Feb. 16, 2017) (unpub.) – Prohibition on parking in same spot for more than 72 hours does not violate due process
- *Yagman v. Garcetti*, 852 F.3d 859 (9th Cir. 2017) – Deposit requirement (to obtain hearing) does not violate due process
- *Weiss v. City of Los Angeles*, 2 Cal.App.5th 194 (2016) – City violated Vehicle Code by delegating initial review (of parking ticket appeals) to contractor





# *County of Los Angeles v. Mendez* \_\_\_\_ U.S. \_\_\_\_, 137 S.Ct. 1539 (2017)

General Municipal Litigation Update – September 2017

- Ninth Circuit's provocation rule, where courts consider officer's pre-shooting conduct in excessive force claims, has "no basis" in the Fourth Amendment



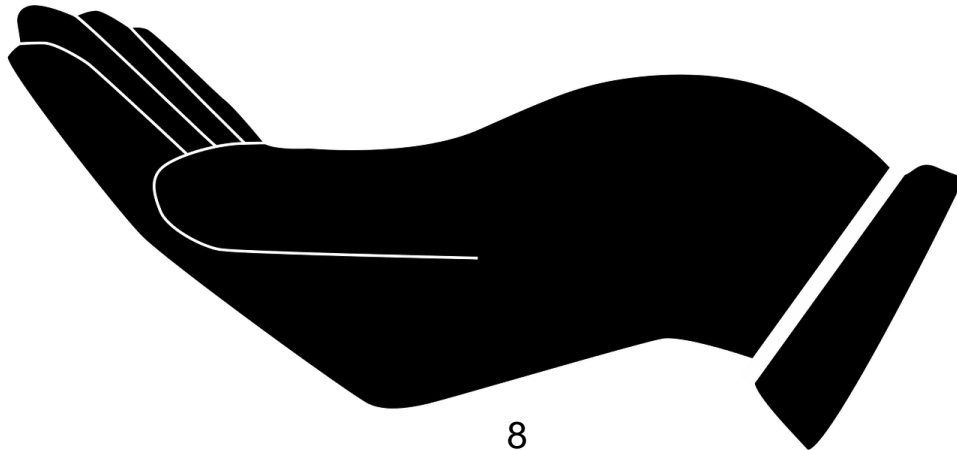


*Santopietro v. Howell*

857 F.3d 980 (9th Cir. 2017)

General Municipal Litigation Update – September 2017

- Arrest of street performer engaged in non-coercive solicitation for tips, for doing business without a business license, may violate First Amendment







## *Recycle for Change v. City of Oakland* 856 F.3d 666 (9th Cir. 2017)

### General Municipal Litigation Update – September 2017

- April 2015 – *Planet Aid v. City of St. Johns*, 782 F.3d 318 (6th Cir. 2015)
  - > Prohibition on charitable donation bins violates First Amend.
- October 2015 – Oakland adopts ordinance regulating donation bins
- January 2016 – District Court denies Plaintiff's Motion for PI
- May 2017 – Ninth Circuit affirms
  - > Ordinance is content-neutral and does not violate First Amendment



# Torts

## General Municipal Litigation Update – September 2017

- *Toeppe v. City of San Diego* – recreational trail immunity (recreational immunity)
- *County of San Mateo v. Superior Court (Rowe)* – natural condition immunity (natural condition immunity)
- *City of Pasadena v. Superior Court (Reyes Jauregui)* (accrual of asbestos-related claim)



# *Toeppe v. City of San Diego* 13 Cal.App.5th 921 (2017)

General Municipal Litigation Update – September 2017



- Plaintiff walking through City park when tree branch fell on her
- Trial court found recreational trail immunity barred Plaintiff's claim
- Court of Appeal reversed



# *County of San Mateo v. Superior Court (Rowe)* 13 Cal.App.5th 724 (2017)

General Municipal Litigation Update – September 2017

- Tree fell on Plaintiff's tent
- Trial court denied City's MSJ on natural condition immunity
- Court of Appeal denied county's writ petition
- Triable issues whether campsite area is "unimproved"



Case	Immunity Denied	View of Potential Closure of Public Facilities
<i>Toeppe</i> – July 2017	Recreational trail immunity	“[I]t might be prudent for the City to evaluate its maintenance of trees in its parks. . . .”
<i>Rowe</i> – July 2017	Natural condition immunity	Purpose of immunity not undermined if “County theoretically . . . consider[ed] eliminating improvements such as campsites rather than shoulder responsibility for keeping those improved areas safe. . . .”
<i>Garcia v. Am. Golf Corp.</i> , 11 Cal.App. 5th 532 (2017) – May 2017	Recreational trail immunity	Liability will “prompt [city contractor] to take corrective action. . . .” City contractor “can pay for safety features. . . . It can obtain insurance, and it can pay lawyers and judgments.”



# *City of Pasadena v. Superior Court (Reyes Jauregui)* 12 Cal.App.5th 1340 (2017)

General Municipal Litigation Update – September 2017



- Plaintiff diagnosed with mesothelioma
- 10+ months later, Plaintiff presented claim for damages
- Plaintiff argued she was never “disabled,” so limitation period never commenced





# *City of Pasadena v. Superior Court (Reyes Jauregui) (cont.)*

General Municipal Litigation Update – September 2017

- Trial court overruled City's demurrer
- Court of Appeal granted City's writ petition
  - > "Accrue" does not mean beginning of limitations period for asbestos-related actions
  - > Plaintiff's claim accrued when she was diagnosed with mesothelioma – therefore, claim was presented untimely
  - > Plaintiff's argument (that claim only accrues on "disability"), if accepted, would mean that her claim "has not – and never will – accrue"



# Land Use/Environmental

General Municipal Litigation Update – September 2017

- *Lynch v. California Coastal Commission*
  - > Forfeiture of objections to permit conditions
- *Cleveland Natl. Forest Foundation v. SANDAG*
  - > CEQA/greenhouse gas emissions
- *City of Morgan Hill v. Bushey*
  - > Referendum
- *The Park at Cross Creek, LLC v. City of Malibu*
  - > Initiative



# *Lynch v. California Coastal Commission* 3 Cal.5th 470 (2017)

General Municipal Litigation Update – September 2017



- Property owners forfeited objections to conditions of permit by constructing seawall project

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# *Cleveland Natl. Forest Foundation v. SANDAG* 3 Cal.5th 497 (2017)

General Municipal Litigation Update – September 2017

- San Diego Assn. of Governments did not abuse its discretion in declining to adopt greenhouse gas emission reduction goals set forth in Governor's 2005 Executive Order



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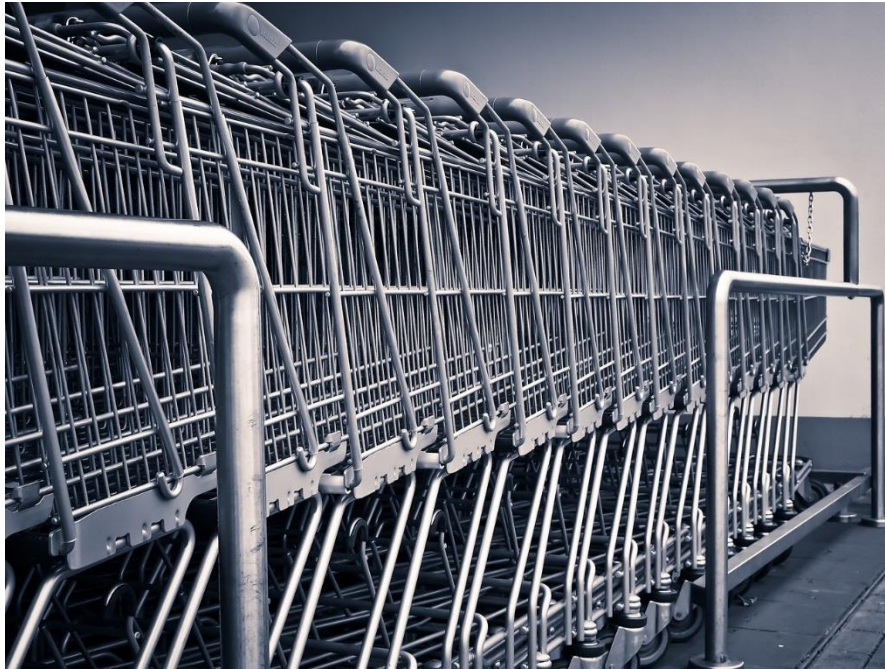
- Referendum can be used to reject ordinance, even where it makes parcel's zoning inconsistent with the general plan
- Created split in authority, Supreme Court granted review
  - > Can the electorate use the referendum process to challenge a municipality's zoning designation for an area, which was changed to conform to the municipality's amended general plan, when the result of the referendum-if successful-would leave intact the existing zoning designation that does not conform to the amended general plan?





# *The Park at Cross Creek, LLC v. City of Malibu* 12 Cal.App.5th 1196 (2017)

General Municipal Litigation Update – September 2017



Voter-approved initiative  
limiting large developments  
and chain stores

- > Exceeds initiative power
- > Violates CUP principles
  - “Starbucks is not a land use . . . ‘Coffee shop’ or restaurant is the land use.”

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# Taxpayer Actions

General Municipal Litigation Update – September 2017

- *Leider v. Lewis*
  - > Alleged elephant abuse
- *Weatherford v. City of San Rafael*
  - > Vehicle impounds



# *Leider v. Lewis*, 2 Cal.5th 1121 (2017)

General Municipal Litigation Update – September 2017

- Plaintiffs filed taxpayer action alleging violation of Penal Code provision prohibiting certain elephant husbandry practices
- Trial court issued injunction against city, and Court of Appeal affirmed



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# *Leider v. Lewis (cont.)*

General Municipal Litigation Update – September 2017

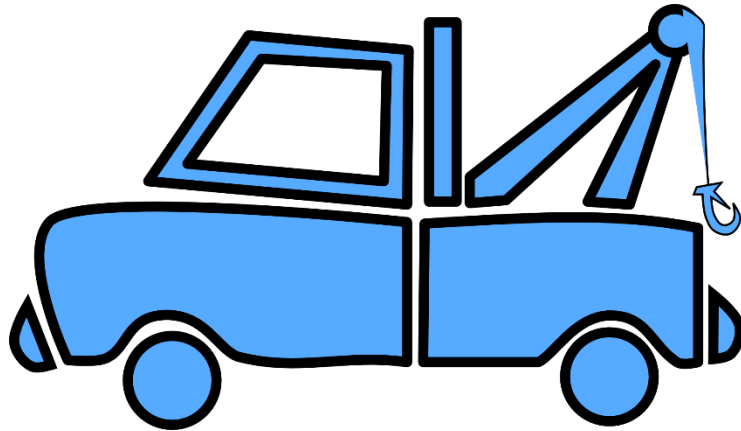
- Supreme Court reversed
  - > Civil Code Section 3369 provides that injunction may not issue to enforce a Penal Code violation, except in the case of a nuisance
  - > Section 3369's ban on injunctions to enforce Penal Code violations applies to taxpayer actions
  - > Plaintiffs not permitted to exercise discretion reserved for district attorney with regard to enforcement of criminal law



# *Weatherford v. City of San Rafael*

## 2 Cal.5th 1241 (2017)

General Municipal Litigation Update – September 2017



- Plaintiff filed taxpayer action to challenge practice of impounding vehicles without notice
- Trial court dismissed, on the ground that Plaintiff lacked standing because she failed to pay property tax
- Court of Appeal affirmed



# *Weatherford v. City of San Rafael (cont.)*

General Municipal Litigation Update – September 2017

- Supreme Court reversed
  - CCP Section 526a does not require payment of property taxes for standing to bring taxpayer action
  - To have taxpayer standing, Plaintiff only need allege that she has paid (or is liable to pay) an assessed tax



# Employment

General Municipal Litigation Update – September 2017

- *Merrick v. Hilton Worldwide*
  - > Age discrimination





- Plaintiff unable to demonstrate pretext for layoff in age discrimination lawsuit
- Circumstantial evidence presented by hotel
  - > Hotel lost profits during recession
  - > Several prior rounds of layoffs
  - > Plaintiff survived those layoffs despite being a member of a protected class



- *Jacks v. City of Santa Barbara*
  - > Franchise fees / Proposition 218
- *California Cannabis Coalition v. City of Upland*
  - > Voter-proposed initiatives / Proposition 218
- *Russell City Energy Co. v. City of Hayward*
  - > Quasi-contract causes of action



## *Jacks v. City of Santa Barbara, 3 Cal.5th 248 (2017)*

### General Municipal Litigation Update – September 2017

- 1999 – SCE and city entered into franchise agreement calling for two percent franchise fee
- 2005 – SCE placed one percent surcharge on bills to recoup portion of franchise fee
- Plaintiffs filed suit, alleging the surcharge was a tax under Proposition 218
- Trial court held surcharge was a fee, not a tax





# *Jacks v. City of Santa Barbara (cont.)*

General Municipal Litigation Update – September 2017

- Court of Appeal reversed, finding the surcharge is a tax, requiring voter approval under Proposition 218
- Supreme Court reversed
  - > Proposition 218 did not change the historical characterization of franchise fees
  - > Franchise fee must bear a reasonable relationship to the value of the property interests transferred
  - > Franchise fees are not taxes, so long as fees “reflect a reasonable estimate of the value of the franchise”



- Medical marijuana initiative (Measure U)
  - > Adopt regulations for up to three dispensaries in the city
  - > Require each dispensary pay \$75,000 annual “fee”
- At least 15 percent of registered voters signed the petition
- City ordered agency report – \$75,000 “fee” was a general tax
  - > Measure U to be submitted to voters at next general election (20 months away)
  - > XIII C, section 2 prohibits “local government” from imposing a general tax unless submitted to voters at general election



## *California Cannabis Coalition v. City of Upland (cont.)*

General Municipal Litigation Update – September 2017

- Plaintiffs filed suit, arguing, among other things, that Measure U should have been submitted to voters via special election
- Trial court denied writ petition, without specifically addressing whether article XIII C, section 2 governs only taxes proposed by local government
- Court of Appeal reversed, finding XIII C, section 2 governs only local government taxes

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- Supreme Court affirmed
  - > “[C]ourts preserve and liberally construe the public’s statewide and local initiative power”
  - > General election requirement of article XIII C, section 2 applies only to local governments – not to voter-proposed initiatives



# *Russell City Energy Co. v. City of Hayward*

## 14 Cal.App.5th 54 (2017)

General Municipal Litigation Update – September 2017

- 2005 – power plant contract contained “payments clause”
  - Plaintiff to pay City \$10 million, and city would not impose any other taxes
- 2009 – voters approved UUT ordinance
- 2011 – city informs power plant it must pay UUT



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## *Russell City Energy Co. v. City of Hayward (cont.)*

General Municipal Litigation Update – September 2017

- Power plant filed suit
- City demurred
  - > Section 31 of the California Constitution prohibits local governments from surrendering or suspending the power to tax
- Trial court sustained city's demurrer
- Court of Appeal affirmed in part



## *Russell City Energy Co. v. City of Hayward (cont.)*

General Municipal Litigation Update – September 2017

- Payments clause surrendered city's power to tax, voiding that provision
- However, court allowed power plant opportunity to amend to assert “quasi-contractual restitution claim” against city



# Public Records

General Municipal Litigation Update – September 2017

- *ACLU v. Superior Court (County of Los Angeles)*
  - > Automated license plate reader information
- *Sukumar v. City of San Diego*
  - > Attorney's fees



- Automated license plate readers
- Cameras capture license plate image
  - > LAPD 1.2 million cars/week
  - > LASD 1.7-1.8 million cars/week
- ~0.2 percent of plate scans connected to suspected crimes or vehicle registration
- Public records request for one week of ALPR data
- Denied under “investigatory file” and catchall exemptions







## *ACLU v. Superior Court (County of Los Angeles) (cont.)*

General Municipal Litigation Update – September 2017

- Trial court found both (1) investigatory file; and (2) catchall exemptions applied
- Court of Appeal found investigatory file exemption applied
  - No discussion of catchall exemption
- Supreme Court granted review



## *ACLU v. Superior Court (County of Los Angeles) (cont.)*

### General Municipal Litigation Update – September 2017

- Bulk collection of ALPR data is not subject to investigatory file exemption
  - > Vast majority of ALPR data “will prove irrelevant for law enforcement purposes”
- Unaltered ALPR data is subject to catchall exemption
- But – anonymized/redacted ALPR data may be disclosable
  - > Remanded for feasibility of anonymization
  - > Randomizing plate numbers “would seem to pose little burden”



# *Sukumar v. City of San Diego*

\_\_\_ Cal.App.5th \_\_\_, 2017 WL 3483653 (2017)

General Municipal Litigation Update – September 2017

August 2015	<ul style="list-style-type: none"><li>• Public records request for 54 categories of documents</li><li>• City stated it provided its “final response”</li></ul>
September 2015	<ul style="list-style-type: none"><li>• Conflicting testimony whether more documents might be produced later</li><li>• Plaintiff filed suit under the Public Records Act</li></ul>
October 2015	City’s attorney advises Plaintiff’s attorney that City was still gathering records
February 2016	City produces additional responsive emails, which were “all remaining emails of which the City was aware”



# *Sukumar v. City of San Diego (cont.)*

General Municipal Litigation Update – September 2017

March 2016	At hearing on Plaintiff's motion to compel, City's attorney states "we've produced everything"
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April 2016	Over a one-month period starting around the time of court-ordered PMK depositions, City produced <ul style="list-style-type: none"><li>• Email to Mayor and others re: code enforcement issues, located via representative for Councilmember's office</li><li>• Five photographs by city staff of Plaintiff's property, located on city hard drive</li><li>• 146 pages of emails</li></ul>
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June 2016	Trial court denies Plaintiff's Public Records Act suit, and denies Plaintiff's fee motion
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# *Sukumar v. City of San Diego (cont.)*

General Municipal Litigation Update – September 2017

- Court of Appeal reversed, finding Plaintiff entitled to reasonable attorney's fees under the "catalyst" theory
- City stated to court in March 2016 it had produced every responsive nonexempt document
- But for subsequent court-ordered PMK depositions, city would not have produce additional responsive documents after March 2016



# *Sukumar v. City of San Diego (cont.)*

General Municipal Litigation Update – September 2017

- Takeaways
  - > Communicate among all potentially involved custodians for responsive information
  - > Communicate with requestor re: what is needed to perform a complete search
  - > Frequently communicate with requestor to provide status updates, especially when request may involve detailed search of many records, or complicated/time-consuming search of archives or outdated storage means

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# Miscellaneous

General Municipal Litigation Update – September 2017

- *People v. Superior Court (Sahlolbei)*
  - > Government Code Section 1090



# *People v. Superior Court (Sahlolbei)*

## 3 Cal.5th 230 (2017)

General Municipal Litigation Update – September 2017



- Independent contractor surgeon (Sahlolbei) recruited anesthesiologist at \$36,000 monthly salary, but hospital paid \$48,000
- Surgeon instructed anesthesiologist to have \$48,000 monthly payments deposited in surgeon's account, with surgeon remitting \$36,000 (keeping \$12,000 for himself)
- Supreme Court – Government Code Section 1090 applies to independent contractors “when they have control over the public purse”

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