General Municipal Litigation Update

Thursday, September 13, 2018 General Session; 1:00 – 2:30 p.m.

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Notes:

General Municipal Litigation Update

Cases Reported from May 4, 2018
Through August 17, 2018

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League of California Cities
2018 Annual Conference
City Attorney's Department Track

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I. Employment

***Palm v. Los Angeles Department of Water & Power*, 889 F.3d 1081 (9th Cir. 2018)**

Holding: Plaintiff lacked a protected property interest in probationary promotional (supervisor) position, when, upon failing to pass probation, he was returned to his (non-supervisor) permanent position with the city.

Facts: After working as an assistant at a city steam plant for 25 years, Plaintiff was promoted to a supervisor position, which carried with it a six-month probationary period. During that time, Plaintiff filed an administrative complaint listing 33 conflicts with his supervisors, including complaints about compliance with health, safety, and labor laws, and altering Plaintiff's time records. Plaintiff was given the option of either "forced resignation" or termination from his probationary supervisor position. Plaintiff resigned, and returned to his permanent assistant position. Plaintiff then filed suit, asserting a variety of claims. As relevant here, Plaintiff alleged that the city's threatened termination of him from his probationary supervisor position violated his due process rights under the Fourteenth Amendment. The District Court granted the city's Motion to Dismiss the due process claim, and denied Plaintiff's Motion for Reconsideration. Plaintiff appealed.

Analysis: The Ninth Circuit affirmed the dismissal of Plaintiff's due process claim. The court held that Plaintiff cannot maintain a due process claim based on his termination from the supervisor position, and his return to his permanent position at the steam plant. In reviewing the city's charter and personnel rules, the court noted that even a probationary employee could have a reasonable expectation of continued employment. Here, however, the city's charter and personnel rules do not provide probationary employees with a vested property interest. The court concluded that the city's probationary rules still apply to Plaintiff, regardless of the fact that Plaintiff was a permanent employee in another city position.

***Fisher v. State Personnel Board*, 25 Cal.App.5th 1 (2018)**

Holding: Termination of State Personnel Board administrative law judge upheld where ALJ joined a private law firm that did business in front of the SPB, and ALJ did not inform, nor seek approval from, the SPB.

Facts: Plaintiff was appointed to the position of administrative law judge with the State Personnel Board in 2010. In 2011, Plaintiff, while still employed as an ALJ, joined a private law firm specializing in administrative law. Plaintiff verbally discussed with the firm the concept of establishing an ethical wall so he would not be involved in an SPB case, but that was not reduced to writing. Plaintiff never requested permission from supervisors at SPB before joining the law firm, as Plaintiff "did not believe it was important," and Plaintiff knew of at least one other SPB ALJ who was performing outside legal work. Plaintiff also said that the chief ALJ and then-presiding ALJ gave him permission to work at the law firm, but they "testified adamantly and persuasively otherwise." Plaintiff also failed to list the law firm on his statement of economic interest (Form 700) for the 2013 reporting period. Additionally, after Plaintiff had joined the law firm, Plaintiff attended a meeting of ALJs, where another ALJ discussed her perception of a high-profile case, in which Plaintiff's law firm was representing a CalTrans employee. The other ALJ sent Plaintiff and other ALJs a draft of her proposed decision. Nonetheless, Plaintiff still did not inform his SPB colleagues about his employment at the law firm. Plaintiff's employment at the law firm was first discovered by a SPB colleague, who was at a local bar association event, and was asked whether Plaintiff was the same person who worked at the law firm. Plaintiff was later terminated after an administrative hearing in front of an ALJ, and the SPB adopted the ALJ's decision. Plaintiff filed a petition for writ of mandate, seeking to overturn his termination. The trial court upheld the SPB's termination of Plaintiff, and dismissed the writ petition.

Analysis: The Court of Appeal affirmed the dismissal. The court found it immaterial that the SPB did not give Plaintiff prior notice that his work at the private law firm constituted an incompatible activity. The court found that Government Code Section 19990 (the incompatible activities statute for State officers and employees) does not somehow allow public employees to engage in incompatible activities, until they receive actual notice of the violation. Additionally, the Court of Appeal found that the penalty of termination was appropriate, under the circumstances. Finally, the court ordered the clerk and the Plaintiff to forward a copy of the appellate opinion to the State Bar of California.

II. Torts

***Ramirez v. City of Gardena,* ___ Cal.5th ___, 2018 WL 3827236 (2018)**

Holding: City entitled to police pursuit immunity, even where police department may not have obtained written certifications from all officers that they have received, read, and understood the department's police pursuit policy.

Facts: Police attempted to bring a vehicle pursuit to an end with a "Pursuit Intervention Technique," which resulted in the suspect vehicle striking a streetlight pole, killing the passenger in the vehicle. Plaintiff (the mother of the decedent passenger) filed suit. The year of the incident, 81 of the 92 police officers in the department had completed training on the department's pursuit policy. The department also contended that all officers had completed forms certifying that they had received, read, and understood the police pursuit policy, but some forms may have been lost during the police department's move to a new police station. Plaintiffs filed suit, alleging negligence and battery claims. The city filed a motion for summary judgment, asserting immunity under Vehicle Code Section 17004.7, which relates to police vehicle pursuits. Section 17004.7 provides for immunity from police motor vehicle accidents if the agency adopts a pursuit policy, provides annual training, and requires officers to certify, in writing, that they have received, read, and understood the policy. The trial court granted the city's motion, and the Court of Appeal affirmed. The Supreme Court granted review.

Analysis: The Supreme Court affirmed. Section 17004.7 does not, itself, require officers to execute written certifications as a condition of immunity for the city. Otherwise, if written certifications were required to be produced for all officers in the agency, it could be very difficult for Gardena, and "almost impossible for a large entity employing thousands of peace officers." Additionally, the statute provides that an officer's failure to sign a certification should not be used as a reason to "impose liability on an individual officer or a public entity." Therefore, the city need not prove "total compliance" with the certification requirement to obtain immunity.

***Gund v. County of Trinity,* 24 Cal.App.5th 185 (2018)**

Holding: Exclusive remedy rule of workers' compensation laws bars state law tort action by Plaintiff husband and wife for assisting sheriff's deputy with 911 call.

Facts: A California Highway Patrol dispatcher received a 911 call from the vicinity of an airstrip. The caller whispered "help me" and said she lived at the end of the airstrip. The county dispatcher tried calling the 911 caller back, and there was no answer, so the dispatcher passed the information to a sheriff's deputy. The deputy called Plaintiffs, who lived hear the airstrip, advised them that the call was likely related to inclement weather (not that the caller was whispering), asked them to check on the caller, and advised that it was "probably no big deal." Plaintiffs drove to the caller's residence, and were brutally attacked by a man who had just committed a double-murder. Plaintiffs filed suit against the county and the deputy for negligence and misrepresentation. Defendants moved for summary judgment on the state law claims, on the ground that workers' compensation was Plaintiffs' exclusive remedy under Labor Code Section 3366 (persons engaged in active law enforcement are deemed to be employees for purposes of workers' compensation laws). The trial court granted the motion, and Plaintiffs appealed.

Analysis: The Court of Appeal affirmed, finding the Plaintiffs were engaged in assisting in "active law enforcement service." Initially, the court noted that the underlying premise of the exclusivity of the workers' compensation remedy is a "presumed bargain that the employer assumed liability for industrial injury without regard to fault," although the employee gives up the "wider range of damages potentially available in tort." As to the merits, the court reviewed cases discussing "active law enforcement" in a variety of contexts, and concluded that the phrase contemplates one is exposing themselves to risks inherent in preventing a crime or breach of peace. The court reasoned that, since the deputy could have responded to the 911 call, the deputy would have clearly been engaged in active law enforcement if doing so. Regardless of the deputy's misrepresentations to the Plaintiffs, the "Plaintiffs still knew they were responding to a 911 call for help."

***Newland v. County of Los Angeles*, 24 Cal.App.5th 676 (2018)**

Holding: County employee was not in the course and scope of his employment when driving home from work in his personal vehicle.

Facts: Defendant Prigo had worked as a deputy public defender since the early 1980's. At the time of the subject motor vehicle accident, Prigo was performing felony trial work from his office in a local courthouse. Prigo was not expressly required to provide a vehicle for carrying out his job duties, although Prigo used

his personal vehicle to carry out job-related functions, such as going to court, and meeting with clients. On the date of the accident, Prigo had six cases on calendar at the courthouse, but did not have to travel outside the courthouse for work. On Prigo's way home from work, he was turning into the post office to mail his rent check. Prigo's vehicle was hit by another driver, and the other driver was forced off the road and injured Plaintiff, a pedestrian. Plaintiff sued, Prigo, the county, and the other driver. The jury found Prigo's negligence caused the accident, that he was required to use his personal vehicle to perform his job for the county, and that the county was liable to Plaintiff for nearly $14 million in damages. The trial court denied the county's post-trial motions, and the county appealed.

Analysis: The Court of Appeal reversed, finding the county's motion for judgment notwithstanding the verdict should have been granted. The court found there was no evidence that Prigo was driving his car within the course and scope of his employment when the accident occurred. Prigo was not commuting in his car at the time of the accident solely because the county required him to have his car available. Rather, he drove to the courthouse "because he did not have any reasonable public transportation options from Long Beach." The court also distinguished several opinions where the employee was required to drive to work on the day of the accident, or was providing a benefit to the employer that the employee have a car available at work.

III. Civil Rights/Fourth Amendment

***Felarca v. Birgeneau*, 891 F.3d 809 (9th Cir. 2018)**

Holding: Officers and university administrators entitled to summary judgment against claims of excessive force during efforts to control a crowd of protestors.

Facts: Thousands of protestors planned to rally at the University of California at Berkeley to support the Occupy Wall Street movement. Two days before the rally, university administrators warned students in a campus-wide email that the school's no-camping policy would be enforced. The protest started off peaceful during the afternoon, but protestors then began erecting tents. University police officers then took the tents down, but protestors set up more tents. Officers returned in riot gear. Protestors began forming a human chain to prevent the police from reaching the tents. Officers then gave warnings, which had no effect. Officer used their hands and batons to gain control over the crowd. Similar disputes arose during the

protests in the evening. Some of the protestors filed suit against university administrators and police officers, alleging excessive force was used. For example, each Plaintiff (except for one) was hit by a baton in the torso or extremities. The District Court denied Motions for Summary Judgment from the officers and administrators, and they appealed.

Analysis: The Ninth Circuit reversed. First, the court found that the force used by two involved officers was not excessive, particularly because "the university was not required to permit the 'organized lawlessness' conducted by the protestors." The protestors understood police orders to disperse, and they interfered with the officers' efforts in that regard. Next, as relevant here, the court found that the university administrators in the police chain of command were not liable for supervisory force claims, as Plaintiffs "have not connected the force applied by each officer to the actions of these administrators." Finally, the court found the on-scene lieutenant and sergeant were entitled to qualified immunity, as Plaintiffs failed to show the law was clearly established that the officers' baton strikes violated their constitutional rights. Here, Plaintiffs failed to identify a case where, after several dispersal warnings were given, the officer uses baton strikes on the torso or extremities for the purpose of controlling a crowd "actively obstructing the officer. . ."

***Carpenter v. United States*, ___, U.S. ____, 138 S.Ct. 2206 (2018)**

Holding: The government generally needs a warrant if it seeks a suspect's historical cell-site location information (CLSI) from a cell phone carrier.

Facts: Four men were arrested for robbing a series of electronic and cell phone stores, and one of the suspects confessed, identifying 15 accomplices. The prosecutors ultimately applied for court orders for the cell phone records of Carpenter, pursuant to the Stored Communications Act, which allows disclosure in this instance where the records "are relevant and material to an ongoing criminal investigation." Two magistrate judges issued orders for cell phone carriers to disclose CSLI for Carpenter during the four-month period of the robberies. Ultimately, the carriers produced a total of 129 days of CLSI, with 12,898 location points for Carpenter. Carpenter was charged with robbery and carrying a firearm during a federal crime of violence. Carpenter moved to suppress the CLSI, as it was not obtained by a warrant, and the District Court denied the motion. At trial, the CLSI was used to place the Carpenter at the location of each robbery, at the time a robbery occurred. Carpenter was convicted of all but one count, and

sentenced to over 100 years in prison. Carpenter appealed, and the Sixth Circuit affirmed. The U.S. Supreme Court granted certiorari.

Analysis: The Supreme Court, in a 5-4 opinion, reversed, finding that the government's acquisition of historical CLSI (i.e., the "mine run criminal investigation") is a search within the meaning of the Fourth Amendment, and the government generally must obtain a warrant before acquiring such records. The court noted its decision was narrow, and does not inform the validity of either (a) real-time CLSI; or (b) "tower dumps" (a list of all the devices that connected to a cell site during a period of time). As to the historical CLSI, the court found it "gives police access to a category of information otherwise unknowable," and "this newfound tracking capacity runs against everyone. . . Whoever the suspect turns out to be, he has effectively been tailed every moment of every day for five years . . ."

***Byrd v. United States*, ___, U.S. ____, 138 S.Ct. 1518 (2018)**

Holding: The mere fact that a driver of a rental car is not listed as an authorized driver on the rental agreement will not defeat the driver's reasonable expectation of privacy under the Fourth Amendment.

Facts: Defendant, in his car, drove a friend to a car rental facility. The friend rented a vehicle, and listed only herself as an authorized driver of the rental car. The two then left in separate cars – Defendant in the rental car, and the friend in Defendant's car. Defendant was then pulled over on the highway for a possible traffic infraction. Defendant provided the car rental agreement to a trooper, and advised a second trooper that a friend had rented the vehicle. The troopers asked Defendant to search the vehicle several times while conversing with him, but they also stated they did not need consent, as Defendant was not listed on the rental agreement. As the troopers began to search the trunk, they located a laundry bag containing body armor, and Defendant began to run away shortly thereafter. The troopers caught up to Defendant, and he surrendered. Defendant also admitted there was heroin in the car, and the troopers found 49 bricks of heroin in the trunk. Defendant was prosecuted, and he moved to suppress the evidence found in the trunk of the car. The District Court denied his motion, and Defendant later entered a conditional guilty plea, reserving the right to appeal the denial of his Motion to Suppress. The Third Circuit affirmed, and the U.S. Supreme Court granted certiorari.

Analysis: The Supreme Court, in a unanimous opinion, vacated the Third Circuit's opinion. The court found it "too restrictive" under the Fourth Amendment to find that drivers not listed on rental agreements always lack an expectation of privacy. The court noted a number of innocuous reasons why an unauthorized driver might drive a rental car, particularly where it may be safer for the unauthorized driver to drive the vehicle. The court noted that the "risk allocation between private parties" (consequences for breaching the rental agreement) has little to do with one's reasonable expectation of privacy under the Fourth Amendment. As to the facts of this case, the court expressly did not decide (and left for the Third Circuit on remand to address) whether the search was valid if (a) Defendant intentionally used his friend to procure the rental car to commit a crime; and (b) probable cause justified the warrantless search in any event.

***Collins v. Virginia*, ___, U.S. ____, 138 S.Ct. 1663 (2018)**

Holding: The automobile exception does not permit an officer without a warrant to enter a home or its curtilage to search a vehicle therein.

Facts: Police officers observed a motorcycle commit two separate traffic infractions, and then evade or elude officers from pulling over the motorcycle. The officers compared notes, and concluded the same motorcyclist was involved. The officers' investigation then yielded pictures on the Defendant's Facebook page showing a motorcycle parked at the top of a driveway of a house. One officer went to the house, and observed (from the sidewalk) what appeared to be a motorcycle covered with a tarp at the same angle and location in the driveway as the Facebook picture. The location where the motorcycle was parked was partially enclosed, and had side access to the house. The officer then walked up to the motorcycle, pulled off the tarp, revealing the motorcycle from the speeding incident. The officer took a photograph of the uncovered motorcycle, and awaited for Defendant to arrive home. When Defendant arrived, he informed the officer he bought the motorcycle without a title, was arrested, and was later charged for receiving stolen property. Defendant filed a motion to suppress, on the grounds that the officer obtained information about the motorcycle through a warrantless search. The trial court denied the motion, and Defendant was convicted. The Virginia Court of Appeals affirmed the conviction, as did the Virginia Supreme Court. The U.S. Supreme Court granted certiorari.

Analysis: The Supreme Court reversed, finding the automobile exception inapplicable here. At the outset, the court concluded that the part of the driveway

where the motorcycle was parked was curtilage. Next, the court declined to extend the automobile exception into the home and its curtilage. Doing so, the court concluded, "would unmoor the [automobile] exception from its justifications . . . Indeed, its name alone should make all this clear enough: It is, after all, an exception for automobiles." The court expressly did not decide whether the officer's actions with regard to the motorcycle may have been reasonable on a different basis, remanding for further proceedings.

IV. Civil Rights/Other

***Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Commission*, ___, U.S. ____, 138 S.Ct. 1719 (2018)**

Holding: State commission's comments and statements prevented a fair and impartial hearing under the Free Exercise Clause of the First Amendment.

Facts: Two men came into Masterpiece Cakeshop, a bakery, to order a cake for their wedding. The bakery owner informed the two men that he does not make cakes for same-sex weddings. One day later, the bakery owner explained to the mother of one of the men two reasons for his declination to bake a cake: (a) the bakery's religious opposition to same-sex marriage; and (b) Colorado (at the time) did not recognize same-sex marriages. The two men filed a discrimination complaint with the Colorado Civil Rights Commission, alleging they were denied service because of their sexual orientation. The Commission staff's investigation revealed that on multiple occasions, the bakery owner had declined to sell custom wedding cakes to same-sex couples. The matter proceeded to a formal hearing with an Administrative Law Judge, who ruled in favor of the couple and against the bakery. The Commission affirmed the ALJ's decision, in full. The bakery appealed to the Colorado Court of Appeals, and they affirmed the Commission's decision The Colorado Supreme Court declined to hear the case. The U.S. Supreme Court then granted certiorari.

Analysis: The Supreme Court reversed the Colorado Court of Appeals' decision in a 7-2 opinion. At the outset, the court explored the substantive arguments that could have been considered from both sides – both the couple's right to be free from discrimination based on sexual orientation in acquiring products and services, and the bakery owner's right to decline to use his artistic skills to make an expressive statement (a custom wedding cake). However, the court ultimately did

not resolve these arguments in its opinion. Rather, the court found the seven-member Commission's treatment of the case to have "some elements of a clear and impermissible hostility toward the sincere religious beliefs that motivated the [bakery owner's] objection." The court found several comments from commissioners appeared to be inappropriate and dismissive, and lacking respect for the bakery owner's arguments under the Free Exercise Clause. For example, one of the commissioners described the bakery owner's faith as "one of the most despicable pieces of rhetoric that people can use. . . " The court concluded that commissioners' statements "cast doubt on the fairness and impartiality" of the hearing. Also, the court noted there were at least three other instances of investigations by a Commission staff finding that bakers acted lawfully in refusing to create cakes with anti-same-sex marriage symbolism.

Hipsher v. Los Angeles County Employees Retirement System, 24 Cal.App.5th 740 (2018)

Holding: Public Employees' Pension Reform Act of 2013 (PEPRA) does not violate the Contracts Clause or the Ex Post Facto Clause of the California Constitution. However, the county retirement system (LACERA) failed to provide sufficient due process protections to retiree, before reducing pension benefits as a result of retiree's conviction of a job-related felony.

Facts: Plaintiff was a firefighter who began conducting an illegal gambling operation starting around 2001. In 2011, undercover law enforcement authorities joined Plaintiff's operation to collect unpaid or past due gambling debts. Plaintiff met with the undercover agents (posing as motorcycle gang members) at a fire station. Plaintiff gave the agents a tour of the fire station, showing the room where he conducted part of the gambling operation. The U.S. Attorney's office later charged Plaintiff for running an illegal gambling business. Plaintiff subsequently retired, entered a guilty plea and was convicted in 2014. In 2013, one year before the conviction, the Legislature passed PEPRA, which provided, among other things, that a public pensioner forfeits a portion of retirement benefits following conviction of a felony offense that occurred in their performance of official duties. In response to Plaintiff's conviction, LACERA adjusted Plaintiff's pension by, among other things, expunging over 12 years of service credits, and reducing Plaintiff's retirement allowance from approximately $6,800 to approximately $2,900. There were no administrative remedies to challenge LACERA's benefit adjustment determination. Plaintiff filed suit, challenging the reduction of pension benefits. The trial court found that LACERA's actions did not violate the

California Constitution's Contracts Clause or Ex Post Facto Clause. However, the trial court found that the county did not provide Plaintiff with sufficient due process protections related to his original retirement benefits. Plaintiff and the county appealed.

Analysis: The Court of Appeal affirmed, with modifications. The court found that the forfeiture provisions of PEPRA did not violate (a) the Contracts Clause, as applied to Plaintiff; and (b) the Ex Post Facto Clause, which only applies to civil legislation "in limited circumstances," and this case is not one of them. However, the court held that Plaintiff did not receive sufficient due process protections before his pension benefits were reduced, and that PEPRA required LACERA (not the county) to provide that due process – here, through LACERA's existing administrative appeal procedures.

***United States v. California*, ___ F.Supp.3d ___, 2018 WL 3301414 (E.D. Cal. 2018)**

Holding: Several provisions of the California Values Act (SB 54), California's response to address recent federal immigration enforcement programs, are not preempted by the Immigration and Nationality Act.

Facts: In 2017, the Legislature passed three bills aimed at addressing recent federal immigration enforcement programs, including SB 54. Among other things, SB 54 (a) prohibits California law enforcement agencies from sharing certain information for immigration enforcement purposes; and (b) limits transfers of individuals to immigration authorities. Plaintiff filed suit against California, asserting the invalidity of various provisions of the three bills, including the referenced restrictions of SB 54. Plaintiff then filed a Motion for Preliminary Injunction.

Analysis: As it pertains to the SB 54 restrictions, the District Court denied the Plaintiff's motion, finding Plaintiff's challenge was unlikely to succeed on the merits, rejecting two preemption arguments (of note) asserted by Plaintiff – conflict preemption and obstacle preemption. The court concluded that the SB 54 restrictions on information sharing (including release dates and home and work addresses) did not directly conflict with (and were therefore not preempted by) 8 U.S.C. Section 1373, which bars states from prohibiting or restricting sharing information "regarding the citizenship or immigration status" with federal immigration authorities. In other words, Section 1373 limits its reach to

information strictly pertaining to immigration status, and not release dates and addresses. The court also rejected Plaintiff's obstacle preemption challenge (pertaining to the Immigration and Nationality Act in general), noting that Congress has not required states to assist in immigration enforcement. Rather, immigration enforcement is merely an option available to the states. Additionally, if Congress prohibited states from restricting law enforcement involvement in immigration enforcement, aside from a narrowly drawn information sharing provision, such legislation may violate the Tenth Amendment and anti-commandeering principles.

V. Land Use

***Lamar Advertising Company v. County of Los Angeles*, 22 Cal.App.5th 1294 (2018)**

Holding: Neither Outdoor Advertising Act nor county ordinance allowed non-conforming billboard to be eligible for re-erection, after original billboard was destroyed in a windstorm.

Facts: In 1967, the county issued a permit for a billboard along a freeway. The billboard consists of 10 wooden telephone poles supporting a 60-foot advertising face. Plaintiff later acquired ownership in the billboard. In 1995, the county adopted an ordinance banning billboards in the area of Plaintiff's billboard, so the structure became a non-conforming use. The amortization period passed, Plaintiff did not obtain a permit to have the billboard remain, and the county did not seek to remove the billboard. In 2008, a windstorm blew over the billboard and one of the support poles. Plaintiff then installed a new advertising face and support structures. The county issued an order to the Plaintiff to remove the billboard. Plaintiff appealed the administrative order, and a hearing officer denied the appeal. Plaintiff filed a petition for writ of mandate, and the trial court denied the petition. Plaintiff appealed.

Analysis: The Court of Appeal affirmed the denial of Plaintiff's writ petition. First, Plaintiff's reconstruction of the billboard was not somehow permissible as "customary maintenance" under California Department of Transportation regulations implementing the Outdoor Advertising Act, Business & Professions Code Section 5200 *et seq.* The regulations require, among other things, that customary maintenance not alter existing dimensions or the approved

physical configuration. Here, however, Plaintiff's reconstruction of the billboard was more than customary maintenance. Plaintiff altered the existing dimensions, and had added new components to the billboard. Additionally, even if the CalTrans regulations authorized reconstruction of the billboard, the county's own ordinance (relating to structures that are "partially destroyed") did not exempt Plaintiff from the county's requirement for a permit. The billboard had entirely lost its functionality, so, under the plain meaning of the phrase, it was not partially destroyed – it was completely destroyed, thus falling outside of the exemption in the county ordinance.

***County of Ventura v. City of Moorpark*, 24 Cal.App.5th 377 (2018)**

Holding: Settlement agreement for beach restoration project found valid, in large part, but the agreement improperly surrendered a geologic hazard abatement district's police power authority to modify sand hauling routes.

Facts: The state formed the Broad Beach Geologic Hazard Abatement District (BBGHAD) to restore a 46-acre stretch of beach in Malibu. Initially, 300,000 cubic yards of sand would be deposited at the beach, with four subsequent deposits of up to 75,000 cubic yards at subsequent five-year intervals. Each of the five deposits will generate 44,000 one-way truck trips for three to five months. Much of the sand would come from rock quarries located approximately 35 miles north of Malibu, between the cities of Fillmore and Moorpark. Moorpark objected to the project, and ultimately entered into a settlement agreement that prohibits trucks used in the project from driving through Moorpark, except in cases of emergency. Fillmore and the County of Ventura challenged the settlement agreement by filing a petition for writ of mandate alleging violations of the California Environmental Quality Act, among other things. The trial court denied the petition, in part, and granted it, in part.

Analysis: The Court of Appeal affirmed in part, and reversed in part, with directions. The court held that the settlement agreement is "part of the whole of the action" of the beach restoration project, and not a separate, nonexempt CEQA project. The settlement agreement is, in fact, a statutorily exempt "improvement" for purposes of geologic hazard abatement districts. The court also found that the settlement agreement is not preempted by Vehicle Code Section 21, which preempts local traffic control ordinances and resolutions. Here, the settlement agreement is a contract – not an ordinance or resolution. The court further concluded that the settlement agreement was not an unlawful attempt by Moorpark

to exercise its regulatory power outside of city limits. The settlement agreement only designates permissible sand hauling routes for BBGHAD's contractors, and BBGHAD could have refused to sign the settlement agreement. Finally, the court held that certain provisions of the settlement agreement are void because they surrender BBGHAD's discretion to alter hauling routes in the future. BBGHAD has the police power to determine hauling routes, and may not surrender that authority to exercise its discretion if circumstances may change. As to the agreement itself, the court held that the settlement is valid and may remain in force, with the exception of provisions relating to the duration of and BBGHAD's limited discretion to modify the route restrictions, which the court voided, in part, and modified, in part.

VI. Finance

***Strategic Concepts, LLC v. Beverly Hills Unified School District,* 23 Cal.App.5th 163 (2018)**

Holding: Government Code Section 1090 applies to former employee who persuaded school district to (a) convert her to an independent contractor, with annual fees exceeding $1.3 million; (b) issue a no-bid $16 million contract to administer a bond fund.

Facts: Christiansen worked for the school district as a director of planning and facilities, with a salary of $113,000 per year, plus a $150-per-month automobile allowance. After one year of employment, the school district terminated her status as an employee, and hired her as a consultant, performing the same duties. The consultant agreement provided that Christiansen's compensation was $160 per hour, with a maximum compensation of $170,000 per year. One year later, Christiansen assigned her contract to Strategic Concepts, a company solely owned by Christiansen. Invoices were approved and paid to Strategic Concepts in the annual amounts of over $250,000, $1.3 million, and $1.3 million, despite the $170,000 not-to-exceed contract authority. Christiansen then proposed that the school district, without seeking proposals from other persons or entities, retain Strategic Concepts to manage projects funded by a proposed bond measure, with fees potentially exceeding $16 million. The school district board retained Strategic Concepts, without seeking proposals. The bond measure passed, and Strategic Concepts collected more than $2 million in fees, even though no specific project had been approved. Christiansen was prosecuted for violating Government Code

Section 1090, was found guilty by a jury, and ordered to pay $3.5 million in restitution. The Court of Appeal reversed the conviction, reasoning that Section 1090 did not apply to independent contractors, in *People v. Christiansen*, 216 Cal.App.4th 1181 (2013). Christiansen and Strategic Concepts filed a civil action seeking a determination that their contracts were not void under Section 1090. Prior to trial, the trial court ruled that Section 1090 does not apply, following the 2013 appellate opinion. Through a jury verdict, and inclusive of interest and attorney's fees, Strategic Concepts obtained a judgment exceeding $20 million. The school district appealed.

Analysis: The Court of Appeal reversed. While the appeal was pending, the California Supreme Court decided *People v. Superior Court (Sahlolbei)*, 3 Cal.5th 230 (2017), which held that Section 1090 may apply to independent contractors, particularly "outside advisors with responsibilities for public contracting similar to those belonging to formal employees . . . " The Supreme Court in *Sahlolbei* also expressly disapproved of the 2013 *Christiansen* opinion in that regard. In its subject 2018 opinion, the Court of Appeal held that Christiansen "used her position of trust as an employee to ingratiate herself with District's administrators." For example, she went from earning $113,000 per year (as an employee) to over $1.3 million per year (as a contractor). Then, Christiansen "used her influence" to obtain a $16 million no-bid contract to administer the school district's new bond fund.

VII. Public Records

***National Conference of Black Mayors v. Chico Community Publishing, Inc.*, 25 Cal.App.5th 570 (2018)**

Holding: Public records requestor not entitled to fees when litigating against public agency over records the agency has already agreed to disclose.

Facts: The Sacramento News and Review (SNR), a local newspaper, was investigating the mayor's and his staff's use of city resources to take over, and the eventual bankruptcy, of the National Conference of Black Mayors (NCBM). SNR made a public records request to the city for emails sent from private accounts associated with the mayor's office. The city provided approximately 900 pages of records on city servers, but it identified some potentially attorney-client communications between the mayor and the NCBM's law firm. The city informed the NCBM it would disclose the records, absent a court order. The NCBM filed an

ordinary mandamus petition under CCP Section 1085, seeking to prevent disclosure of the privileged emails to SNR. The city did not oppose NCBM's petition. In litigation, the trial court reviewed 113 records, which the NCBM requested to be reviewed in camera. The court ultimately ordered 58 emails to be disclosed in unredacted form, and 17 to be redacted and disclosed. SNR moved for attorney's fees against the mayor under the Public Records Act and the Private Attorney General Statute, CCP Section 1021.5. As to the Public Records Act, SNR argued that the mayor was acting as a city official when the mayor (with the NCBM) sought nondisclosure of the records. The trial court denied the fee request. SNR appealed the denial of fees against the mayor under the Public Records Act.

Analysis: The Court of Appeal affirmed the denial of fees against the mayor under the Public Records Act. The court noted that the city was not required to oppose the writ petition for several reasons, including the fact that the attorney-client privilege can only be asserted by the holder of the privilege – which, in this case, was not the city. The court also noted that "the City did not withhold public records from the newspaper, thus the newspaper could not initiate litigation under the exclusive procedure provided in the [Public Records] Act." The newspaper is simply not entitled to fees under the Public Records Act because it did not "prevail" under its provisions.

VIII. Attorneys

***Monster Energy Company v. Schechter*, ___ Cal.App.5th ___, 2018 WL 3829255 (2018)**

Holding: Attorneys who signed a settlement agreement "approved as to form and content" were not parties that were bound by the settlement agreement, including its confidentiality provisions.

Facts: The Fourniers filed a civil suit against Monster, and the Fourniers were represented by a law firm where attorney Schechter worked. The lawsuit resulted in a settlement, the settlement agreement provided that it was signed on behalf of the "Parties . . . [and] their . . . attorneys. . . " The settlement agreement further provided that the "Plaintiffs and their counsel agree" to keep the settlement confidential. The settlement agreement explained that the confidentiality extended to disclosure to "Lawyers & Settlements [and] VerdictSearch (or the like)," and

stated that any public comment would be limited to "This matter has been resolved." The settlement agreement was signed by the Fourniers and Monster. Under the parties' signature block, the parties' respective attorneys signed a block that said "approved as to form and content." One month after the settlement agreement was signed, Schechter was interviewed by a reporter for lawyersandsettlements.com, where Schechter discussed the general terms of the settlement. The online article reporting the settlement also concluded with an advertisement for persons injured by Monster energy drinks to "click on the link" to connect with a lawyer. One employee of lawyersandsettlements.com also works for Schechter's law firm. Monster filed suit against Schechter and his law firm, alleging a breach of the settlement agreement. Schechter and his law firm filed an anti-SLAPP motion, on, among other things, the breach of contract claim, on the ground that Schechter's statements to the reporter were protected speech. The trial court denied the motion, and Schechter and his law firm appealed.

Analysis: The Court of Appeal reversed, in relevant part. The court held that Schechter's statements to the reporter protected under the anti-SLAPP statute. Monster failed to conclusively prove that Schechter's firm did, in fact, receive advertising leads from lawyersandsettlements.com – and thus the commercial speech exemption from the anti-SLAPP statute did not apply. As to the merits of the breach of contract cause of action, the court concluded that Monster failed to demonstrate a probability of prevailing. The court concluded that "approved as to form and content" means only that an agreement "has the attorney's professional thumbs-up." Schechter and his law firm were not parties to the settlement agreement, including its confidentiality provisions. While the settlement agreement compelled the attorneys to keep the settlement confidential, the attorneys only approved the agreement as to form and content. The attorneys "could not actually be bound unless the manifested their consent." Neither Schechter nor his law firm were identified on the Fourniers' signature line of the settlement agreement. And even if the Fourniers represented that they could sign for their attorneys, that would not be binding on the attorneys. Rather, the agreement only compelled the Fourniers to direct Schechter and his law firm to keep the agreement confidential. And finally, the court noted that, while not present in this case, "[i]t seems easy" to draft a settlement agreement that explicitly makes the attorneys a "party" for purposes of a confidentiality provision, and requiring attorneys to sign the agreement – not just approving as to form and content. Otherwise, the "attorney is free to blab" about the settlement.