General Municipal Litigation Update

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General Municipal Litigation Update

Cases Reported from September 14, 2018
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I. Public Records / Open Meetings

***National Lawyers Guild v. City of Hayward*, 27 Cal.App.5th 937 (2018) (rev. granted 12/19/2018)**

Holding: City entitled to recover its costs incurred in constructing disclosable video in response to a public records request.

Facts: A public interest group made a public records request for records relating to a demonstration in Berkeley, where Hayward police officers provided security. Responsive records included police body-worn camera footage, which was recorded on video. In responding to the request, the city issued an invoice to the requestor for approximately $2,900, for reimbursement of costs incurred in copying the videos for production, including redacting them. The requestor paid the fee under protest, and the city provided the videos. The requestor then made a second public records request, for additional videos, and the city offered to permit the requestor to either (a) view the videos free of charge; or (b) receive copies for approximately $300 to cover production costs. The requestor filed suit. The trial court concluded that the Public Records Act did not permit the city to charge a requestor for costs incurred in redacting the videos. The city appealed.

Analysis: The Court of Appeal reversed, finding the city was entitled to recover its costs of preparing and redacting the videos for production, pursuant to Government Code Section 6253.9(b)(2) (allowing recovery of costs for production of electronic records where extraction is needed). The court concluded that the Legislature, in adopting this statute, was aware that "the cost of redacting exempt information from electronic records would in many cases exceed the cost of redacting such information from paper records." The city was allowed to recover the costs "to extract exempt material from [the videos] in order to produce a copy" to the requestor, and the matter was remanded to the trial court for an assessment of those costs.

***Associated Chino Teachers v. Chino Valley Unified School Dist.*, 30 Cal.App.5th 530 (2019)**

Holding: Disposition letters resulting from two personnel complaints about a coach's conduct are exempt from disclosure as a personnel record under the California Public Records Act.

Facts: High school teacher, who was coaching the girls' volleyball team, was investigated as a result of two separate complaints from parents of student-athletes, relating to his conduct as a coach. The complainants did not allege any egregious conduct in their complaints. The school investigated the allegations, and provided the teacher and both complainants with a written disposition letter – but only as to the complainants' own child. The disposition letters were not placed in the teacher's personnel file, although a letter of warning and letter of concern was placed in the personnel file. After receiving a public records request from a local news reporter, the school informed the teacher that it would disclose the disposition letters. The teachers' union filed a writ petition, seeking to prevent disclosure of the disposition letters. The trial court denied the writ petition, and the teachers' union appealed.

Analysis: The Court of Appeal reversed, finding the disposition letters should not be disclosed. The court found the appeal was not moot, even though the school provided the disposition letters to complainants, as the school maintained confidentiality over the personnel investigation, and limited disclosure to complainants, alone. Additionally, the fact that the disposition letters were not found in the teacher's personnel file does not, by itself, impact the confidentiality of the records. As to the merits, the court found the disposition letters exempt from disclosure as a personnel record under Government Code Section 6254(c). Disclosure of the disposition letters would implicate the teacher's substantial privacy interests, and the potential harm to privacy interests outweighs the public interest in disclosure.

***Anderson-Barker v. Superior Court*, 31 Cal.App.5th 528 (2019)**

Holding: In response to a public records request, local agency does not have a duty to disclose records it merely has access to through a contractor, if the agency did not create or obtain such records.

Facts: A local attorney made a public records request for electronic data relating to vehicles that private towing companies had impounded at the direction of the police department. The data was stored in databases held by city contractors. The city had the contractual rights to access the data, but the data was created, owned, and controlled by city contractors, and city staff had used only a limited portion of one database (that contained responsive records), and had never accessed the other relevant database. This litigation had previously proceeded to the Court of Appeal, with the court holding that the Civil Discovery Act applies to proceedings under the Public Records Act (*City of Los Angeles v. Superior Court (Anderson-Barker)*, 9 Cal.App.5th 272 (2017)). Following discovery in the matter, the trial court denied the petition on the merits, finding the city did not have possession or control of the data, so the data was not subject to disclosure under the Public Records Act. The requestor filed a petition for writ of mandate.

Analysis: The Court of Appeal denied the petition, concluding that the city's right to access the data is insufficient to establish constructive possession, for purposes of the Public Records Act. The court noted that the city might have a duty to disclose data it actually extracted, and then used for a governmental purpose. However, the city does not have a duty, under the Public Records Act, to disclose all of the data on the privately-held databases. The court also noted its decision involving the Public Records Act was consistent with a U.S. Supreme Court interpretation of the Freedom of Information Act, where it held that FOIA did not apply to records that "merely could have been obtained" by the agency. *Forsham v. Harris*, 445 U.S. 169, 186 (1980).

***Preven v. City of Los Angeles*, 32 Cal.App.5th 925 (2019)**

Holding: Committee exception of the Brown Act does not permit a full City Council from barring a person's public comment at a special meeting on an agenda

item, where that person previously provided public comment on the same item to a City Council committee.

Facts: Plaintiff provided public comment at an agenda item at a (five-member) City Council committee meeting. The item related to a proposed real estate development near Plaintiff's residence. The following day, a special meeting of the full (15-member) City Council was held, where one agenda item was the proposed development. Plaintiff sought to provide public comment at the City Council meeting, and was denied, on the ground that he and others commented on the same item the day before, at the committee meeting. Plaintiff sent a cease-and-desist letter to the city, which was not responded to, and Plaintiff then filed suit. Plaintiff alleged that the city violated the Brown Act by preventing him from giving public comment at the special City Council meeting. The city filed a demurrer, arguing that the "committee exception" of the Brown Act (Government Code Section 54954.3(a)) allowed it to prevent public comment to the full City Council if the person desiring to speak already addressed a City Council committee on the same item. The trial court sustained the city's demurrer, finding Plaintiff did not have a right to provide public comment at the special City Council meeting, as Plaintiff already provided public comment to the City Council committee. Plaintiff appealed.

Analysis: The Court of Appeal reversed, finding that the committee exception did not apply to special meetings of the City Council. In other words, the Brown Act did not permit the City Council from limiting public comment at special meetings, based on comments at a prior committee meeting.

***TransparentGov Novato v. City of Novato*, ___ Cal.App.5th ___ 2019 WL 1551701 (2019)**

Holding: City's response to cease-and-desist letter, committing to refrain from challenged practice of establishing "subcommittees," was a sufficient "unconditional commitment" under the Brown Act. Also, a challenge to the city's practice of allowing oral requests for agenda items was moot, as the city's prohibition on the practice was unequivocal.

Facts: Two projects were previously approved by the City Council: a solar panel carport, and a bus transfer facility. During public comment on matters not on the City Council's agenda at a subsequent meeting, there was substantial comment on the bus transfer facility. The City Council then engaged in a discussion of both the solar project and the bus project. The City Council then held successive discussions declining to place the bus project on a future agenda (12 minutes), reaching a lack of consensus on whether place the solar project on a future agenda (11 minutes), and forming a "subcommittee" to study the solar project (seven minutes). Eight months later, Petitioner sent a cease-and-desist letter to the city, asserting the City Council discussed substantive issues relating to the solar project and the bus project, and established the subcommittee without agendizing the two items, in violation of the Brown Act. The city agreed that it would not establish subcommittees in the future without agendizing the items. Additionally, the City Council adopted a resolution prohibiting Councilmembers from making oral requests to place items on future agendas. Petitioner then filed a petition for writ of mandate. The trial court denied the petition, and Petitioner appealed.

Analysis: The Court of Appeal affirmed. The court found the city's response to Petitioner's cease-and-desist letter, agreeing to stop the practice of forming subcommittees without first placing the formation of a subcommittee on an agenda, to be sufficient. The city's letter is "precisely the type of 'unconditional commitment'" (to cease challenged activity) that protects cities from litigation under the Brown Act. Next, the court found the claim regarding the City Council's non-agenda discussion of the solar and bus projects to be moot. The City Council's resolution (prohibiting oral requests for agenda items) is unequivocal, and there is no reasonable basis to conclude the city would repeat its past practice.

II. Finance

***Wilde v. City of Dunsmuir*, 29 Cal.App.5th 158 (2018) (rev. granted 1/30/19)**

Holding: Proposition 218 did not curtail voters' referendum power to challenge local resolutions and ordinances.

Facts: The City Council passed a resolution raising water rates, following a public hearing. Leading up to the adoption of the resolution, the city provided notice of

the public hearing, and protest ballots where residents could object. 40 protest votes were received, when 800 were required for a successful protest. The resolution therefore went into effect, when adopted by the City Council. Petitioner then gathered 145 signatures (a sufficient number) calling for a referendum to repeal the City Council's resolution. The city rejected the referendum petition, advising plaintiff that (a) the rate-setting is administrative, and not subject to the referendum process; and (b) Proposition 218 allows for initiatives, but not referenda. Petitioner filed suit, seeking to place her referendum on the ballot. The trial court denied the petition, finding that the setting of new water rates is an administrative act, not subject to referendum. Petitioner ultimately appealed. While the litigation was pending with the trial court, Petitioner gathered sufficient signatures to place an initiative on the ballot, to amend the city's water and sewer rates then imposed by the challenged City Council resolution. Voters rejected the initiative measure.

Analysis: The Court of Appeal reversed. As a preliminary matter, court found the litigation is not moot, even with voters rejecting Petitioner's initiative measure. The aims differed between the referendum effort (seeking to repeal the resolution) and the initiative effort (seeking to establish new water and sewer rates). Next, the court found that Proposition 218, while it expended initiative powers, it did not curtail voters' referendum powers. Finally, the court held the resolution is subject to referendum because it is legislative, not administrative, in nature. The new water rates adopted by the city were not just an administrative adjustment of rates previously established over 20 years ago. The rates resulted from a newly formulated set of policies, including an allocation of new infrastructure costs.

III. Anti-SLAPP Statute

***Rand Resources, LLC v. City of Carson*, 6 Cal.5th 610 (2019)**

Holding: Statements made by city officials and representatives to Plaintiff as to who should represent the city in negotiations to bring an NFL franchise to the city are not sufficient to bring a cause of action within the reach of the anti-SLAPP statute. However, acts by city representatives that allegedly disrupted Plaintiff's exclusivity agreement were subject to the anti-SLAPP statute, as they involved the

City Council’s possible extension of Plaintiff’s agreement, as well as the NFL’s possible franchise relocation.

Facts: Plaintiff and the city entered into an agreement where Plaintiff became the city’s exclusive agent to negotiate with the NFL to build a new home stadium for an NFL team. One year after entering into the agreement, Plaintiff asserted that the city stopped adhering to the agreement, and breached the exclusivity provision. For example, Plaintiff stated that the city and another negotiator, Bloom, began contacting NFL representatives about bringing an NFL franchise to the city, and the mayor falsely told Plaintiff he did not know what Bloom was doing with the city and the NFL. Plaintiff filed a six-count complaint against the city, the mayor, and the Bloom defendants, asserting a series of contract and fraud claims. The defendants filed an anti-SLAPP motion on five of the causes of action, and the trial court granted the motion. The Court of Appeal reversed, finding the action did not result from defendants’ exercise of their free speech rights in connection with a public issue, as defined by the anti-SLAPP statute. The California Supreme Court granted review.

Analysis: The Supreme Court, in a unanimous 7-0 opinion, affirmed, in part, and reversed, in part. As to the two causes of action asserting that the mayor and the city attorney made false statements to Plaintiff about the city’s alleged breach of the exclusivity provision in Plaintiff’s agreement, those statements were not made “in connection with” an issue in front of the City Council, or an issue of public interest. The speech was only concerned with the narrow issue of who should represent the city in negotiations with the NFL – which the court concluded was not a matter of public significance, here. As to the promissory fraud cause of action that asserts the city attorney made a false statement at the time the original agreement with Plaintiff was negotiated, the court found that statement was unrelated to the alleged breach – two years later – in relation to the potential renewal of the agreement. As to the two intentional interference causes of action that assert the Bloom defendants disrupted the Plaintiff’s relationship with the city, the court found the Bloom defendants’ acts to be “in connection with” (a) an issue in front of the City Council (the extension of Plaintiff’s agreement); and (b) a matter of public interest (the NFL’s possible franchise relocation). In the end, the court concluded that only the two intentional interference causes of action are subject to the anti-SLAPP statute.

IV. Employment

***CAL FIRE Local 2881 v. CalPERS*, 6 Cal.5th 965 (2019)**

Holding: Legislature's doing away of the opportunity to purchase additional retirement service credit (airtime) through the Public Employees' Pension Reform Act of 2013 (PEPRA) was not a benefit entitled to protection under the Contracts Clause of the California Constitution.

Facts: The option to purchase airtime was available for CalPERS members from 2003 through 2012. In 2012, the Legislature enacted PEPRA, which, among other things, gave eligible CalPERS members one last four-month window of opportunity to purchase airtime service credit. After that, the option would cease to exist. In 2013, after the expiration of time to purchase airtime service credit, state firefighters and their union filed suit, asserting the option to purchase airtime was a vested contractual right, and was eliminated in violation of the Contracts Clause of the California Constitution. The trial court entered judgment against the Plaintiffs, and the Court of Appeal affirmed. The California Supreme Court granted review.

Analysis: In a unanimous 7-0 opinion, the Supreme Court affirmed, holding that the opportunity to purchase airtime was not a vested right protected by the Contracts Clause. The court concluded that the Legislature did not intend to create a contractual right in the opportunity to purchase airtime, and that no implied contractual right was created. In finding no vested right in the opportunity to purchase airtime, the court declined to opine on the validity of the "California Rule" – i.e., if the opportunity to purchase airtime were protected, whether PEPRA's elimination of airtime is an unconstitutional impairment of that vested right.

***Marquez v. City of Long Beach*, 32 Cal.App.5th 552 (2019)**

Holding: State minimum wage law applies to wages set for employees of a charter city.

Facts: Two plaintiffs, on behalf of a putative class of 200 city employees, asserting the city paid them less than the State minimum wage, which was $10 per hour at the time. The city demurred, arguing that the action was barred by the home rule doctrine, because wages set by charter cities are a municipal affair. The trial court sustained the city's demurrer, dismissing the action. Plaintiffs appealed.

Analysis: The Court of Appeal reversed. The court concluded that the State minimum wage law falls outside the home rule authority of a charter city. The State minimum wage only sets a floor to the lowest possible compensation – and the impact of the minimum wage requirements only impinges "to a limited extent" on local control of municipal affairs. The court also noted that the minimum wage requirement intrudes less on local authority than other local laws held invalid by the California Supreme Court, such as the prevailing wage law, mandatory binding arbitration requirements, and prohibitions on cost-of-living increases.

V. Land Use / California Environmental Quality Act

***T-Mobile West LLC v. City & County of San Francisco*, ___ Cal.5th ___, 2019 WL 1474847 (2019)**

Holding: Public Utilities Code Sections 7901 and 7901.1, which limit some aspects of local control over telephone line installation in the public right-of-way, do not prohibit cities from regulating aesthetics of wireless facilities in the public right-of-way.

Facts: The city adopted an ordinance regulating wireless facilities in the public right-of-way. The ordinance sets forth various standards of aesthetic compatibility for wireless facilities, such as heightened review in historic districts and "view" districts. A cell carrier and a provider of wireless infrastructure filed suit, seeking to invalidate the ordinance. Plaintiffs argued that Public Utilities Code Section 7901, which allows cities to regulate telephone lines that "incommode" the public right-of-way, preempted the city's efforts to condition approval on aesthetic considerations. Plaintiffs also argued that the ordinance violated Public Utilities Code Section 7901.1, which requires to cities, consistent with Section 7901, to exercise reasonable control over how roads are accessed, and to do so in an equivalent manner. The trial court held that Section 7901 did not preempt the

ordinance, and that the ordinance did not violate Section 7901.1. The Court of Appeal affirmed, and the California Supreme Court granted review.

Analysis: The Supreme Court affirmed in a unanimous 7-0 opinion. Section 7901 does not preempt local regulation of telephone lines based on aesthetic considerations. Nothing in the statute says anything about aesthetics or the appearance of telephone lines, and case law interpreting the statute does not support preemption, either. Additionally, the ordinance did not violate Section 7901.1, which only applies to carriers' temporary access of the right-of-way – during construction of telephone lines. The ordinance treats all entities similar in that regard.

***Sierra Club v. County of Fresno*, 6 Cal.5th 502 (2018)**

Holding: *De novo* standard of review is appropriate for considering whether environmental impact report has adequately discussed potential environmental impacts.

Facts: The county approved an EIR for a master-planned community at a 942-acre formerly zoned agricultural site. The project contemplated approximately 2,500 age-restricted units, other residential units, and a commercial village, among other things. The EIR generally discussed the possible adverse health effects from air quality, but also explained that a more detailed analysis of health impacts was not possible at the early planning phase. Petitioners filed suit. The trial court denied the Petitioners' claims, in relevant part. Petitioners appealed, asserting that the EIR's discussion of air quality impacts was inadequate under the California Environmental Quality Act. The Court of Appeal agreed with Petitioners, and reversed. The developer petitioned for review to the California Supreme Court, and the court granted review relating to the air quality impact discussion in the EIR.

Analysis: The Supreme Court, in a unanimous 7-0 opinion, affirmed, in part, and reversed in part. The court held that *de novo* review (not substantial evidence review) is appropriate for assessing whether an EIR has adequately discussed potential environmental impacts. Applying that standard, the court held that the EIR's "general description of symptoms associated with exposure" to pollutants is

inadequate. The EIR should have explained the nature and magnitude of the potential health consequences – in other words, it should make "a reasonable effort to discuss . . . the general health effects associated with a particular pollutant and the estimated amount of that pollutant the project will likely produce." In a separate part of the opinion, the court approved of the EIR's approach to substitute new mitigation measures at a later date, to address the project's air quality impacts – so long as the new mitigation measures were shown to be equally effective or superior to those in the EIR.

***Save Lafayette Trees v. City of Lafayette*, 32 Cal.App.5th 148 (2019)**

Holding: In lawsuit challenging agreement to remove trees, challenges for (a) planning and zoning law violations must be timely under Government Code Section 65009's 90-day filing and service limitation period; (b) violations of CEQA must be filed within 180 days of the agency's decision.

Facts: The city approved an agreement with PG&E for the removal of up to 272 trees (216 were protected) within PG&E's gas pipeline rights-of-way. The city and PG&E agreed that removal would occur not via the city's traditional tree protection processes for removal, but rather, through a municipal code section allowing for removal of a protected tree for the "health, safety and general welfare." 90 days later, Petitioners filed suit, and served their suit the following (91st) day. Petitioners alleged violations of CEQA and the city's general plan and municipal code, among other things. PG&E demurred, and the city joined. The trial court sustained the demurrer, finding the lawsuit time-barred by Government Code Section 65009, which imposes a 90-day limitation to file and serve actions asserting violations of planning and zoning laws. Petitioners appealed.

Analysis: The Court of Appeal affirmed, in part, and reversed, in part. The court held that the claims based on violations of the planning and zoning law were not timely served. Courts have interpreted the 90-day limitation of Section 65009 as applying to a broad range of decisions, including the city's tree ordinance here, thus barring suit for the planning and zoning law claims. The court also found a municipal code provision offering a 180-day limitation period to be preempted by Section 65009. Next, the court held that the CEQA cause of action was timely filed (not later than 180 days after the agency's decision) and served (not later than

10 days after filing of the action). CEQA (with its 180-day limitation period, in this particular case), the specific statute, controls over the more general Government Code Section 65009 (with its 90-day limitation period).

VI. Civil Rights

***City of Escondido v. Emmons*, ___ U.S. ___, 139 S.Ct. 500 (2019) (*per curiam*)**

Holding: For qualified immunity to be denied in an excessive force case, the court must explain, with specificity, how case law prohibits an officer's actions in the subject case.

Facts: Two officers responded to a domestic violence call at an apartment. After an exchange with the residents, Plaintiff was ultimately taken to the ground by one officer, and was arrested resisting and delaying a police officer. The incident was captured on the officer's body-worn camera. Plaintiff filed suit against the officer and a sergeant who was at the scene. The District Court granted the Defendants' Motion for Summary Judgment. The Ninth Circuit reversed, finding summary judgment should not have been granted in favor of both the officer (who used force) and the sergeant (who did not use any force). Defendants petitioned the U.S. Supreme Court for certiorari.

Analysis: The Supreme Court, in a *per curiam* opinion, reversed as to the sergeant, and vacated and remanded as to the officer. First, as to the sergeant, the court explained that the Ninth Circuit's view that summary judgment on the excessive force claim should have been denied was "quite puzzling" – since the sergeant did not use force. Second, as to the officer, the court remanded for consideration of whether the officer is entitled to qualified immunity. The Ninth Circuit's formulation of the clearly established right (the "right to be free of excessive force") was too general, and the court noted that the Ninth Circuit "made no effort" to explain, with specificity, how case law prohibited the officer's actions in this particular case. Here, a court should ask whether clearly established law prohibits officers from stopping and taking down a suspect, given the circumstances presented to the officer.

***American Freedom Defense Initiative v. King County*, 904 F.3d 1126 (9th Cir. 2018)**

Holding: County transit agency's rejection of bus advertisement violates the First Amendment.

Facts: The county's transit agency approved and posted an advertisement from U.S. Department of State on buses, entitled "Faces of Global Terrorism." The transit agency staff member approving the ad had been involved in the transit advertising program for over 30 years, and approved the ad without concern. After the ad was posted on buses, the transit agency began receiving letters of concern from community members, as well as a member of Congress. The State Department ultimately retracted the ad, after it was posted for approximately three weeks. About one month later, a group of private individuals and a non-profit group submitted their own ad, modeled on the State Department's ad, but with false statements inserted. The transit agency rejected that ad, and Plaintiffs sued. The District Court denied Plaintiff's Motion for a Preliminary Injunction, and the Ninth Circuit affirmed that denial. Plaintiffs then revised their ad, removed the false statements, and re-submitted it to the transit agency. The transit agency rejected the revised ad (on grounds of disparagement and disruption), and the litigation proceeded at the District Court level. The District Court granted the county's Motion or Summary Judgment, and Plaintiffs appealed.

Analysis: The Ninth Circuit reversed, in relevant part. The court found the transit agency's disparagement standard discriminates, on the basis of viewpoint. Even though this case involves a nonpublic form, where there is more leeway to restrict speech, the transit agency's regulations must be both reasonable and viewpoint neutral. Here, the disparagement restriction is "itself viewpoint discriminatory on its face." Additionally, the court held that the transit agency's rejection of the ad, based on the potential to disrupt the transportation system, to be unreasonable. Here, the court could actually test the transit system's hypothesis (of disruption to the transportation system), since the transit agency approved a very similar State Department ad. During the time the State Department ad was posted on buses, there were a small number of complaints and concerns – but no evidence in the record demonstrating any harm, disruption, or interference to the transportation system.

***Davison v. Randall*, 912 F.3d 666 (4th Cir. 2019)**

Holding: County supervisor's banning of constituent from "government official" Facebook page violates the First Amendment.

Facts: The day before she was sworn as chair of the county's Board of Supervisors, the supervisor created a "Chair Phyllis J. Randall" page on Facebook. The supervisor also managed two other Facebook pages – a personal profile, and a campaign page. The supervisor also designated the chair's page as a "government official" page for Facebook, providing her county email and telephone information. On her campaign page, the supervisor described her chair's page as her "county Facebook page." Plaintiff, who runs a "Virginia SGP" Facebook page to generally post political commentary, posted a comment on the chair's Facebook page about school board members and their families alleged conflicts of interest. The supervisor then (a) deleted the comment and her underlying post; and (b) banned the Virginia SGP page from the chair's page, which prevents the Virginia SGP page from further commenting on the chair's page. Twelve hours later, the supervisor unbanned the Virginia SGP page. Plaintiff filed suit, alleging the supervisor's ban violated various U.S. and Virginia constitutional provisions. The District Court granted summary judgment in favor of the Board of Supervisors – and the Plaintiff appealed. At a bench trial, as against the supervisor herself, the court entered judgment, in relevant part, in favor of Plaintiff on free speech grounds – and the supervisor appealed.

Analysis: The Fourth Circuit affirmed. At the outset, the court concluded that Plaintiff has standing, because he intends to continue posting comments on the chair's page on Facebook, and the supervisor has not disavowed future enforcement against Plaintiff. Next, the Fourth Circuit found that the supervisor was acting under color of law (for purposes of Plaintiff's 42 U.S.C. Section 1983 claim), in view of the supervisor's creation and administration of the chair's page, and her banning Plaintiff from the page. Third, in a matter of first impression for a federal appellate court, the court found the interactive (commenting) component of the chair's Facebook page to be a traditional public forum for First Amendment purposes, and that the supervisor engaged in unconstitutional viewpoint discrimination when she banned Plaintiff from the page. The supervisor's banning of Plaintiff from her chair's page "constitutes black-letter viewpoint discrimination." As to the Board of Supervisors, however, the court found the

Board of Supervisors were properly dismissed from the litigation, as they did not know of the chair's page, and did not acquiesce in the supervisor's (a) administration of the page; and (b) banning of Plaintiff from the page.

***Homeaway.com, Inc. v. City of Santa Monica*, 918 F.3d 676 (9th Cir. 2019)**

Holding: Ordinance prohibiting unlicensed short-term rentals does not violate Communications Decency Act or First Amendment.

Facts: The city passed an ordinance authorizing licensed home-sharing, where residents remain on-site, but prohibiting all other forms of short-term rentals of 30 consecutive days or less. The main purpose of the ordinance was to preserve existing residential housing stock and the quality and character of residential neighborhoods. Plaintiffs HomeAway and Airbnb filed suit, and while the litigation was pending, the city amended its ordinance. In the amended ordinance, the city retained its prohibition on home-sharing, except for licensed home-shares, and required online platforms to (a) collect and remit transient occupancy tax; (b) disclosed listing and booking information regularly; (c) refrain from booking rentals not licensed and listed in the city's registry; and (d) refrain from collecting fees from unlicensed home-shares. The District Court granted the city's Motion to Dismiss on the grounds that the Plaintiffs failed to state a claim under the Communications Decency Act of 1996 (providing immunity for providers and users of an interactive computer service who publish information provided by others) and the First Amendment. Plaintiffs appealed.

Analysis: The Ninth Circuit affirmed, in relevant part. The court found that the Communications Decency Act does not preempt the ordinance. The ordinance only prohibits platforms' processing of booking transactions for unlicensed home-shares – but it does not impose liability for the content of the listings on the Plaintiffs' home-share websites. The court also found that the ordinance does not implicate the First Amendment for commercial speech purposes, as the conduct of booking transactions for unlicensed rentals involves only non-speech, non-expressive conduct.

***American Beverage Assn. v. City & County of San Francisco*, 916 F.3d 749 (9th Cir. 2019) (*en banc*)**

Holding: Plaintiffs entitled to preliminary injunction on First Amendment grounds against ordinance requiring health warnings on advertisements for certain sugar-sweetened beverages.

Facts: The city adopted an ordinance requiring health warnings on advertisements for certain sugar-sweetened beverages to include a statement that read as follows: "WARNING: Drinking beverages with added sugar(s) contributes to obesity, diabetes, and tooth decay. This is a message from the City and County of San Francisco." The ordinance required the warning contain occupy at least 20 percent of the advertisement. The purpose of the ordinance was to inform the public about the presence of added sugars, and thereby promote consumer choice, and improved diet and health. Plaintiffs (trade groups representing beverage industry, retailers, and outdoor advertising interests) sued to prevent implementation of the ordinance, alleging it violated the First Amendment. The District Court denied Plaintiffs' Motion for Preliminary Injunction. A three-judge panel of the Ninth Circuit reversed, and the court then granted review in front of an *en banc* panel.

Analysis: The *en banc* panel reversed the District Court's decision, and remanded the matter for further proceedings. The *en banc* panel concluded the District Court abused its discretion in denying the Plaintiffs' Motion for Preliminary Injunction. In considering the Plaintiffs' First Amendment claim, the panel applied heightened scrutiny for government-compelled speech, requiring the city to prove that the compelled speech is (a) purely factual; (b) non-controversial; and (c) not unjustified or unduly burdensome. Based upon expert witness testimony presented to the District Court, the panel concluded that the city failed to prove that the ordinance is not unjustified or unduly burdensome. Specifically, it is possible that a warning that covers 20 percent of an advertisement may drown out Plaintiffs' messages, and may effectively rule out the possibility of running an advertisement, in the first place. For example, the city's own expert witness cited a study on safety warnings, and that study used warnings that only occupied 10 percent of the advertisement. Since the panel concluded the city failed to meet its burden on the "unjustified or unduly burdensome" factor, finding Plaintiffs have a "colorable" First Amendment claim, the panel ended its merits analysis there. The court further concluded that the Plaintiffs had also met the remaining requirements for a preliminary injunction.