2019 Spring Conference

City Attorneys' Department

Hyatt Regency Monterey
Monterey, California

May 8-10, 2019

Name: _____

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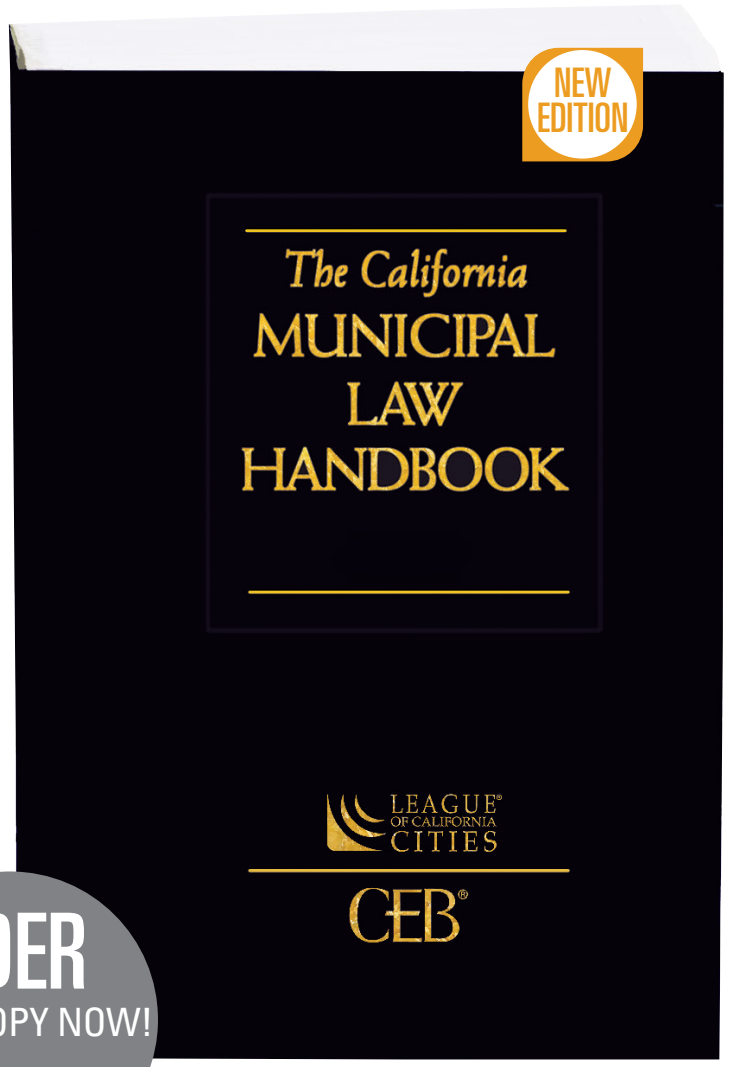

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2019 City Attorneys' Spring Conference

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2019 CITY ATTORNEYS' SPRING CONFERENCE

Wednesday, May 8 – Friday, May 10

Hyatt Regency, Monterey

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President: Damien Brower, City Attorney, Brentwood
1st Vice President: Celia Brewer, City Attorney, Carlsbad
2nd Vice President: Lynn Tracy Nerland, City Attorney, San Pablo
Director: Michelle Marchetta Kenyon, City Attorney, Rohnert Park, Pacifica, Piedmont, Moraga and Calistoga

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Wednesday—May 8

10:00 a.m. – 6:00 p.m. **REGISTRATION OPEN**
Regency Foyer

11:45 a.m. – 1:00 p.m. **LUNCH ON YOUR OWN**

1:00 – 3:00 p.m. **GENERAL SESSION**
Regency Ballroom
Moderator: Damien Brower, City Attorney, Brentwood

Welcoming Remarks
Speaker: M. Christine Davi, City Attorney, Monterey

10 Things to Look for in an EIR
Speaker: Michael Hogan, Partner, Hogan Law APC

Land Use and CEQA Litigation Update
Speaker: Andrea K. Leisy, Partner, Remy Moose Manley

Public Works Procurement Update
Speaker: Maggie W. Stern, Shareholder, Kronick, Moskovitz, Tiedemann & Girard

3:00 - 3:15 p.m. **BREAK**

Wednesday—May 8
(Continued)

3:15 – 4:45 p.m. **GENERAL SESSION**

Regency Ballroom

Moderator: Lynn Tracy Nerland, City Attorney, San Pablo

Ehrlich Resurrected: Public Art Ordinances Once Again Under Attack

Speaker: Thomas B. Brown, City Attorney, St. Helena, Partner, Burke, Williams & Sorensen LLP

Essential Skills: Developing the City Attorney and City Council Relationship

Speakers: Attorney Development and Succession Committee Members with help from a few friends

5:00 – 6:00 p.m. **MEET AND GREET FOR UNDER TEN** (*Fewer than 10 years of municipal law practice)*

Regency Ballroom

Meet colleagues and share ideas about municipal law and the City Attorneys' Department

6:30 – 8:00 p.m. **ALL THAT JAZZ EVENING RECEPTION**

Monterey Ballroom, Beach-Grove Rooms, Lobby Level

Hor d'Oeuvres and No Host Beverages

Thursday—May 9

8:00 a.m. – 4:00 p.m. **REGISTRATION OPEN**
Regency Foyer

8:00 – 9:00 a.m. **BREAKFAST**
Monterey Ballroom, Lobby Level

9:00 – 10:30 a.m. **GENERAL SESSION**
Regency Ballroom
Moderator: Celia Brewer, City Attorney, Carlsbad

Navigating Housing Development in the New Era
Speakers: Barbara Kautz, Partner, Goldfarb & Lipman
Diana Varat, Of Counsel, Richards, Watson & Gershon

Streamlined Processing of Ministerial Projects under SB 35
Speakers: Patricia E. Curtin, Land Use/Public Agency Attorney, Wendel Rosen
Amara L. Morrison, Land Use/Public Agency Attorney, Wendel Rosen

10:30 – 10:45 a.m. **BREAK**

10:45 a.m. – Noon **GENERAL SESSION**
Regency Ballroom
Moderator: Michelle Marchetta Kenyon, City Attorney, Rohnert Park, Pacifica, Piedmont, Moraga and Calistoga

General Municipal Litigation Update
Speaker: Javan N. Rad, Chief Assistant City Attorney, Pasadena

Wireless Facilities in Our Right of Way: Whose Streets Are These Anyway?
Speaker: Robert ("Tripp") May III, Telecom Law Firm, P.C.

12:15 – 1:15 p.m. **NETWORKING LUNCHEON**
Monterey Ballroom, Lobby Level

Thursday—May 9
(Continued)

1:30 – 3:15 p.m.

GENERAL SESSION
Regency Ballroom
Moderator: Damien Brower, City Attorney, Brentwood

Department Business Meeting and Colleague Recognition
- *President's Report – Damien Brower*
- *Director's Report – Michelle Marchetta Kenyon*
- *Colleague Recognition – Department Officers*

FPPC Update
Speaker: Daniel G. Sodergren, City Attorney, Pleasanton

Scooter Wars: Local Approaches to Regulating Shared Mobility Devices
Speaker: Zachary M. Heinselman, Associate, Richards, Watson & Gershon

Shots Fired! How to Respond to an Officer Involved Shooting
Speakers: J. Scott Tiedemann, Managing Partner, Liebert Cassidy Whitmore
Jeb Brown, Assistant County Counsel, Riverside County Counsel's Office

3:15 - 3:30 p.m. **BREAK**

3:30 - 4:30 p.m.

GENERAL SESSION
Regency Ballroom
Moderator: Michelle Marchetta Kenyon, City Attorney, Rohnert Park, Pacifica, Piedmont, Moraga and Calistoga

Closed Session Training Program (Open Government Behind Closed Doors)
Speakers: Christi Hogin, City Attorney, Lomita, Malibu & Palos Verdes Estates, Interim City Attorney, Pomona, Of Counsel, Best Best & Krieger
Michael Jenkins, City Attorney, Goleta, Hermosa Beach, Rolling Hills and West Hollywood, Of Counsel, Best Best & Krieger

4:45 – 5:45 p.m.

Concurrent Group Discussions

- **Cannabis Regulation** *(Big Sur 1-3)*
  Moderator: Jeffrey V. Dunn, Best Best & Krieger

- **Coastal Cities** *(Spyglass 1)*
  Moderator: Christi Hogin, City Attorney, Lomita, Malibu & Palos Verdes Estates, Interim City Attorney, Pomona, Of Counsel, Best Best & Krieger

- **Homelessness** *(Cypress 1-3)*
  Moderator: Marni von Wilpert, Deputy City Attorney, San Diego

- **Solo and Small City Attorney Offices** *(Spyglass 2)*
  Moderator: Kathleen A. Kane, City Attorney, Burlingame

Friday—May 10

7:00 a.m. – 7:45 a.m. **FUN RUN – *Sponsored by Best Best & Krieger LLP***
Meet Outside Conference Center Entrance at 6:45 a.m.

7:45 a.m. – 8:45 a.m. **BREAKFAST**
Monterey Ballroom

8:00 a.m. – 10:15 a.m. **REGISTRATION OPEN**
Regency Foyer

9:00 a.m. – 10:15 a.m. **GENERAL SESSION**
Regency Ballroom
Moderator: Celia Brewer, City Attorney, Carlsbad

Municipal Tort and Civil Rights Litigation Update
Speaker: Timothy T. Coates, Managing Partner, Greines, Martin, Stein & Richland

Cannabis Conundrum—How to Extinguish Illegal Marijuana Businesses
Speaker: David J. Ruderman, City Attorney, Lakeport, Colantuono, Highsmith & Whatley PC

10:15 - 10:30 a.m. **BREAK**

10:30 a.m. – 12:30 p.m. **GENERAL SESSION**
Regency Ballroom
Moderator: Lynn Tracy Nerland, City Attorney, San Pablo

Labor and Employment Litigation Update
Speaker: Stacey N. Sheston, Partner, Best Best & Krieger

MCLE Specialty Credit for Legal Ethics
Ethical Principles for City Attorneys
Speaker: Joseph M. Montes, City Attorney, Alhambra, Santa Clarita and Assistant City Attorney, Rosemead

Closing Remarks

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10 Things to Look for in an EIR

Wednesday, May 8, 2019 General Session; 1:00 – 3:00 p.m.

Michael Hogan, Partner, Hogan Law APC

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2019 City Attorneys' Spring Conference

League of California Cities

REVIEWING AN EIR

(Ten Steps for Success)

Michael M. Hogan

Hogan Law APC
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San Diego, CA 92101
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REVIEWING AN EIR

Introduction

The California Environmental Quality Act (CEQA) requires cities and other lead agencies to prepare an environmental impact report (EIR) for proposed projects which may have a significant impact on the environment. An EIR is intended to identify the potential adverse effects of a proposed project and to recommend mitigation measures and alternatives which can avoid or reduce those impacts. Because many development projects are controversial, EIRs often are subject to legal challenges. As a result, city attorneys are regularly asked to review EIRs for compliance with CEQA's requirements before the documents are presented to the city council for certification.

This paper provides practical advice for city attorneys who are tasked with reviewing the adequacy and completeness of EIRs. Although this paper refers to EIRs, the "Ten Steps for Success" discussed below are equally applicable to other CEQA documents, including initial studies, negative declarations and addendums. The recommendations in this paper are based on CEQA's statutory provisions (Public Resources Code § 21000, et seq.), the CEQA Guidelines (California Code of Regulations, title 14, § 15000, et seq.) and the author's 25 years of experience in advising cities and other public agencies on their duty to comply with CEQA.

Ten Steps for Success

1. Support Assumptions and Conclusions with Substantial Evidence
2. Verify All Numbers
3. Address the Question Asked
4. Analyze the Extent of Potential Significant Impacts
5. Address Post-2030 GHG Emissions
6. Make Mitigation Measures Effective and Enforceable
7. Use the Active Voice
8. Don’t Defer Mitigation
9. Require Evidence of Infeasibility
10. Embrace Public Comments

STEP 1: Support Assumptions and Conclusions with Substantial Evidence

"Substantial evidence" includes facts, reasonable assumptions predicated upon facts, and expert opinion supported by facts. It does not include argument, speculation or unsubstantiated opinion or narrative. (CEQA Guidelines § 15384.)

For example, a determination that mitigation would "substantially" reduce significant impacts, which is not supported by facts or other evidence, is insufficient. (*Sierra Club v. County of Fresno* (2018) 6 Cal.5th 502.)

- Do ask "why" or "who says so" with respect to all assumptions and conclusions

- Don't accept assumptions and conclusions at face value

STEP 2: Verify All Numbers

Inconsistent or incorrect numbers in the text or appendices of an EIR may result in an unstable project description or the understatement of potential impacts. (See, e.g., *Ione Valley Land, Air and Water, etc. v. County of Amador* (2019) __ Cal.App.5th ___ [although appendix to DEIR contained accurate data, that data was not reflected in the text of the DEIR]; *San Joaquin Raptor Rescue Center v. County of Merced* (2007) 149 Cal.App.4th 645 [inconsistencies in proposed aggregate mining project's estimated annual production caused project description to be inadequate and misleading].)

- Do check all numbers throughout the EIR

- Don't ignore the tables, figures or appendices

STEP 3: Address the Question Asked

EIRs often fail to address the specific question asked. This primarily occurs in two areas: (1) in an EIR's analysis of the "thresholds of significance" which are used to determine whether an impact is significant or less than significant; and (2) in the responses to public comments on the adequacy of a Draft EIR.

Thresholds of Significance (CEQA Guidelines § 15064.7)

- Do address the questions asked
- Don't combine separate questions

Responses to Public Comments (CEQA Guidelines § 15088)

- Do restate the comment's point or question in the response
- Don't ignore any points or questions raised in a comment

STEP 4: Analyze the Extent of Significant Impacts

An EIR's designation of a particular adverse environmental effect as "significant" does not excuse the EIR's failure to reasonably describe the magnitude of the impact. (*Sierra Club v. County of Fresno* (2018) 6 Cal.5th 502 [EIR deemed insufficient because it identified significant air quality impacts but failed to discuss the extent of such impacts].)

- Do discuss the magnitude or extent of significant impacts
- Don't skip from the nature of an impact to the necessary mitigation

Example:

Would the project be located on a geologic unit or soil that is unstable, or that would become unstable as a result of the project, and potentially result in on- or off-site landslide, lateral spreading, subsidence, liquefaction or collapse?

No soil or geologic conditions were encountered during the geotechnical investigation that would preclude the development of the property as presently planned, provided the recommendations of the geotechnical report and requirements under the California Building Code are followed. Therefore, impacts would be less than significant.

STEP 5: Address Post-2030 GHG Emissions

A lead agency must consider a project's greenhouse gas (GHG) emissions in light of the statewide reduction targets for 2030 and 2050. In considering the effect of a proposed project on these long-term targets, an EIR's analysis stays in step with evolving scientific knowledge and the state's regulatory scheme. (*Cleveland National Forest Foundation v. SANDAG* (2017) 3 Cal.5th 497.)

Environmental analysis is expected to improve as more and better data becomes available. This expectation applies to all aspects of an EIR, including:

- Impact Analysis
- Mitigation Measures
- Alternatives

(See, e.g., *Cleveland National Forest Foundation v. SANDAG* (2017) 17 Cal.App.5th 413.)

STEP 6: Make Mitigation Measures Effective and Enforceable

CEQA requires an EIR to identify mitigation measures which are both effective and enforceable. "Effective" means the measures can reasonably be expected to avoid or reduce a potential significant impact. (CEQA Guidelines § 15126.4(a)(1)(A).) "Enforceable" means the measures are stated as conditions of approval in a permit, agreement or other legally binding document or incorporated into a plan, policy, regulation or project design. (CEQA Guidelines § 15126.4(a)(2).)

Do identify the four "W's" in every mitigation measure:

- Who
- What
- When
- Where

STEP 7: Use the Active Voice

In *Sierra Club v. County of Fresno* (2014) 226 Cal.App.4th 704, the Fifth District Court of Appeal held that mitigation measures written in the passive voice are unenforceable because they fail to identify the person responsible for performing the mitigation. The Supreme Court declined to accept this view, holding that one could reasonably infer from the surrounding circumstances the identity of the person responsible for carrying out a measure. (*Sierra Club v. County of Fresno* (2018) 6 Cal.5th 502.)

Nonetheless, use of the active voice should be encouraged because it increases the clarity of environmental documents.

- Do use the active voice

  ("The project applicant shall implement the following noise reduction measures during construction . . . .")

- Don't use the passive voice

  ("The following noise reduction measures shall be implemented during construction . . . .")

STEP 8: Don't Defer Mitigation

Don't put off for future study or determination what can be done now. If practical considerations preclude devising mitigation measures at the time of project approval:

- Do commit the agency to devising the measures in the future
- Do identify specific performance standards which the measures must achieve
- Do identify the types of potential actions that can feasibly achieve the performance standards

(CEQA Guidelines § 15126.4(a)(1)(B).) Brand names may be an appropriate substitute for performance standards. (*Sierra Club v. County of Fresno* (2018) 6 Cal.5th 502 [EIR's specification of "PremAir or similar catalyst system" deemed a sufficient performance standard for HVAC systems].)

STEP 9: Require Evidence of Infeasibility

Like conclusions regarding significant impacts, findings of infeasibility must be supported by substantial evidence. (CEQA Guidelines § 15091(b).) The unsubstantiated opinions of project applicants do not constitute substantial evidence. (*Citizens of Goleta Valley v. Board of Supervisors of Santa Barbara County* (1988) 197 Cal.App.3d 1167.)

For development projects, economic infeasibility means the cost of a mitigation measure or alternative is so great that a reasonably prudent person would not proceed with the project. (*SPRAWLDEF v. San Francisco Bay Conservation & Development Com*. (2014) 226 Cal.App.4th 905.)

- Do require comparative cost, profit and economic data
- Do perform independent analysis of the evidence provided
- Don't accept unsupported assertions that mitigation measures or alternatives are too expensive

STEP 10: Embrace Public Comments

Every public comment which raises a "significant environmental issue" is entitled to a meaningful response, including detailed explanations of why specific comments and suggestions are not accepted. Conclusory statements, unsupported by factual information, are not sufficient. (CEQA Guidelines §§ 15088, 15204.)

Use public comments to your advantage. The exhaustion doctrine requires objections to be sufficiently specific so that the agency has the opportunity to evaluate and respond to them. (*Sierra Club v. County of Orange* (2008) 163 Cal.App.4th 523 [must present "exact issue"].) Responses to comments are the last, best chance to prevent a successful legal challenge.

Responses to comments also present another opportunity for a lead agency to tell its story. Although written responses are not required for late comments, it is prudent to provide written responses to all comments regardless of when they are received. (CEQA Guidelines § 15207.)

When responding to comments:

- Do remember who your audience is
- Do repeat the comment in the response
- Don't use "Comment Noted"
- Don't be snarky or defensive

Example:

Comment: The proposed reverse-angle parking will be shunned by most drivers.

Response: Commenter has offered no evidence whatsoever to support this assertion. Section 2.4.6 of the EIR states unequivocally that reverse-angle parking would improve sight-lines for approaching bicyclists and motorists, which completely refutes commenter's interpretation.

Land Use and CEQA Litigation Update

Wednesday, May 8, 2019 General Session; 1:00 – 3:00 p.m.

Andrea K. Leisy, Partner, Remy Moose Manley

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Land Use & CEQA Litigation Update
September 2018 – May 2019

Andrea K. Leisy
Remy Moose Manley, LLP
Sacramento, California

May 8, 2019
[* Case Summaries are Current as of April 17, 2019]

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I. CEQA

Scope of CEQA

Golden Door Properties LLC v. County of San Diego (2018) 27 Cal.App.5th 892

The Fourth District Court of Appeal upheld the trial court's determination that the County of San Diego's "2016 Climate Change Analysis Guidance Recommended Content and Format for Climate Change Analysis Reports in Support of CEQA Document" ("2016 GHG Guidance") was ripe for adjudication, constituted piecemeal environmental review, and contained an improper threshold of significance, in violation of CEQA and a previously-issued writ of mandate.

In 2011, the County updated its general plan. The Environmental Impact Report (EIR) for the update incorporated mitigation measures to address greenhouse gas emissions from county operations. Two such measures are at issue here. First, Mitigation Measure CC-1.2 required the County to prepare a Climate Action Plan (CAP), and to adopt Greenhouse gas (GHG) emission targets and deadlines for achieving the targets. Second, Mitigation Measure CC-1.8 required the County to revise its guidelines for determining GHG significance based on the CAP. The county adopted a CAP, which was set aside when the court granted a petition for writ of mandate filed by the Sierra Club. While that case was on appeal, the County adopted the "2013 Guidelines for Determining Significance for Climate Change" ("2013 Guidelines"). Sierra Club challenged the 2013 Guidelines through a supplemental petition, which the parties stipulated to stay pending the appeal. In 2014, the court of appeal upheld the trial court's decision to set aside the CAP. On remand, the trial court issued a supplemental writ directing the County to set aside both the CAP and the 2013 Guidelines and retained jurisdiction to ensure compliance.

In 2016, while in the process of developing the CAP, the County published the 2016 GHG Guidance. In one section, the County stated that it represented "one potential set of criteria and methodologies, along with supporting evidence that would be appropriate for Climate Change Analysis," while in another section it stated that "[t]he County Efficiency Metric is the recognized and recommended method by which a project may make impact significance determinations." Sierra Club filed a second amended petition in the trial court, and Golden Door Properties, LLC, filed a separate challenge to the 2016 GHG Guidance. The cases were consolidated through a stipulation and the trial court determined that the claims were ripe, that the 2016 GHG Guidance created a threshold of significance, violated Mitigation Measures CC-1.2 and CC-1.8, was not supported by substantial evidence, and violated the previous writ of mandate because it constituted piecemeal review. The County appealed.

First, the court addressed the issue of ripeness. The County argued that the action was not ripe because it was still developing the CAP and because the controversy did not involve a specific set of facts (that is, no project using the 2016 GHG Guidance to perform Climate Change Analysis had been challenged). The court disagreed, finding that the situation here involved a threshold of significance that would "be used routinely to determine environmental effects…" and thus generally applicable. The court distinguished *Pacific Legal Foundation v. California Coastal Commission* (1982) 33 Cal.3d 158 because that case involved a challenge to policies in a guidance document, under which the Commission might impose certain permit

conditions should any of the landowner/plaintiffs apply for such a permit. The court found that, although the 2016 GHG Guidance acknowledged that other methods for determining significance may apply, the efficiency metric was stated to be "the recognized and recommended method" for determining GHG significance, making it generally applicable and thus justiciable.

The County argued that the 2016 GHG Guidance did not set a threshold of significance, but instead, provided a recommended method for evaluating GHG emissions. The court disagreed and found that, because the 2016 GHG Guidance provided one "recognized and recommended" efficiency metric to measure the significance of a project's GHG emissions, the efficiency metric was a threshold of significance. That the County's 2013 Guidelines were more explicit than the 2016 GHG Guidance did not make the efficiency metric any less of a threshold of significance. The court found that the metric violated CEQA because the County had failed to follow the adoption procedures for such thresholds laid out in CEQA Guidelines section 15064.7, which required formal action by the County after a public review period. The court also found that Mitigation Measure CC-1.8 required the County to adopt the CAP before updating its guidance documents because Measure CC-1.8 required the updated guidance to be based on the CAP.

The court also found that the threshold of significance was not supported by substantial evidence. Specifically, the court held that the County needed to support the efficiency metric with substantial evidence establishing a relationship between the statewide data used to establish the metric and the County's reduction targets. The 2016 GHG Guidance stated that the efficiency metric represented the County's "fair share" of statewide emissions mandates, but did not explain why that was so. Additionally, the efficiency metric was recommended for all projects, but the 2016 GHG Guidance did not explain why the efficiency metric (based on service population) would be appropriate across all project types.

The court also agreed with the petitioners that the County had "piecemealed" its environmental review because the 2016 GHG Guidance preceded the completion of the CAP. The County argued that, because the CAP was on schedule to be released in compliance with the previous writ, the 2016 GHG Guidance did not violate the writ. The court applied the law-of-the-case doctrine and stated that its previous decision held that the CAP and the updated County guidance were a single project for CEQA purposes. For that reason, the CAP and updated guidance must be publicly reviewed and adopted by the County together. Because the CAP had not been adopted when the 2016 GHG Guidance was issued by the County, the 2016 GHG Guidance violated the writ.

McCorkle Eastside Neighborhood Group v. City of St. Helena (2019) 31 Cal.App.5th 80

The First District Court of Appeal affirmed a judgment denying a petition for writ of mandate seeking to overturn the City of St. Helena's approval of an 8-unit multifamily residential project, finding the city's approval authority was limited to design review under the zoning ordinance. Because the city lacked any discretion to address the project's environmental effects, the city properly determined CEQA review was not required, despite also relying on the Class 32 categorical exemption.

Between 2015 and 2016, the City amended its general plan and zoning ordinance to eliminate the requirement to obtain a conditional use permit for multifamily projects in High

Density Residential (HDR) districts. Consequently, multifamily residential projects were a permitted use in HDR districts, with only design review approval required. Real Party applied for design review approval for the project which was located within an HDR district. Real Party also applied for a demolition permit to demolish an existing single family home on the site.

City planning staff concluded: (1) the project was exempt from CEQA under the Class 32 infill exemption (CEQA Guidelines § 15332); and (2) the project met the design review criteria. At the planning commission hearing several neighbors and community members opposed the project, alleging that the site was contaminated, had inadequate drainage, lacked sufficient open space and would result in cumulatively considerable impacts. Opponents of the project also contended that the project design was inconsistent with the design of the neighboring historical homes.

The city attorney advised the members of the planning commission that, under the city's zoning ordinance, the commission was required to approve the project if it met the city's design review criteria. The city attorney added that while he was confident the Class 32 infill exemption applied, CEQA also did not apply because the approval was non-discretionary. The commission approved the project and adopted findings that the project was exempt from CEQA and would not cause any significant environmental effects. Opponents appealed.

At the city council hearing, the city attorney similarly advised the members of the council that the project was exempt from CEQA under the Class 32 infill exemption, and that their review was limited to the project design. The council voted 3-2 to deny the appeal and uphold the planning commission's approval. The council adopted a resolution containing detailed findings to support the design review approval. The council also found that the Class 32 infill exemption applied, but, even if some level of CEQA review was required, the city was limited to reviewing design-related issues and not the use-related environmental impacts the project opponents had raised.

The McCorkle Eastside Neighborhood Group and St. Helena Residents for an Equitable General Plan filed a petition for writ of mandate challenging the city council's approval as a violation of CEQA and local zoning laws. The trial court denied the petition. The groups appealed. The primary issue on appeal was whether the city abused its discretion by approving the project without requiring an EIR. The appellants argued that the Class 32 infill exemption requires the city council to determine that the project would not result in any significant environmental effects relating to traffic, noise, air quality, and water quality. According to the appellants, the city council could not have done so because it reviewed only the project design.

The court disagreed and held that, irrespective of reliance on the Class 32 exemption, the city council correctly determined that the scope of its discretion was limited to design review and, therefore, no environmental review was required. Under the city's design review ordinance, the city council could not disapprove the project for non-design related reasons. The court found that substantial evidence supported the city council's findings that the project met the design review criteria and would not result in design-related impacts.

With regard to the Appellants' design-related concerns, the court rejected the notion that review was required for those concerns alone, at least for the project at issue. Quoting from the

First District's decision in *Bowman v. City of Berkeley* (2004) 122 Cal.App.4th 572, 592, the court stated, "[W]e do not believe that our Legislature in enacting CEQA . . . intended to require an EIR where the sole environmental impact is aesthetic merit of a building in a highly developed area." Furthermore, the court added, "[w]hile local laws do not preempt CEQA, 'aesthetic issues like the one raised here are ordinarily the province of local design review, not CEQA.' 'Where a project must undergo design review under local law, that process itself can be found to mitigate purely aesthetic impacts to insignificance . . . .'" (Quoting *Bowman* at p. 594.)

While the court recognized that St. Helena is not as urban as Berkeley (the location of the *Bowman* project), it nonetheless found that "the principles of that case apply to the design review in this case, which cannot be used to impose environmental conditions." The court next rejected the appellants' argument that the mere fact the city had some discretionary authority in the design review process made the project subject to CEQA. According to the court, the rule that a project will be deemed discretionary for purposes of CEQA if it requires both discretionary and ministerial approvals "applies only when the discretionary component of the project gives the agency the authority to mitigate environmental impacts."

Finally, the court found that it was unnecessary for the city to rely on the Class 32 infill exemption because the city lacked any discretion to address the project's non-design related environmental effects. The court also found it unnecessary to address the appellants' argument that the Class 32 exemption did not apply based on the "unusual circumstances" exception. According to the court, "[b]ecause CEQA was limited in scope to design review whether or not the Class 32 exemption applied, any exception to the exemption was irrelevant." (*Id*., p. 95.)

Bottini v. City of San Diego (2018) 27 Cal.App.5th 281

The Fourth District Court of Appeal upheld the trial court's ruling ordering the City of San Diego to set aside its determination that the construction of a single-family home required full environmental review.

In February 2011, the Bottini family purchased Windemere Cottage ("Windemere"). At that time, Windemere's designation as a historical resource was pending before the city's historical resources board. Shortly thereafter, the board declined to grant historical status to Windemere. In November 2011, the city's neighborhood code compliance division determined that Windemere constituted a public nuisance and ordered the Bottinis to demolish the structure. They complied. Then in August 2012, the Bottinis applied for a coastal development permit for the construction of a single-family home on the vacant lot. City staff determined that the project was categorically exempt from CEQA, but on an appeal of the determination, the city council ordered a fuller evaluation of the project using a January 2010 baseline, concluding that the demolition of Windemere was part of the project. The council further concluded that the project was not exempt because the unusual circumstances and historic resources exceptions to the exemption applied. In response to the city council's decision, the Bottinis filed a petition for writ of administrative mandamus seeking to compel the city council to set aside its decision, as well as a complaint alleging constitutional causes of action. The trial court granted the CEQA petition finding that the demolition of Windemere was not a component of the project and therefore the city's determination that the project is not categorically exempt lacked substantial evidentiary

support. It granted summary judgment in favor of the city as to the constitutional claims. The Bottinis and the city cross-appealed.

The court of appeal held that an environmental baseline that presumed the existence of the Windemere cottage, which in reality no longer existed at the time the project was proposed, did not accurately reflect the environmental conditions that would be affected by the project. The court dismissed the city's allegations that the Bottinis "strong-armed" the city into making a public nuisance determination because there was no evidence to support such an allegation. Moreover, the court found that the public nuisance determination confirmed that the demolition permit served a purpose distinct from and not part of the single-family home under review. Thus, the court concluded that the demolition of the cottage could not properly be considered part of the project.

Using the appropriate baseline, the court held that the city erred in concluding that the Class 3 exemption did not apply to the project. The construction of a single-family home on a vacant lot is typically categorically exempt. The court further determined that no exceptions to the exemption applied.

The Bottinis alleged three causes of action for violation of the California Constitution's takings, equal protection, and due process clauses. Regarding the takings claim, the court applied the test set forth in *Penn Central Transportation Co. v. New York City* (1978) 438 U.S. 104, 124, concluding that the Bottinis did not have a "reasonable investment-backed expectation" because there was no evidence they intended to demolish the cottage when they purchased the property. Even if they had articulated a distinct expectation to do so, there was no basis to conclude that they had a reasonable expectation that they could demolish the cottage to construct a new residence without undertaking any form of environmental review. The court further found that the Bottinis could not sustain a claim for due process because they did not identify any property interest or statutorily conferred benefit of which the city had deprived them. Finally, with respect to equal protection, the court held that the Bottinis did not meet their burden to show that the city's decision was not rationally related to a legitimate government interest.

As of April 10, 2019, the Supreme Court reviewed the matter and "dismissed as improvidently granted." Under the Rules of Court § 8.528(b) and § 8.1115(e)(2), the CEQA portion of this decision is now citable.

Categorical Exemptions

Berkeley Hills Watershed Coalition v. City of Berkeley (2019) 31 Cal.App.5th 880

The First District Court of Appeal upheld the City of Berkeley's determination that three new single-family homes on adjacent parcels in the Berkeley Hills fell within the scope of the Class 3 categorical exemption found in CEQA Guidelines section 15303, and that the "location exception" did not apply. The court also held that the city did not violate a local ordinance requiring a use permit for the addition of a fifth bedroom to existing homes.

In 2016, a group of landowners submitted applications to the City of Berkeley for permits to construct three new single-family homes on three contiguous parcels in the Berkeley Hills. In connection with the permit applications, the property owner hired a consulting firm to prepare a geotechnical and geologic hazard investigation of the proposed residences. The report indicated that a portion of the site is within the Alquist-Priolo Earthquake Fault Zone (APEFZ) and is also located in a potential earthquake-induced landslide area mapped by the California Geologic Survey on their Seismic Hazard Mapping Act map for the area. The city later retained its own consultants to peer review the report and provide additional information regarding slope stability and seismic hazards.

The city ultimately approved the use permits in 2017 after finding the proposed projects were categorically exempt from CEQA under the Class 3 categorical exemption for new construction of small structures. A group of petitioners filed a petition for writ of mandate challenging the city's approval. In contesting the city's CEQA exemption findings, the petitioners argued the "location" exception under Guidelines, section 15300.2, subdivision (a), applied and precluded the city from relying on the exemption. The petitioners also argued the city's approval violated zoning requirements regarding "fifth bedrooms."

The trial court denied the petition for writ of mandate and the petitioners appealed. Although the petitioners conceded that the projects fell within the "Class 3" categorical exemption, which applies to "construction and location of limited numbers of new, small facilities or structures," including "up to three single-family residences" in "urbanized areas," they alleged that the city was precluded from relying on the exemption because the projects met the "location" exception set forth in Guidelines, section 15300.2 (a). That section provides that several categorical exemptions, including Class 3, are "qualified by consideration of where the project is to be located" and do not apply "where the project may impact on an environmental resource of hazardous or critical concern where designated, precisely mapped, and officially adopted pursuant to law by federal, state, or local agencies." The petitioners argued that this exception applied because the projects were located in the APEFZ, which the petitioners alleged was is an environmental resource of hazardous concern. The court disagreed.

At the outset, the court clarified that the same bifurcated standard of review applicable to the unusual circumstances exception (CEQA Guidelines, § 15300.2(c)), also applies to the location exception. According to the court, whether a project is located where there is "an environmental resource of hazardous or critical concern" is a factual inquiry subject to review for substantial evidence. If this standard is met, the court then applies the fair argument standard in determining whether a project "may impact on" the environmental resource due to the project's location.

Applying this standard, the court held that the exception did not apply to the projects. The court first explained that for the location exception to apply, it is the "environmental resource" which must be "designated, precisely mapped, and officially adopted pursuant to law." The petitioners, however, cited statutes that mapped the physical locations of potential earthquakes and landslides. Citing the dictionary definition of "resource," the court concluded that earthquakes and landslides are geologic events, not environmental resources, as contemplated by the location exception. Moreover, while the APEFZ is "officially mapped" in accordance with the Seismic Hazards Mapping Act, that statute was enacted for the purpose of preventing

economic loss and protecting health and safety, not to identify the locations of environmental resources. Similarly, as the Supreme Court affirmed in *California Building Industry Assn. v. Bay Area Air Quality Management Dist.* (2015) 62 Cal.4th 369, CEQA is concerned with a project's significant effects on the environment, not the significant effects of the environment on the project. Accordingly, the court held that the location exception was inapplicable based solely on the fact the project was located in a potential earthquake and landslide zone.

The court then considered whether the city's determination that the project site was not located in an environmentally sensitive area was otherwise supported by substantial evidence and found that it was. The geotechnical reports produced during the administrative process were designed to evaluate the potential impact of landslides and fault ruptures on the project. There was no evidence that the project posed a risk of harm to the APEFZ. The court therefore held that the petitioners failed to meet their burden of showing that the projects were located where there is "an environmental resource of hazardous or critical concern."

Because the court found the city's determination supported by substantial evidence, it did not need to reach the second prong of the location exception inquiry—whether substantial evidence supports a "fair argument" that the project "may impact" the mapped resource—but it did anyhow. The court found that the petitioners failed to identify any substantial evidence that would support a fair argument that the project would have an adverse effect on the environment. The petitioners pointed to no evidence in the geologic reports that construction of the proposed residences would exacerbate existing hazardous conditions or harm the environment. Nor did petitioners submit their own geotechnical evidence, or any other evidence, to establish as much.

Turning to the municipal code claim, the court considered whether the city violated a code provision that requires a use permit before adding a fifth bedroom. The petitioners alleged that the city violated this provision because it did not require additional use permits, despite the fact that all of the residences had more than four bedrooms. The court was unpersuaded.

During the administrative proceedings, the city attorney explained that the ordinance applies only to modifications of existing dwellings—not to new construction. The purpose of the ordinance was to gain discretion over creation of "mini-dorms" via the addition of bedrooms to existing buildings, which in some cases could otherwise be done without discretionary review.

The court gave deference to the city's interpretation, finding that the ordinance was intertwined with issues of fact, policy, and discretion regarding zoning requirements and impacts to the local community. And even without such deference, the court concluded the city's interpretation was correct based on the plain meaning of the words used in the ordinance. Use of the word "addition of a fifth bedroom" implies the preexistence of four bedrooms. Because the projects were all new construction, the "fifth bedroom" ordinance did not apply.

San Diegans for Open Government v. City of San Diego (2018) 31 Cal.App.5th 349

The Fourth District Court of Appeal rejected a challenge to an amended lease agreement between the City of San Diego and the operator of an amusement park in Mission Beach. The court upheld the city's determination that the amended lease was categorically exempt from CEQA. The court also held that the amended lease did not violate a city proposition limiting

development in the area, or a city charter provision requiring that certain contracts can only be approved by ordinance.

In 1925, a developer built an amusement park on the San Diego oceanfront, which is now commonly known as Belmont Park. Upon the developer's death, the amusement park was granted to the city for the enjoyment of the people and the city later dedicated the park and surrounding land, collectively referred to as Mission Beach Park, to be used solely for park and recreational purposes.

In 1987, the city entered into a lease agreement with the park operator and approved a development plan to revitalize the park. The 1987 lease authorized the operator to demolish and renovate certain facilities, and to construct several new buildings for restaurants, shops, and other commercial uses. The lease was for a 50-year term and included a right of first refusal to enter into a new agreement in the future.

Following the execution of the 1987 lease, the city's electorate passed Proposition G, which limited the development of Mission Beach Park to certain specified uses. It also included an exemption for projects that had obtained "vested rights" as of the effective date of the measure. In 1988, the city passed an ordinance providing that the 1987 lease and development plan for Belmont Park provided a vested right under Proposition G, and as a result, the use and redevelopment of the park could continue as planned.

In 2015, the city entered into an amended lease with the current operator, Symphony Asset Pool XVI, LLC. The amended lease required Symphony to pay rent, operate, and maintain the property, and also gave Symphony the opportunity to extend the lease beyond the original 50-year term. Under the terms of the agreement, if Symphony completed ongoing and planned improvements, made additional improvements, and paid the city a lump sum payment, the amended lease could be extended an additional 50 years. Prior to approving the amended lease, the city determined that it was categorically exempt from CEQA under the "existing facilities" exemption found in CEQA Guidelines section 15301.

Shortly thereafter, a local group filed a lawsuit challenging the amended lease on three grounds: (1) that the amended lease violated Proposition G by authorizing new uses in excess of the vested rights conferred under the 1987 lease; (2) that the city improperly determined that the amended lease was categorically exempt from CEQA; and (3) that the approval of the amended lease violated the city charter, which at the time required certain agreements lasting more than five years to be adopted by ordinance after notice and a public hearing. The trial court ruled in favor of the city and the petitioner appealed.

The Court of Appeal first considered whether the amended lease violated Proposition G. The petitioner argued that it did because the scope of work allowed under the amended lease exceeded the vested rights determined by the city in 1988, and because the extension of the lease beyond the original 50-year term exceeded the vested rights obtained in 1988. The court rejected both arguments. First, the court found that the original lease included a long list of allowable uses and all of the uses allowed under the amended lease were encompassed within the broad language of the original agreement. Second, the court held that the extension beyond the original 50-year term did not violate Proposition G because the 1987 lease contemplated such an

extension by including a right of first refusal to enter into a new agreement. Furthermore, neither Proposition G nor the city's 1988 ordinance finding a vested right contained any time limit on the rights vested.

Turning to the petitioner's CEQA claim, the court considered whether the city properly determined that the amended lease was categorically exempt from CEQA under Guidelines section 15301 (Class 1 exemption). Section 15301, known as the "existing facilities" exemption, covers the "operation, repair, maintenance, permitting, leasing, licensing, or minor alteration of existing public or private structures, facilities, mechanical equipment, or topographical features, involving negligible or no expansion of use beyond that existing at the time of the lead agency's determination." The petitioner argued that the amended lease did not fit within this exemption because it contemplated a wide range of improvements, including construction of a new restaurant and bar, food court venues, and a new arcade, which according to the petitioner, involved more than a negligible expansion of the existing use. The court disagreed.

The court found that all of the construction activities cited by the petitioner had already been completed at the time the amended lease was executed, and thus were existing facilities. The court noted that while the amended lease did contemplate additional improvements to a pool facility in the future, the petitioner did not argue those activities were outside the scope of the exemption. At any rate, the court added, those activities involved only the refurbishment of existing facilities and not new construction, and therefore, they too fell squarely within the exemption.

Petitioner also argued that even if the amended lease did fit within the existing facilities exemption, the unusual circumstances exception in CEQA Guidelines section 15003.2 (c) applied and precluded the city from relying on the exemption. Under that section, a categorical exemption "shall not be used for an activity where there is a reasonable possibility that the activity will have a significant effect on the environment due to unusual circumstances."

Petitioner alleged the existence of the voter-passed Proposition G constituted an unusual circumstance within the meaning of section 15003.2 because the voters had used the initiative power to declare a distinct interest in minimizing the environmental impacts of development in Mission Beach. The petitioner also argued that there was a fair argument that the project would result in significant traffic and noise impacts. To support this claim, the petitioner cited a statement by a Symphony representative that the project would generate an additional $100 million in revenue over the term of the lease, which the petitioner argued could only occur with significantly more visitors and, therefore, significantly more traffic and noise. The court rejected these arguments, finding that the types of impacts alleged by the petitioner were speculative, and in any event, the petitioner failed to establish that the alleged traffic and noise impacts would be due to the alleged unusual circumstance (i.e., the existence of Proposition G).

The final issue in the case was whether the approval of the amended lease violated a provision in the city's charter requiring that certain agreements lasting more than five years could only be approved by ordinance following publication in a local newspaper and a public hearing. Petitioner argued that the charter provision applies to any contract lasting more than five years, while the city countered that the provision only applies to agreements that require the city to expend funds. After finding that the charter language was ambiguous and could support either

interpretation, the court explained that the city's interpretation of its own charter is entitled to deference. The city's longstanding interpretation of the provision was that it applied solely to agreements requiring the city to expend funds. Because it found this interpretation to be reasonable and consistent with the legislative history, the court deferred to the city and ruled that the charter provision did not apply to the amended lease.

Mitigated Negative Declarations

Friends of Riverside's Hills v. City of Riverside (2018) 26 Cal.App.5th 1137

The Fourth District Court of Appeal upheld the trial court's conclusion that the City of Riverside properly adopted a negative declaration and was not required to prepare an EIR for a six-unit Planned Residential Development in the city's Residential Conservation Zone. The court also found that the city did not abuse its discretion by approving the project with six homes on six lots.

In 2015, Real Parties in Interest (the Lofgrens) applied to develop approximately twelve acres of property they owned in the city's Residential Conservation Zone (RCZ). The RCZ places special requirements on proposed residential development in order to protect the natural landscape in the zone. These requirements include submitting information on the natural slope of lots in the parcel to determine the minimum lot size (the greater the average slope, the larger the minimum lot size), and, ordinarily, a maximum density of 0.5 dwelling units per acre. Projects that qualify as Planned Residential Developments (PRDs) allow smaller minimum lot sizes and higher density. PRDs must be designed to protect and retain the natural topographic features of the site and may cluster homes in less steep areas of the site to protect such features and preserve open space. The Lofgrens also sought a density bonus to allow 0.63 dwelling units per acre by preserving 4.85 acres of the site as managed open space and selecting from a list of "superior design" elements.

As the project moved through the city's administrative process, the acreage information fluctuated on the maps submitted by Real Party (between just over 12 acres and just over 11 and a half acres) and the design of the site changed. After preparing an initial study, the city issued a negative declaration for the project. Petitioner Friends of Riverside's Hills (Friends) commented several times during the administrative process concerning the acreage (and thus the number of allowable lots) and density. Twice, the city and/or the Lofgrens amended the project to address Friends' concerns. Friends also argued that: the city had failed to require the Lofgrens to have a recognized conservation group oversee the open space preservation because an early version of the conditions of approval designated a homeowners' association, the project would require excessive grading, the natural slope information submitted by the Lofgrens was inconsistent, and the project violated CEQA because it was inconsistent with the city's zoning and grading ordinances. Ultimately, the city approved the project with the density bonus to allow six single-family homes on six lots ranging from just over a half-acre to just over an acre in size and with average natural slopes ranging from 21 to 29.5 percent.

Friends sought a writ of mandate to set aside the city's approval and require an EIR. Friends argued several theories to support their position, including, first, that the project did not

comply with the RCZ because it failed to cluster the proposed lots on the less steep portions of the site and preserve the natural features. Second, Friends argued that the project would require excessive grading. Third, they contended that the Lofgrens were required to seek a variance for lots smaller than two acres. Finally, Friends argued that the city abused its discretion by failing to support its determination regarding the natural slope of the proposed lots and by deferring selection of the "superior design" elements to the grading permit stage of development. The trial court found that there was no evidence that the project violated any of the land use provisions identified by Friends and denied the petition. Friends appealed.

On appeal, the court found that the RCZ was adopted by the city for environmental protection purposes, so violating those provisions could create a significant impact on the environment. But, the court found that there was no evidence in the record of any of the land use impacts alleged by Friends. First, Friends claimed that the project might violate the RCZ in the future, if it did not buildout as proposed in the PRD. The court found this to be speculation because the Lofgrens had not yet submitted final plans for the location of the homes. The court also found that while the RCZ required site design to be sensitive towards the natural topographic and habitat features of the site, clustering homes in less sensitive and steep portions of the site was one way that the applicant could choose to demonstrate the required sensitivity. There was no requirement to build in the least steep area of the site.

The court also pointed out that Friends were not challenging the actual conditions of approval, but arguing that the Lofgrens might not comply with them in the future, and that could have environmental impacts. The court stated that such an argument was true in nearly all cases, and that, if the project did not comply with the permit conditions, Friends could seek supplemental environmental review at that time. Further, the conditions required the project to be built in substantial conformance with the proposed PRD. Next, the court dismissed the variance argument, finding that the minimum two-acre lot size only applied where a proposed development was not a PRD. Lastly, the court rejected the abuse of discretion claims, finding that there was substantial evidence in the record of the average natural slope of the lots to support the city's determination that the site could support six lots. The court also found that RCZ did not require an applicant to select the "superior design" elements prior to permit approval, but, in any case, the Lofgrens had selected their preferred "superior design" elements.

Georgetown Preservation Society v. County of El Dorado (2018) 30 Cal.App.5th 358

The Third District Court of Appeal upheld a trial court ruling requiring an EIR for the potentially significant aesthetic impacts of a Dollar Store proposed in a "quaint Gold Rush-era hamlet."

In 2015, the Georgetown Preservation Society (Society) filed a petition for writ of mandate challenging the County's adoption of a mitigated negative declaration and approval of design review for a proposed Dollar General store in rural El Dorado County. The project included a 9,100-square-foot retail store with 12,400 square feet of parking on three vacant lots along Georgetown's Main Street. Local residents opposed the project, submitting comments that the project's size and overall appearance were inconsistent with the "look and feel" of historic downtown Georgetown. The trial court found that the comments supported a fair argument that

the project may have a significant aesthetic effect on the environment and directed the County to prepare an EIR. The County and Real Parties (appellants) appealed.

Appellants argued that, in approving the project, the County had reviewed the project for consistency with its Historic Design Guide and found the project substantially complied with all applicable design standards. The appellants contended the County's finding of compliance with its design guidelines should be entitled to deference and should be reviewed under the substantial evidence standard. The court rejected this argument, drawing a distinction between Planning and Zoning Law findings and the CEQA fair argument standard. The court explained that, although Planning and Zoning law findings are reviewed for substantial evidence, design review is not a substitute for CEQA review and the fair argument standard still applies, even apparently to arguments based on consistency with agency plans and policies. According to the court, although an agency's design review forms part of the body of evidence to consider when determining whether the fair argument standard has been met, the application of design guidelines does not insulate the project from CEQA review at the initial study phase under the fair argument standard. Moreover, the court explained, while design review may provide substantial evidence that aesthetic impacts are less than significant, if contrary evidence meets the fair argument standard, an EIR is required.

Applying the fair argument standard to the project at issue, the court stated it had "little difficulty finding the fair argument standard was met . . . ." The court noted that multiple commentators objected to the size and overall appearance of the project, including some people claiming backgrounds in design and planning. As a result, the court stated, it could not seriously be disputed that the low threshold needed to trigger an EIR was met. The court also rejected appellants' arguments that here the County's design review criteria recommending specific architectural styles and features constituted a technical subject beyond the credible reach of lay commenters. The court noted that several decisions have found lay commentary on nontechnical matters to be admissible and probative, and may satisfy the fair argument standard. According to the court, while the commenters may have lacked the background to apply the County's design standards, a rational lay person familiar with the area could conclude a 9,100-square-foot chain store may impact the historic district's aesthetic.

Finally, the court rejected an argument by the County that some of the evidence cited from lay persons was not credible. According to the court, the County's decision-makers were obligated to state, in the record and with particularity, which proffered evidence lacked credibility and why. While the appellants asserted that much of the cited testimony lacked basis in facts, the court held that the County could not discount such evidence in litigation after failing to do so in the administrative record. The court added that even if the County had made such determinations here, doing so would have been an abuse of discretion because the court found the testimony constituted substantial evidence supporting a fair argument.

Environmental Impact Reports

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

On December 24, 2018, the California Supreme Court issued its highly-anticipated decision in *Sierra Club v. County of Fresno,* invalidating portions of an EIR's air quality analysis prepared for a 55 and over Specific Plan project. The Court found that: (1) when reviewing whether an EIR's discussion of environmental effects "is sufficient to satisfy CEQA," courts must be satisfied that the EIR "includes sufficient detail to enable those who did not participate in its preparation to understand and consider meaningfully the issues the proposed project raises"; (2) an EIR must show a "reasonable effort to substantively connect a project's air quality impacts to likely health consequences"; (3) a lead agency "may leave open the possibility of employing better mitigation efforts consistent with improvements in technology without being deemed to have impermissibly deferred mitigation measures"; and (4) a lead agency "may adopt mitigation measures that do not reduce the project's adverse impacts to less than significant levels, so long as the agency can demonstrate in good faith that the measures will at least be partially effective at mitigating the project's impacts."

The controversy arose over an EIR prepared by the County of Fresno for the Friant Ranch project, a proposed master-planned community near the unincorporated community of Friant in north-central Fresno County. The project included a Specific Plan and Community Plan Update. The Specific Plan provided the framework for the development of approximately 2,500 single and multi-family residential units that are age restricted to "active adults" age 55 and older, other residential units that are not age restricted, a commercial village center, a recreation center, trails, open space, a neighborhood electric vehicle network, and parks and parkways. The project also included 250,000 square feet of commercial space on 482 acres and the dedication of 460 acres to open space. The Community Plan Update expanded a preexisting Community Plan's boundaries to include the Specific Plan area and added new policies that were consistent with the Specific Plan and the County's General Plan.

The EIR generally discussed the health effects of air pollutants such as Reactive Organic Gases (ROG), oxides of nitrogen (NOx), and particulate matter (PM), but without predicting specific health-related impacts resulting from the project's emissions. The EIR found that the project's long-term operational air quality effects were significant and unavoidable, even with implementation of all feasible mitigation measures. The EIR recommended a mitigation measure that included a "substitution clause," allowing the County, over the course of project build-out, to allow the use of new control technologies equally or more effective than those listed in the adopted measure. The County chose to approve an alternative that was identified as the "environmentally superior alternative" in the EIR, rather than the initial proposal.

The Sierra Club filed a petition challenging the County's certification of the EIR and approval of the project. The trail court denied the petition in full. Sierra Club appealed. The Court of Appeal reversed the trial court's judgment on three grounds. First, the court held that the EIR was inadequate because it failed to include an analysis that correlated the project's emission of air pollutants to its impact on human health. Second, it found that the mitigation measures for the project's long-term air quality impacts violated CEQA because they were vague, unenforceable, and lacked specific performance criteria. Third, the court held that the

EIR's statement that the air quality mitigation provisions would substantially reduce air quality impacts was unexplained and unsupported.

Real Party in Interest petitioned the Supreme Court for review and review was granted. The Court issued a unanimous opinion, affirming in part, and reversing in part, the Court of Appeal's decision.

First, addressing the standard of review, the Court held that in certain circumstances claims alleging that an EIR's discussion of environmental impacts is inadequate may be reviewed de novo under the "procedural" prong of CEQA's standard of review. (Pub. Resources Code, § 21168.5.) The Court explained that, over time, "a procedural issues/factual issues dichotomy" has been created with a substantially different standard of review applied to each type of error. While courts determine de novo whether an agency has employed the correct procedures, the agency's substantive factual conclusions are accorded greater deference and will be upheld if they are supported by substantial evidence.

The Court explained that the issue of whether an EIR's discussion of environmental impacts is adequate, such that it facilitates "informed agency decision-making and informed public participation," does not "fit neatly within the procedural/factual paradigm." Relying heavily on *Laurel Heights Improvement Assn. v. Regents of University of California* (1988) 47 Cal.3d 376, the Court held that, although there are instances where the agency's discussion of significant project impacts may implicate a factual question that makes substantial evidence review appropriate, "whether a description of an environmental impact is insufficient because it lacks analysis or omits the magnitude of the impact is not a substantial evidence question." The Court explained that "a conclusory discussion of an environmental impact that an EIR deems significant can be determined by a court to be inadequate as an informational document without reference to substantial evidence." The Court held that in these instances, claims that an EIR's discussion of environmental impacts is inadequate or insufficient may be reviewed de novo. Although agencies have considerable discretion to decide the manner of the discussion of potentially significant effects in an EIR, the Court concluded that a reviewing court must determine whether the EIR includes enough detail "to enable those who did not participate in its preparation to understand and to consider meaningfully the issues raised by the proposed project." The Court determined that this inquiry presents a mixed question of law and fact, and as such, "it is generally subject to independent review."

Second, the Court considered whether the EIR's air quality analysis complied with CEQA. The challenged EIR quantified the amount of air pollutants the project was expected to produce and also provided a general description of each pollutant and how it affects human health. The EIR explained that a more detailed analysis of health impacts was not possible at the early planning phase and that a "Health Risk Assessment" is typically prepared later in the planning process. Nevertheless, the Court of Appeal found that the EIR was inadequate because it failed to correlate the increase in emissions with adverse impacts on human health. The Supreme Court agreed, with qualifications.

The Court found an EIR must reflect "a reasonable effort to substantively connect a project's air quality impacts to likely health consequences." Specifically, an EIR must show "a reasonable effort to discuss relevant specifics regarding the connection between" (1) the "general

health effects associated with a particular pollutant" and (2) the "estimated amount of that pollutant the project will likely produce." Thus, an EIR must "provide an adequate analysis to inform the public how its bare [emissions] numbers translate to create potential adverse [health] impacts or it must adequately explain what the agency does know and why, given existing scientific constraints, it cannot translate potential health impacts further."

Here, the EIR quantified how many tons per year the project would generate of ROG and NOx (both of which are ozone precursors). Although the EIR explained that ozone can cause health impacts at exposures for 0.10 to 0.40 parts per million, the Court found this information meaningless because the EIR did not estimate how much ozone the project would generate. Nor did the EIR disclose the specific levels of exposure to PM, carbon monoxide, and sulfur dioxide that would trigger adverse health impacts. In short, the Court found the EIR made "it impossible for the public to translate the bare numbers provided into adverse health impacts or to understand why such translation is not possible at this time (and what limited translation is, in fact, possible)." Outlining the unhealthy symptoms associated with exposure to various pollutants, as the EIR did, was insufficient.

The Court was unpersuaded by Real Party's explanation, supported by amici curiae briefs submitted by air districts, as to why the connection between emissions and human health that the plaintiffs sought could not be provided in the EIR given the state of environmental science modeling. Even if that was true, the Court explained, the EIR itself must explain why it is not scientifically possible to do more than was already done in the EIR to connect air quality effects with potential human health impacts.

The Court also noted that, on remand, one possible topic to address would be the impact the project would have on the number of days of nonattainment of air quality standards per year. The Court stopped short of stating such a discussion is required. Instead, the Court noted that the County, as lead agency, has discretion in choosing the type of analysis to provide.

Third, the Court turned to the adequacy of mitigation measure 3.3.2 which included a suite of measures designed to reduce the project's significant air quality impacts by providing shade trees; utilizing efficient "PremAir" or similar model heating, ventilation, and air conditioning systems; building bike lockers and racks; creating bicycle storage spaces in units; and developing transportation related mitigation that would include trail maps and commute alternatives. The measure included a substitution clause allowing the County to "substitute different air pollution control measures for individual projects, that are equally effective or superior to those propose[d] [in the EIR], as new technology and/or other feasible measures become available [during] build-out within the [project]." The EIR stated that the measures would "substantially reduce" operational air quality impacts related to human activity within the entire project area, but not to a less-than-significant level.

The Court found the EIR's mitigation and analysis of health effects to be lacking in adequate explanation or factual support. According to the Court, the EIR "must accurately reflect the net health effect of proposed air quality mitigation measures." Here, the EIR included no facts or analysis to support the inference that the mitigation measures will have a quantifiable "substantial" impact on reducing the adverse effects.

The Court also considered whether the air quality measure impermissibly deferred formulation of mitigation because it allowed the County to substitute equally or more effective measures in the future as the project builds out. The Court held that this substitution clause did not constitute impermissible deferral of mitigation because it allows for "additional and presumably better mitigation measures when they become available," consistent with CEQA's goal of promoting environmental protection. The Court noted that mitigation measures need not include precise quantitative performance standards, but they must be at least partially effective, even if they cannot mitigate significant impacts to less than significant. Thus, the measure was adequate even though the County had discretion to determine what specific measures would be implemented.

Lastly, the Court reasoned that "the inclusion of mitigation measures that partially reduce significant impacts does not violate CEQA." Rather, if all feasible mitigation measures have been incorporated into an EIR and significant effects still exist, an agency may still approve the project if it finds the unmitigated significant effects are outweighed by the project's benefits.

SOMCAN v. City and County of San Francisco (Feb. 13, 2019) ___ Cal. App. 5th ___ (Case No. A151521)

In the first appellate decision to apply the CEQA standard of review that was recently articulated by the California Supreme Court in *Sierra Club v. County of Fresno* (2018) 6 Cal.5th 502 - the First District Court of Appeal held that an EIR prepared for a mixed-use development project was legally adequate.

The City and County of San Francisco certified an EIR and approved the development of a mixed-use project that included office, retail, cultural, educational, and open-space uses for a four-acre property in downtown San Francisco. The EIR described two "options" for the project, an "Office Scheme" and a "Residential Scheme."

In finding the EIR adequate despite a variety of claims, the court applied the three "basic principles" articulated by the Supreme Court regarding the standard of review for adequacy of an EIR: (1) An agency has considerable discretion to decide the manner of the discussion of potentially significant effects in an EIR; (2) However, a reviewing court must determine whether the discussion of a potentially significant effect is sufficient or insufficient, i.e., whether the EIR comports with its intended function of including detail sufficient to enable those who did not participate in its preparation to understand and to consider meaningfully the issues raised by the proposed project; and (3) The determination whether a discussion is sufficient is not solely a matter of discerning whether there is substantial evidence to support the agency's factual conclusions.

The court rejected petitioners' claim that the EIR's project description was unstable because the draft EIR presented two alternative schemes. The court found the project description contained the required information and was not confusing or misleading despite presenting two different use options. According to the court, the EIR described only one proposed project—a mixed use development with two options for different allocations of residential and office units—and the analysis was not curtailed, misleading, or inconsistent. The court also rejected petitioners' argument that the final EIR adopted a "revised" project that was a variant of another

alternative identified in the draft EIR—emphasizing that the CEQA reporting process is not designed to freeze the ultimate proposal in the precise mold of the initial project, but is instead intended to allow consideration of other options that may be less harmful to the environment.

The court upheld the EIR's cumulative impacts analysis, finding no evidence in the record to support petitioners' claim that the EIR's list of projects was inadequate because it was developed in 2012 (during the "Great Recession") and did not reflect the recent increase in development. Accordingly, the court held that the petitioners had not met their burden of proving the EIR's cumulative impacts analysis was not supported by substantial evidence. Notably, the court cited *Sierra Club v. County of Fresno* for the proposition that agencies have discretion in selecting the methodology to be used in evaluating environmental impacts, subject to review under the substantial evidence standard.

In upholding the EIR's traffic analysis, the court deferred to the city's determination of the geographic boundaries to use for the chosen intersections. The court noted that the city explained its reasoning for selecting certain intersections and excluding others, and the analysis was supported by substantial evidence. The city also was not required to include the Safer Market Street Plan in the EIR that was not reasonably foreseeable when the city initiated EIR preparation. Finally, the court found that the EIR addressed the mitigation measures petitioners alleged were missing and did not need to analyze additional alternatives because the alternatives were not feasible, would not meet the project objectives, or would not reduce environmental impacts.

The court also rejected petitioners' argument that the developer was required to provide an alternative project configuration under the city's comfort criterion for wind speeds because exceedance of the criterion alone did not establish a significant impact under CEQA. The court also rejected petitioners' assertion that the project failed to provide adequate onsite open space where the EIR provided that the project includes more space than the local code required and would result in a less-than-significant impact related to use of existing parks and open spaces.

The court also determined the EIR clearly set forth specific information about the shade and shadow impacts and analyzed why they would not produce a significant environmental effect. The court rejected petitioners' argument that sunlight is a "special and rare resource" warranting "special emphasis" under section 15125 of the CEQA Guidelines, citing petitioners' failure to cite any authority. The city also made a good faith effort to discuss inconsistencies with the applicable general plans—noting that CEQA does not mandate perfection.

Finally, the court upheld the city's statement of overriding considerations against petitioners' claim that the city improperly considered the benefits of the project before considering feasible mitigation measures or alternatives. The court emphasized that the project was modified to substantially conform to the identified environmentally superior alternative, which would not have occurred if there had been no consideration of mitigation measures or alternatives.

Subsequent Environmental Review/Addenda

Save Our Heritage Organisation v. City of San Diego (2018) 28 Cal.App.5th 656

The Fourth District Court of Appeal found that the addendum process under CEQA Guidelines section 15164 fills a procedural gap in the statute and is not invalid. The court also ruled that Public Resources Code section 21081 findings are not required again with an addendum.

The City of San Diego certified an EIR and approved a project in 2012 to restore pedestrian and park uses to portions of Balboa Park. Save Our Heritage Organisation (SOHO) filed a petition for writ of mandamus challenging the project. The superior court granted the petition and directed the City to rescind the project approval. The Real Party in Interest and SOHO each appealed the judgment, and the court of appeal reversed the trial court's judgment and upheld the EIR. The Real Party in Interest filed a motion seeking an award of attorney fees, which the trial court denied and the appellate court affirmed.

While the appeals were pending, several physical changes occurred to the project's environmental setting. In 2016, the City adopted an addendum to the EIR to address modifications to the project. The addendum concluded that: (1) There were no substantial changes to the project requiring major revisions to the EIR because of new or substantially increased significant environmental effects; (2) There were no substantial changes in circumstances requiring major revisions to the EIR because of new or substantially increased significant environmental effects; and (3) There was no new, previously unknown or unknowable, information of substantial importance showing: (a) the project would have significant effects not discussed in the EIR; (b) the project would have substantially more severe significant effects than shown in the EIR; (c) previously infeasible mitigation measures and project alternatives were now feasible and would substantially reduce significant environment effects; or (d) considerably different mitigation measures than analyzed in the EIR would substantially reduce significant environmental effects. The City incorporated these findings into its resolution adopting the addendum.

The court found that SOHO did not meet its burden of proof to show that CEQA Guidelines section 15164, which allows for preparation of addenda, is invalid. The court explained the difference between quasi-legislative rules (those in which the Legislature has delegated a portion of its lawmaking power) and interpretive rules (those in which an agency interprets a statute's meaning and effect). Although the California Supreme Court has not ruled on which category applies to the CEQA Guidelines, the court explained that such a distinction was not necessary to make here because, either way, SOHO did not establish that section 15164 is invalid.

The court determined that Guidelines section 15164 is both (1) consistent and not in conflict with CEQA; and (2) reasonably necessary to effectuate the purpose of CEQA.

The court explained that the Resources Agency promulgated Guideline 15164 to implement Public Resources Code section 21166, which describes the circumstances under which an agency must conduct subsequent or supplemental review. That section, explained the

court, creates a presumption against further environmental review once an EIR has been finalized. And, although section 21166 does not expressly authorize an "addendum," the court explained that Guidelines section 15164 fills in the gap for CEQA projects where there is a previously certified EIR that should be revised, but the conditions that warrant preparation of a subsequent EIR under section 21166 are not met. Furthermore, the court said, Guidelines section 15164 is consistent with and furthers the objectives of section 21166 because it requires an agency to substantiate its reasons for determining why project revisions do not necessitate further environmental review.

The court also explained that the absence of a public review process for an addendum does not render Guidelines section 15164 inconsistent with CEQA. Instead, the absence of public review reflects the finality of adopted EIRs, and the proscription against further environmental review except in specified circumstances in section 21166. In addition, the court pointed to the analogous requirement that a Final EIR must be recirculated before certification only where revisions add significant new information. Finally, the court emphasized that the Resources Agency first promulgated Guidelines section 15164 in 1983, and the Legislature has not modified CEQA since then to eliminate the addendum process.

SOHO argued that the City was required to make new findings under section 21081, but the court disagreed. Section 21081 provides that a public agency shall not approve or carry out a project for which an EIR has been certified unless the agency makes specific findings with respect to identified significant effects. The court explained that neither the Code nor the Guidelines suggests new findings are required when an addendum is prepared. And, the court explained, the only purpose of findings is to address new significant effects, but an addendum is only proper where no new significant environmental impacts are discovered. Where there are no new significant impacts, there is no need for findings. Therefore, the court held, findings are not required for an addendum.

Other Issues/Res Judicata

Inland Oversight Committee v. City of San Bernardino (2018) 27 Cal.App.5th 771

The Fourth District Court of Appeal upheld a lower court's ruling sustaining the city's demurrer without leave to amend, finding that the petitioners' claims under CEQA and the Water Code were barred by the doctrine of res judicata.

The action involved a proposed development pending in various permutations for decades in the Highland Hills area of San Bernardino. In 1982, the city approved a specific plan and EIR for the project. The EIR was promptly challenged by a homeowners association, one of the same petitioners in this case. The parties resolved the suit through a settlement agreement. A later addendum to the agreement stipulated that if future project modifications met specified criteria (i.e., did not increase the level of development or result in greater impacts), then those changes would be considered "minor modifications." Minor modifications would not be subject to additional CEQA review. The project was not built at that time.

In 2014, the original developers' successors in interest wanted to proceed with the project. The city approved the project, agreeing that proposed modifications were minor, and did

not require further environmental review. The HOA sued (the related action). Respondents requested and received a court order confirming that the modifications complied with the terms of the settlement agreement, were minor in nature, and that no further CEQA review was required.

This suit was then brought by the original petitioner, the HOA, and joined by two environmental groups (CREED-21 and Inland Oversight Committee). Petitioners asserted that the project as modified violated CEQA and the Water Code. Respondents successfully moved for a demurrer without leave to amend. This appeal followed.

The court ruled that the petitioners' claims were barred by res judicata, because the issue of whether further environmental review was required was resolved in the related action. Under the doctrine of res judicata, a valid, final judgment on the merits is a bar to subsequent action by parties or their privies in the same cause of action. In California, whether causes of action in two suits are the same for the purpose of res judicata depends on whether they involve the same primary right. In the CEQA context, the same primary right is at issue if the actions involve the same general subject matter, provided that they are not distinct episodes of noncompliance.

The allegations of noncompliance with the settlement agreement were the same in both this suit and the prior related matter. In both, the petitioners contended that the city violated CEQA by not conducting further environmental review. As the court held in the related matter, the updated proposal is a minor modification, and no further environmental review is required. That decision was final.

The court rejected the contention by the environmental group petitioners that they were not in privity with the HOA. Privity is found if the party's interests are so similar that the party in the prior action was the current party's virtual representative. The court found that standard applied here, because the environmental groups and the HOA both opposed the project and sought to invalidate its approvals. Even accepting the contention that the environmental groups were acting in public interest, and that the HOA acted in its own private interest, the petitioners failed to articulate how those interests were not aligned. The HOA did not, for example, assert any particular private harm that was not shared with the public at large. This holding is consistent with other persuasive authority finding privity between individuals asserting private interests and nonprofit organizations asserting public interests, both on similar grounds.

The court also found that the petitioners' Water Code claims (alleging that a water supply analysis was required) were similarly barred by res judicata. As with the CEQA claims, the Water Code allegations rested on the petitioners' key assertion—that the project was not a minor modification of the original project, and that further environmental review was required. That claim was litigated and decided; as such, a water supply analysis could not be required. The court further briefly noted that petitioner's claims would also be barred under the doctrine of collateral estoppel.

Atwell v. City of Rohnert Park (2018) 27 Cal. App. 5th 692

The First District Court of Appeal found petitioners' CEQA and Planning and Zoning Law claims barred by res judicata. In 2010, the City of Rohnert Park (City) prepared a General Plan and EIR for a Walmart store to add space for a 24-hour grocery store/supermarket (Project) in the northwest corner of the City. Following a public hearing, the planning commission declined to certify the EIR because the Project did not comply with the General Plan and was inconsistent with Policy LU-7 (to encourage new neighborhood commercial facilities and supermarkets to maximize residential accessibility). Walmart appealed the commission's decision and after a subsequent public hearing discussing Policy LU-7, the City Council approved the Project with recommended conditions.

Sierra Club and Sonoma County Conservation Action (SCCA) filed a petition for writ of mandate challenging the City's approval of the EIR and the Project. Nancy Atwell, Elizabeth Craven, Matthew Weinstein (appellants), were not named parties in the action. Petitioners raised, but did not pursue, the claim that the Project was in conflict with Policy LU-7. The trial court granted the petition and ordered the Project approvals be remanded for additional environmental review.

After vacating the Project approvals, the City prepared a revised EIR but did not alter the original EIR's analysis of consistency with the General Plan. In 2014, after another public hearing, the planning commission certified the revised EIR and reapproved the Project.

In 2015, appellants filed a petition for writ challenging the Council's re-approval of the Project as inconsistent with its General Plan and Policy LU-7. The City asserted appellants' claims were barred by res judicata and filed a motion for judgment on the pleadings. When a complaint fails to allege facts sufficient to state a cause of action, judgment on the pleadings in favor of the defendant is appropriate. Judgment was entered in favor of the City after appellants did not contest the trial court's tentative order which granted the City's motion and concluded the petition was barred by the doctrine of res judicata and statute of limitations. Petitioners appealed.

On appeal, the court affirmed the trial court's decision, holding that appellants' claims were barred by res judicata because consistency with the General Plan was challenged by the Sierra Club and SSCA and resulted in a final judgment. Appellants asserted their petition raised a distinct issue because the Project's consistency with the General Plan was not actually litigated by the Sierra Club action since the petition was based on the City Council's 2015 resolutions, which were approved after the Sierra Club action. The court explained, so long as the later-raised issues constitute the same cause of action involved in the prior proceeding, res judicata bars issues that *could have been* litigated.

Under the doctrine of res judicata, a valid, final judgment on the merits is a bar to subsequent action by parties or their privies for the same cause of action. In California, whether causes of action in two suits are the same for the purpose of res judicata depends on whether they are based on the same primary right. The court explained the same primary right is at stake if two actions involved the same injury to the petitioner and the same wrong by the defendant regardless of what different theories are pled in a second suit and/or new forms of recovery

sought. The court explained that new challenges to a revised EIR can be barred when the material facts have not changed and the two proceedings involve the same primary right and the same cause of action.

The court notes there was no dispute that the Project proposal remained unchanged and that both the 2010 and 2015 resolutions found the Project would be consistent with the General Plan and Zoning Ordinance. The court also found the revised EIR addressed the traffic and noise impacts that the trial court found to be deficient in the original EIR. The changes made to the revised EIR were unrelated to the concerns regarding Policy LU-7 brought by appellants. All of the Policy LU-7 arguments brought by appellants were identical to those raised before the Council in 2010 and were evaluated in the original EIR. The court therefore found appellants' petition was not based on changed material facts and raised the same claims as those raised by the Sierra Club action.

Appellants' claims were also found barred by res judicata based on privity. The court found privity between the parties because the Sierra Club and appellants opposed the project and sought to invalidate its approvals on behalf of citizens, taxpayers, property owners, and electors of the City. Despite appellants' claim of personal harm, the court held Sierra Club brought their petition on behalf of its members who are part of the community; thus, the relationship to the subject matter of the litigation is identical. Appellants failed to assert that petitioners' litigation did not adequately represent their interest.

Ione Valley Land, Air, and Water Defense Alliance, LLC, v. County Of Amador, et al. (2019) 33 Cal.App.5th 165

The Third District Court of Appeal found petitioner's new arguments challenging a partially recirculated and certified EIR barred by res judicata. In 2012, the County of Amador (County) approved the Newman Ridge Project (Project) and certified an EIR. The Project involved an aggregate quarry and related facilities owned by Newman Minerals (Applicants). The Project consisted of two parts: the Newman Ridge Quarry and the Edwin Center. After the EIR was certified, Petitioner (LAWDA) filed a petition for writ of mandate under CEQA. LAWDA raised a multitude of issues, including air quality, traffic and responses to comments.

The trial court granted the petition in part, finding the 2012 EIR's analysis of traffic deficient. All other claims were denied. The trial court ordered the County to decertify the EIR, and revise and recirculate the traffic analysis. After recirculation the County certified the revised EIR, approved the Project and sought a return on the writ.

The trial court granted the motion to discharge the writ. LAWDA filed a new petition for writ of mandate. The trial court denied the petition, which LAWDA appealed.

Previously, in April 2015 and prior to discharge of the first writ, LAWDA filed a second petition challenging the partially recirculated EIR on grounds other than traffic. The trial court sustained a demurrer with leave to amend, claiming the contentions were already litigated and resolved. No record of the hearing was available to the court of appeal.

The court of appeal agreed with the County and Applicants contention that LAWDA was barred from raising nearly all the claims contained in the second petition. The trial court's writ required the County to revisit only the traffic impacts from the 2012 EIR. The court of appeal held all of LAWDA's objections to the partially recirculated EIR and Project approval were barred by res judicata, except for the issues regarding traffic.

The court of appeal rejected LAWDA's claim that decertification of the EIR enabled petitioner to pursue new arguments, reasoning that the decertification did not alter the sufficiency of the remainder of the EIR that had already been litigated and resolved. The court held that because LAWDA failed to include the counter-argument to the application of res judicata in their opening brief, they forfeited the argument. They noted that " 'the rule is that points raised in the reply brief for the first time will not be considered, unless good reason is shown for failure to present them before.' " (*Ibid*., quoting *Neighbors v. Buzz Oates Enterprises* (1990) 217 Cal.App.3d 325, 335, fn. 8.).

LAWDA also argued that the County's responses to Caltrans' comments were deficient and the partially recirculated EIR did not account for the Mule Creek State Prison expansion or the City of Galt's concerns. The court of appeal found LAWDA's assertions lacking merit, the response to Caltrans' concerns was adequate. The court also found the revised EIR's consideration of the Mule Creek State Prison expansion sufficient, as was the response to concerns raised by Galt. The court affirmed the trial court's decision.

II. LAND-USE CASES

Planning and Zoning Law

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

In a prior published opinion filed on October 23, 2018 (28 Cal. App. 5th 622), the First District Court of Appeal upheld an order sustaining without leave to amend a demurrer to petitioners' Planning and Zoning Law claims as time barred under Government Code section 65009(c)(1)(E), and reversing the order sustaining the demurrer as to the first (CEQA) cause of action, finding that the CEQA cause of action was timely filed. Thereafter, both Real Party (PG&E) and Petitioner filed petitions for rehearing. The Court of Appeal granted PG&E's petition to allow reconsideration of the conclusion regarding the CEQA claim, ultimately finding no reason to alter the original conclusions and reissued the opinion with limited modification.

In March 2017, the City approved an agreement with PG&E conditionally authorizing the removal of up to 272 trees from PG&E's local natural gas pipeline rights-of-way. City staff and PG&E disagreed regarding whether or not PG&E was subject to permitting requirements in the city's tree protection ordinance. Rather than requiring PG&E to obtain a tree removal permit, PG&E and city staff agreed to process the project under a provision of the City's municipal code allowing the removal of protected trees "to protect the health, safety and general welfare of the community." Petitioners Save Lafayette Trees, et al., filed a lawsuit challenging the city's approval of the tree removal agreement. The petition alleged that the city failed to comply with the Planning and Zoning Law and CEQA. The petition also alleged that the city violated petitioners' due process rights by failing to provide sufficient notice of the city council meeting

at which the agreement was approved. The petition was filed on June 26, 2017, 90 days after the city's approval of the agreement, and served the following day.

PG&E filed a demurrer to the petition, which the city joined, contending that the challenge was time barred under Government Code section 65009, subdivision (c)(1)(E), which requires that an action challenging a decision under the Planning and Zoning law be filed *and served* within 90 days. The trial court sustained the demurrer without leave to amend and dismissed the petition. Petitioners appealed.

On appeal, the appellate court affirmed in part and reversed in part. First, the court agreed with the trial court that the petitioners' Planning and Zoning Law claims were time barred under Government Code section 65009(c)(1)(E). The court explained that the 90-day limit in that section applies broadly to any action challenging a decision by a legislative body regarding a permit provided for by a local zoning ordinance. In this case, the court concluded the city's tree ordinance is a zoning ordinance, codified in the "Planning and Land Use" title of the city's municipal code. Although the city entered an agreement for the removal of trees rather than issuing a "permit," the court concluded there was no meaningful difference between the two in this instance, thus, section 65009(c)(1)(E) applied.

The court rejected petitioners' arguments that section 65009(c)(1)(E) did not apply. Petitioners' alleged section 65009 only pertained to decisions involving housing. The court was unpersuaded, finding authority applying the statute to challenges involving a broad range of planning and zoning decisions. The court similarly rejected an argument that section 65009 did not apply because the city council was not acting in one of the statutorily enumerated roles when it approved the agreement (i.e., a board of zoning adjustment, zoning administrator or board of appeal). The court explained that it is the underlying decision being reviewed, not the reviewing body, that determines the applicability of section 65009. The court also rejected petitioners' argument that its action was subject to the longer, 180-day statute of limitations provided by the city's municipal code for actions challenging a decision of the city council. The court agreed with the trial court that the municipal code section directly conflicted with Government Code section 65009 and was therefore preempted. Petitioners' due process claim, alleging that strict compliance with the statute should be excused because the city failed to provide sufficient notice of the city council meeting, was also rejected. The city satisfied the public notice requirements of the Brown Act. Petitioners failed to allege sufficient facts to support its contention its members were entitled to personal notice.

With regard to the petitioners' CEQA claim, the court of appeal reversed the trial court, finding the 180-day statute of limitations applied pursuant to Public Resources Code section 21167, subdivision (a). Under that section, a complaint or petition shall be served not later than 10 business days from the date the action was filed. After finding these sections could not be reconciled with the 90-day limit in Government Code section 65009, the court found the more specific Public Resources Code provisions govern. The CEQA petition was therefore timely filed and served.

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1305 Ingraham, LLC v. City of Los Angeles (2019) 32 Cal.App.5th 1253

The Second District Court of Appeal ruled that appellant's planning and zoning law claims were barred by the 90-day statute of limitations found in Government Code section 65009, rejecting appellant's arguments that: (1) the planning commission's failure to act was not a "decision" triggering the 90-day limitations period; and (2) the planning director's decision was not reviewable under Government Code section 65009.

Appellant timely challenged the planning director's approval of affordable housing incentives and site plan review for a multi-story mixed use project. The planning commission failed to consider the appeal. No hearing was held. Nevertheless, the city approved the project and a notice of determination was filed. Nine months later, appellant filed a petition for writ of mandate and complaint for declaratory relief. The trial court held that appellant's claims were time-barred by the 90-day statute of limitations. The court of appeal affirmed.

Relying on relevant provisions of the Los Angeles Municipal Code (LAMC), which states that prior to deciding an appeal, the planning commission shall hold a hearing, appellant asserted that a hearing was a prerequisite to any decision. The court disagreed relying on a later LAMC code provision, which by its plain terms stated that the planning director's decision becomes final where the planning commission fails to timely act. The court further found that interpreting Government Code section 65009 to allow a decision to become final despite a procedural irregularity did not violate procedural rights of appellants, but instead advanced the purposes of site plan review set forth in the LAMC. The court rejected appellant's argument that the term "legislative body" contemplates more than the findings of the planning director, a single person. The court held that it is the subject matter of the decision being reviewed that controls application of Government Code section 65009—not the legislative body charged with making the decision.

California Coastal Act

Fudge v. City of Laguna Beach (2019) 32 Cal. App. 5th 193

The Fourth District Court of Appeal finds the California Coastal Act takes precedence over CEQA for de novo review of appeals involving the issuance of a coastal development permit (CDP).

In April 2016, Hany Dimitry bought a house located in the city of Laguna Beach (City) between Pacific Coast Highway and the ocean. Dimitry wanted to demolish the home and replace it with a new three-story single family residence. Mark Fudge (Fudge) opposed the project, contending that the existing house had historical value as a "relatively unaltered" example of Spanish Colonial Revival Design and that the new house would obstruct "view corridors."

In January 2017, the City's Design Review Board (Board) denied Dimitry's application for a coastal development permit (CDP), citing the home's historical importance. A few months later, the City Council overturned the Board's decision, approved a CDP for demolition, but took no action on the proposed new house. Under the California Coastal Act (Coastal Act), local

agencies with certified local coastal programs (LCPs) are authorized to approve CDPs in the first instance, but their decisions may be appealed to the California Coastal Commission (Commission).

In June 2017, Fudge filed an appeal of the CDP to the Commission. The next month, while the Commission's de novo hearing was pending, Fudge filed a petition for writ of mandate under CEQA seeking to vacate the CDP.

In August 2017, the Commission accepted Fudge's appeal on the CDP. The court noted the Commission must accept the appeal unless it fails to raise "substantial issues." (Pub. Resources Code, § 30625 (b)(1).) Once the Commission accepts an appeal, it has de novo authority over the CDP, nullifying the local agency's approval. (§ 30621 (a).) In response to a demurrer, the trial court dismissed Fudge's CEQA lawsuit, finding the dispute moot in light of the Commission's acceptance of Fudge's CDP appeal, and concluded the CDP was now *entirely* in the Commission's hands. While the appeal was pending, the Commission approved Dimitry's request to demolish the house, permits were issued, and the house was demolished.

Fudge appealed the dismissal, arguing his appeal of the CDP to the Commission would not be heard "in the same manner" as the original granting of the CDP by the City because the City was required to make its decision under CEQA, while the Commission would make its decision under the Coastal Act. While local agencies must comply fully with CEQA, the Commission is subject to compliance with its certified regulatory program.

The court explained that when a state agency's regulatory program has been certified by the Secretary of Resources, the information provided under the regulatory program may be submitted "in lieu of" the usual environmental impact report (EIR). The court of appeal found the Legislature provided for de novo review of appeals to the Commission. The court stated when there is a conflict between the Coastal Act and CEQA, the Legislature "impliedly emphasized the importance of the Commission's de novo review in section 21174, which says the Coastal Act takes precedence over CEQA." The court noted the reasoning behind the Legislature's choice was to avoid allowing a project opponent "two bites at the apple," and to avoid undermining the Commission's ability to implement uniform policies governing coastal development.

The court of appeal affirmed the trial court's decision dismissing, as moot, petitioner's CEQA challenge to the CDP authorizing demolition of a house. The court also found, because the City's action was nullified by the Commission's acceptance of review, judicial review against the City was unavailable. Thus, the superior court properly denied Fudge's request for attorneys' fees. The court declined to contemplate the merits of any §30801 writ that Fudge may bring against the Commission's decision to give Dimitry the CDP.

Venice Coalition to Preserve Unique Community Character v. City of Los Angeles (2019) 31 Cal. App. 5th 42

The Second District Court of Appeal upheld the trial court's decision to grant a motion for summary judgment filed by the City of Los Angeles, finding that when land use decisions are ministerial, no due process protections are triggered.

In February 2016, appellants Venice Coalition to Preserve Unique Community Character and Celia R. Williams (Venice Coalition) filed a complaint for declaratory and injunctive relief against the City. Appellants alleged the process by which the City approved various development projects in Venice violated the California Constitution, the Coastal Act, the Venice Land Use Plan (LUP), and the California Code of Civil Procedure. The trial court granted the City's motion for summary judgment, which the Venice Coalition appealed.

In 2003, the City Planning Commission approved an amendment to the Venice Specific Plan which implemented the policies of the Venice Land Use Plan (LUP), allowing certain small-scale development projects to be issued a "Venice Sign-Off" (VSO) by the Director of Planning and exempting them from further review and decision.

First, Venice Coalition claimed the City's approval of VSO's violated community members' due process rights because of the lack of public notice and hearing. Finding petitioners' argument unpersuasive, the court explained that ministerial actions, as here, involve nondiscretionary decisions based on objective standards. As such, due process is typically not triggered because the decision is "essentially automatic" and based on fixed standards. The court therefore upheld the trial court's finding that the VSO process is ministerial since the Director of Planning does not exercise independent judgment, but rather utilizes nondiscretionary checklist forms.

Second, the court rejected Venice Coalition's claim that the City failed to ensure all VSO projects complied with the requirements of the LUP. Agreeing with the City, the court reasoned that when VSO projects are found consistent with the specific plan standards, they are also deemed consistent with LUP requirements. The court also noted that any challenge to the VSO process was required to be brought within the 90-day statute of limitations period per Government Code section 65009(c)(1)(A). Petitioner's claim was therefore barred by the statute of limitations. The court also noted that the City ultimately evaluates specific plan projects for compliance with the LUP when obtaining a CDP.

The Venice Coalition did not challenge the grant of summary judgment in favor of the City for the third cause of action, which alleged that the City acted in excess of its authority by issuing exemptions from the Coastal Act's requirement that development projects obtain CDPs.

Lastly, the Venice Coalition's fourth cause of action alleged the exemptions granted by the City were unauthorized under the Coastal Act because §30610 only allows for "improvements" to existing structures and not additions. Specifically, they claimed any improvements that increased existing height or floor area were limited to 10 percent. The court explained petitioner's interpretation was incorrect and the 10 percent improvement language only applies to projects within a certain proximity to the ocean. The Coastal Act contemplates improvement to existing structures, including additions. Additions falling outside the 10 percent proximity limitation can be deemed exempt from the requirement to obtain a CDP.

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City Charter

Westsiders Opposed to Overdevelopment v. City of Los Angeles (2018) 27 Cal.App.5th 1079

The Second District Court of Appeal upheld the City of Los Angeles' interpretation of its charter, allowing a General Plan amendment for a transit-oriented development project.

In 2013, Real Parties in Interest Dana Martin, Jr., Philena Properties, L.P., and Philena Property Management, LLC (Philena) applied to develop a mixed-use, transit oriented development project on the site of a former car dealership in West Los Angeles. The project site is located on the corner of Bundy Drive and West Olympic Boulevard, less than 500 feet from a light rail station. As part of its application, Philena requested that the city change the site's general plan designation from light industrial to general commercial. The city prepared and certified an EIR and approved the project. Westsiders Opposed to Overdevelopment (Westsiders) sued, challenging the amendment as a violation of City Charter provisions for general plan amendments. The trial court denied the petition for writ of mandate, finding the city did not exceed its authority under the charter or abuse its discretion in approving the general plan amendment. Westsiders appealed.

As relevant here, Los Angeles City Charter section 555 governs general plan amendments. Section 555 (a), allows the general plan to be amended "by geographic area, provided that the . . . area involved has significant social, economic or physical identity." Subdivision (b) states, in pertinent part, that "[t]he Council, the City Planning Commission or the Director of Planning may propose amendments to the General Plan." Westsiders argued that both of these provisions prevented the City from approving the general plan amendment in this case. Specifically, Westsiders alleged that the general plan could not be amended for a single project or parcel because it is not a large enough "geographic area" with "significant social, economic or physical identity" as required by section 555(a). Westsiders also argued that, by requesting the general plan amendment, Philena effectively "initiated" the amendment in violation of section 555(b).

Because the general plan amendment was for a single project, the court found judicial review under Code of Civil Procedure section 1094.5 (administrative mandamus) governed. In discussing the appropriate standard of review, the court also recognized that charter cities are presumed to have power over municipal affairs, and that any limitation or restriction on that power in the charter must be clear and explicit. The court added that, while construing the charter was a legal issue subject to de novo review, the city's interpretation of its own charter is entitled to great weight unless it is clearly erroneous, and must be upheld if it has a reasonable basis.

Affirming the trial court's decision, the court concluded that the plain meaning of the terms "geographic area" and "significant social, economic or physical identity" did not contain any clear and explicit limitation on the size or number of parcels involved when amending the general plan. Further, the court found that the city's determination that the site had significant economic and physical identity because it was one of the largest underutilized sites with close proximity to transit in West Los Angeles, and that the project would be the first major transit-oriented development, satisfied the charter requirements. The court rejected Westsiders'

argument that, in considering whether a geographic area has "significant social, economic or physical identity," the city may not consider the proposed project and future uses of the site.

Next, with regard to Westsiders' claim based on section 555 (b), the court also rejected their argument that, by filling out a land use application requesting that the city amend the general plan, Philena had illegally "initiated" the amendment. Similar to its analysis of subdivision (a), the court found that section 555 (b) contained no clear and explicit limitation on who could *request* that the city amend the charter. According to the court, the city followed the procedures required by the charter because, after Philena made its request, it was the planning director who formally initiated the amendment process.

The court also rejected Westsiders' claim that the city was required to make specific findings regarding the project site, including that the site constituted a "geographic area" or that the lot has "significant economic or physical identity." Because amending the general plan is a legislative act, the city was not required to make explicit findings to support its decision. Moreover, the court added, the city did make findings, it just did not use the exact language of the charter. The city's analysis showed the site had significant economic and physical characteristics and met the requirements of Charter section 555.

Westsiders' argument that the city impermissibly "spot-zoned" the project site through the general plan amendment was also rejected because Westsiders failed to raise this argument in the trial court and was thus barred from raising it on appeal.

Public Trust Doctrine

Environmental Law Foundation et al. v. State Water Resources Control Board (2018) 26 Cal.App.5th 844

The Third District Court of Appeal upheld a decision by the trial court on summary judgement finding public agencies have a duty under the Public Trust Doctrine to consider the adverse impacts of groundwater pumping on public trust resources (i.e. rivers, lakes), and compliance with the Sustainable Groundwater Management Act (SGMA) does not operate as a substitution for such consideration.

The case centered on the Siskiyou County's duty to consider the public trust doctrine in permitting groundwater wells that could adversely affect flows in the Scott River. Seeking declaratory relief, the Environmental Law Foundation (ELF) claimed the County had a duty under the public trust doctrine to consider whether groundwater extractions in the Scott River system could affect uses of the river protected by the doctrine. The County filed a cross-complaint and request for its own declaratory relief. To expedite the appeal, the parties stipulated to various undisputed material facts, including that the Scott River is a navigable waterway for the purposes of the public trust doctrine, that extraction of groundwater interconnected with the Scott River system has an effect on surface flows, and that the County's permitting and groundwater management programs regulate extraction of the interconnected groundwater.

The parties also agreed that the trial court had decided several questions of law relevant to the appeal: the public trust doctrine applied where the extraction of groundwater affects public

trust resources and uses in the Scott River; the County, in regulating the extraction of groundwater in the Scott River system, has a public trust duty to consider whether permitted wells will affect public trust resources and uses in the Scott River; the SGMA did not conflict with the County's duty under the public trust; and the Board has both the authority and a duty under the public trust doctrine to regulate groundwater extractions that affect public trust uses in the Scott River. Both the trial court and the court of appeal concluded that the question of what the Board could or should do to regulate such groundwater was a question for another day.

The Third District Court of Appeal upheld the trial court's decision that the public trust doctrine applied to the extraction of groundwater to the extent such extraction may adversely impact the river. The court also upheld the trial court's determination that the SWRCB had the authority and duty to "take some action" regarding groundwater extractions that affect uses of the Scott River protected by the public trust doctrine. Lastly, the court found the SGMA neither supplanted nor "fulfilled" the State's duty to consider the public trust doctrine where groundwater extraction could affect protected uses.

On appeal, the County argued that the public trust doctrine does not apply to the extraction of groundwater and, as such, it did not have to consider the doctrine in issuing well permits. Relying heavily on the seminal case *National Audubon Society v. Superior Court* (1983) 33 Cal.3d 419, the court rejected the County's arguments in full. Following the reasoning in *National Audubon*, the court found the key question is the impact of an activity on public trust resources. In *National Audubon*, the Supreme Court found that diversion of water from streams unprotected by the public trust doctrine, nevertheless triggered the doctrine when the diversions impacted protected uses in Mono Lake. The court of appeal therefore found unpersuasive the County's argument that, because the groundwater being extracted was not itself "navigable," it was not protected by the public trust doctrine.

The court of appeal similarly rejected the County's arguments that the State's constitutional mandate requiring the "reasonable use" of water, along with the SWRCB's statutory permitting obligations under the Water Code, subsumes any duty to consider the public trust doctrine. The court, in its discussion of the SGMA, also rejected the County's argument that the Legislature intended to occupy the field of groundwater regulation and therefore "fulfilled" the State's obligations under the public trust doctrine, reasoning that statutes do not supplant the common law unless there is no rational basis for harmonizing potential conflicts between the two. The court agreed with ELF's argument that the SGMA is not as comprehensive a body of law as the appropriative rights system at issue in *National Audubon*, noting the Legislature expressly stated that the SGMA supplements - but does not alter nor supplant - the common law.

Importantly to counties (and cities), the court rejected the County's fallback argument that, even if the State had a duty under the public trust doctrine, that duty did not fall to the County to fulfill. The court found the general use of the term "State" to include counties as subdivisions of the State which have a shared obligation under the public trust doctrine to protect resources subject to the Public Trust Doctrine. The Legislature, moreover, when enacting the SGMA, did not make itself the sole keeper of the public trust.

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Other/Grading Permit

York et al., v. City of Los Angeles (2019) ___Cal.App.5th___ (Case No. B278254)

The Second District Court of Appeal upheld a trial court decision denying Petitioner/Appellants' request for leave to amend their complaint alleging: (1) the City's action denying relief from a City zoning ordinance was arbitrary and capricious; (2) the City had taken Appellants' property by depriving them of substantially all economic value, that equated to inverse condemnation; and (3) the City had arbitrarily and unlawfully imposed restrictions on Appellants' use of their property and treated Appellants differently than other similarly-situated homeowners.

In November 2011, Kenneth and Annette York (Appellants) sought approval from the City of Los Angeles (City) to build a large house which would require 80,000 cubic yards of grading. The City granted permission to build the home and accessory structures but denied the grading request.

The City's Baseline Hillside Ordinance (BHO) sets out the maximum amount of grading allowable on a property in a designated hillside area. In order to grant a deviation from the by-right grading limitations, a zoning administrator must hold a public hearing and make findings. After conducting a public hearing in 2013, the Zoning Administrator issued a written determination approving the home and accessory buildings but denying the request for grading. The Appellants appealed the Zoning Administrator's decision to the Area Planning Commission (Commission). In 2014, the Commission held a public hearing and voted to deny the appeal.

In January 2015, Appellants filed a complaint and petition for writ of mandate. The trial court denied Appellants' mandate petition, and concluded that the City's decision was supported by substantial evidence. The trial court granted the City's request for judicial notice and the motion for judgment on the pleadings, reasoning that "the matter [is] not ripe as plaintiffs have not proposed plans of reduced scope that would nonetheless allow the proposed project. Plaintiffs, for instance, could propose plans that would export all or some of the excavated soil from the site or propose its deposit elsewhere on the site."

The court of appeal upheld the trial court's denial of the petition for writ of mandate. The court noted that abuse of discretion does not require reversal unless the appellant shows the ruling was prejudicial. The zoning administrator told the Commission that while he had misunderstood the scope of his discretion he would have made the same decision in any case. The court also held that if Appellants believe that building a residence on the property requires grading, it is their burden to make that showing—not the City's burden to demonstrate to the contrary. The court also noted that evidence that some of the project's features benefitted the community did not require the conclusion that the project was beneficial as a whole.

The court also upheld the trial court's judgment granting judicial notice and the motion for judgment on the pleadings. In addressing the Appellants' second and third causes of action, the court discussed regulatory takings. The court noted if a governmental agency has not decisively acted to ban all development on a parcel, an owner's ability to use his or her property cannot be said with assurance to have been irretrievably lost and therefore is not a taking. The court held the Appellants' due process and equal protection claims were not ripe since it is

unknown how the City will apply the BHO to Appellants' property as no final decision had been made regarding Appellants' allowable scope of development. The court of appeal held no amendments could overcome the defects within Appellants' complaint.

III. CEQA GUIDELINES

On December 28, 2018, the Office of Administrative Law approved various amendments to the CEQA Guidelines proposed by the Natural Resources Agency. The final amendments, Statement of Reasons and supporting materials are available at: http://resources.ca.gov/ceqa/

This is the first comprehensive update to the Guidelines since the late 1990s. The proposed package contains changes or additions involving nearly thirty different sections, addressing nearly every step of the environmental review process. In addition to the regular updates required by Public Resources Code section 21083, this package also includes new provisions required by recent legislation, including SB 743, which required the Governor's Office of Planning and Research to develop new methodology for addressing transportation impacts. Among these provisions is new Guideline section 15064.3, which proposes "vehicle miles traveled" as the most appropriate measure of a project's transportation impacts in light of the goals of Senate Bill 743. Once that section is adopted, automobile delay (often called "level of service") will no longer be considered an environmental impact under CEQA, particularly in the context of land use projects.

Other examples of the amendments include:

- Updated exemptions for residential and mixed-use developments near transit and redeveloping vacant buildings;
- Clarifications for the use of existing environmental documents to cover later projects;
- New provisions to address energy efficiency and the availability of water supplies;
- Simplified requirements for responding to comments; and
- Modified provisions to reflect recent CEQA cases addressing baseline, mitigation requirements and greenhouse gas emissions.

The updated CEQA Guidelines apply prospectively. Additionally, while a public agency could immediately apply the proposed new Guidelines section regarding the evaluation of transportation impacts (Guidelines section 15064.3), statewide application of that new section would not be required until January 1, 2020.

Public Works Procurement Update

Wednesday, May 8, 2019 General Session; 1:00 – 3:00 p.m.

Maggie W. Stern, Shareholder, Kronick, Moskovitz, Tiedemann & Girard

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Notes:_____

PUBLIC WORKS PROCUREMENT UPDATE 2019

May 8, 2019

PREPARED BY

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PUBLIC WORKS PROCUREMENT UPDATE 2019

The following is a summary of legislation and case law issued between January 1, 2018 and March 25, 2019 relevant to public contracting for California cities, organized by topic.

I. CALIFORNIA UNIFORM PUBLIC CONSTRUCTION COST ACCOUNTING ACT

A. AB 2249 – Increase in CUPCCAA Solicitation Thresholds

The California Uniform Public Construction Cost Accounting Act ("the Act") has been amended by the Legislature to increase its solicitation thresholds. Assembly Bill ("AB") 2249 was enacted on August 20, 2018 and took effect on January 1, 2019. The bill amended the Act, which only applies to agencies, including cities, whose governing boards have elected, by resolution, to become subject to uniform construction cost accounting procedures located at Public Contract Code section 22030 et seq.

The Act previously authorized public projects of $45,000 or less to be performed by the employees of a public agency, authorized public projects of $175,000 or less to be let to contract by informal procedures, and required public projects of more than $175,000 to be let to contract by formal bidding procedures.

AB 2249 amended the Act to increase the thresholds for the solicitation. The Act now authorizes public projects of $60,000 or less to be performed by the employees of a public agency, authorizes public projects of $200,000 or less to be let to contract by informal

procedures, and requires public projects of more than $200,000 to be let to contract by formal bidding procedures. In the event all bids received for the performance of a public project, which was informally solicited, are in excess of $200,000, the city may award the contract at $212,500 or less to the lowest responsible bidder if it determines the cost estimate of the public agency was reasonable.

PRACTICE POINTER: You may need to review your City's purchasing policy or ordinances to see if any revisions are necessary to update the solicitation thresholds.

II. LOCAL PREFERENCE

A. AB 2762 – Increase Authority for Small Business Local Preference

Public Contract Code section 2002 authorizes local agencies to give a preference to local small business enterprises in the award of construction, goods procurement, and service contracts. AB 2762 was enacted on September 21, 2018, and became effective on January 1, 2019. The bill increases the preference to be afforded small local businesses, and adds a pilot program for two new categories of preference.

In the floor analysis, the authors of the bill noted that "[p]ublic procurement represents a significant source of potential business revenue. A growing number of local agencies are

seeking ways to leverage these ongoing government expenditures with public procurement policies that result in reinvestments in local communities. The authors have introduced this measure to increase the number of small businesses, disabled veteran-owned businesses, and social enterprises participating in public contracting."

More particularly, AB 2762 amended Section 2002 to increase the maximum value of a small business procurement preference used by a local agency when awarding a contract based on the lowest responsible bidder from 5% to 7% of the lowest responsible bidder and set a maximum financial value of $150,000.

The bill also authorizes a pilot project to allow local agencies with the counties of Alameda, Contra Costa, Lake, Los Angeles, Marin, Napa, San Francisco, San Mateo, Santa Clara, Solano, and Sonoma to establish a disabled veteran business preference and/or a social enterprise preference for use in public contracts for construction, goods or services awarded to the lowest responsible bidder. This pilot program has been codified at Public Contract Code section 2003. Under Section 2003(a)(1)(B), when more than one preference is applied to a bid package, the maximum percentage value of multiple preferences shall be no more than 15% of the lowest responsible bidder and a maximum financial value of multiple preferences at no

more than $200,000. The pilot program will be effective January 1, 2019, through January 1, 2024.

PRACTICE POINTER: If your city uses a small business local preference, you may want to evaluate whether to increase the preference to 7%.

III. BIDDING

A. *West Coast Air Conditioning Co. Inc. v. California Department of Corrections & Rehabilitation*

In *West Coast Air Conditioning Co. Inc. v. Department of Corrections & Rehabilitation* (2018) 21 Cal.App.5th 453, California's Fourth Appellate District Court of Appeal considered whether a bidder was entitled to recover bid preparation costs under a promissory estoppel theory, after successfully challenging the award of a contract.

1. Background

In February 2015, the California Department of Corrections & Rehabilitation ("CDCR") published an invitation to bid for an HVAC project at its Ironwood Prison. The project involved building a new central plant to provide air conditioning for the prison and to reroof the prison. The work was to occur while the prison was fully operational and occupied.

In May 2015, CDCR awarded the contract to Hensel Phelps Construction Co. ("HP") for approximately $88 million after finding that HP was the lowest bidder. West Coast Air Conditioning Co. Inc. ("West Coast") was the next lowest bidder with a bid of about $98 million.

West Coast challenged the award of the contract by filing a petition for writ of mandate on the grounds that HP's bid "suffered from myriad defects, including failing to list the license numbers of about 17 subcontractors among other missing subcontractor information […]; submitting a bid containing 'typographical/arithmetical errors'; and submitting a revised bid after the deadline that included substantial alterations to the percentages of work that HP's subcontractors would perform." (*West Coast Air Conditioning Co. Inc. v. Department of Corrections & Rehabilitation* (2018) 21 Cal.App.5th 453, 456.) The petition also sought, in pertinent part, "'general damages in an amount sufficient to reimburse West Coast for its bid preparation costs' and interest." (*Ibid*.)

Despite the pending action, CDCR issued the notice to proceed to HP in July 2015, and HP commenced work. On September 11, 2015, the trial court granted West Coast's motion to set aside the contract, and also ruled that the contract should have been awarded to West Coast. On September 16, 2015, West Coast sent CDCR a demand that they cease work and requested that the project be awarded to West Coast. However, CDCR and HP proceeded with

work until West Coast finally obtained a temporary injunction on October 6, 2015. The permanent injunctions were granted to West Coast on December 11, 2015. In its December 11, 2015 order, the court agreed with CDCR's argument that the court could not compel CDCR to exercise its discretion to award the project to West Coast.

Prior to the trial of the Promissory Estoppel Cause of Action in May of 2016, the parties stipulated to the following:

> a. The bid documents published by CDCR for the Project stated a contract for the Project would be awarded to the lowest responsible bidder"; "b. CDCR received bids for the Project on April 30, 2015"; "c. CDCR awarded the Project contract to HP and on July 7, 2015, issued a notice to HP to proceed with the Project contract"; "d. Work on the Project began in July 2015"; "e. Pursuant to the temporary restraining order issued on October 6, 2015, CDCR and HP halted all work on the Project and have not recommenced any work"; "f. CDCR may endeavor to prove the amount of work completed by HP on the Project through declaration and documents"; and "g. West Coast's reasonable costs to prepare its bid submitted to CDCR on April 30, 2015 for the Project were and are in the sum of $250,000.

(*West Coast Air Conditioning Co. Inc. v. Department of Corrections & Rehabilitation, supra,* 21 Cal.App.5th 453, 457-458.)

At trial, CDCR argued for the first time that West Coast's bid was non-responsive. The court rejected this contention and, after finding that CDCR refused to award the contract to

West Coast, awarded West Coast $250,000 in bid preparation costs. CDCR appealed to California's Fourth District Court of Appeal.

2. Decision in the Court of Appeal

The Court of Appeal considered two issues, including whether West Coast's bid was responsive, and whether monetary damages may be awarded to a bidder who successfully challenges a contract award in the event injunctive relief is insufficient to achieve justice.

On the first issue, the Court found that there was overwhelming evidence in the record that West Coast's bid was responsive and lambasted CDCR for waiting until trial to allege that West Coast's bid was non-responsive.

PRACTICE POINTER: If you receive a bid protest for a project, note any deficiencies in the protesting party's bid in your response to the protest to preserve the argument in the event of litigation.

On the second issue, CDCR argued that West Coast obtained effective relief by obtaining the injunction in the trial court. In support of its argument, CDCR exclusively relied on *Kajima/ Ray Wilson v. Los Angeles County Metropolitan Transportation Authority* ("*Kajima*") (2000) 23 Cal.4th 305, 308. The Court distinguished *Kajima*, notating that:

> *Kajima* makes clear that damages generally will not be available under a promissory estoppel theory **unless it is possible both to set aside the misawarded contract and to award the contract instead to the lowest responsible bidder**. Here, the HP contract was set aside by ordinary writ of mandate, thus satisfying the first

> "element" of *Kajima*. The difficulty in the instant case is the second "element"—awarding the contract to the next lowest responsible bidder. As noted ante, CDCR refused to award West Coast the contract to construct the subject project even after the writ of mandate issued.

(*West Coast Air Conditioning Co. Inc. v. Department of Corrections & Rehabilitation, supra,* 21 Cal.App.5th 453, 466 [emphasis added].)

Since CDCR refused to award the contract to West Coast, the Court of Appeal concluded that "the issuance of a permanent injunction in favor of West Coast, the lowest responsible bidder, without either an award of the public works contract to it or an award of damages equal to its bid preparation costs, would result in an inadequate remedy to West Coast." (*West Coast Air Conditioning Co. Inc. v. Department of Corrections & Rehabilitation, supra,* 21 Cal.App.5th 453, 468.) The Court also stated that "West Coast prepared its bid and incurred $250,000 in costs in reliance on CDCR's representation that if a contract was awarded, which turned out to be the case, it would be to the lowest responsible bidder, which turned out not to be the case," and was thus entitled to recover its bid preparation costs.

The Court went on to state that "[a]llowing West Coast to recover its bid preparation costs under the circumstances of this case will further the important public policies underlying the competitive bidding laws of 'encouraging proper challenges to misawarded public contracts

by the most interested parties, and deterring government misconduct." (*West Coast Air Conditioning Co. Inc. v. Department of Corrections & Rehabilitation, supra,* 21 Cal.App.5th 453, 468.)

IV. PREVAILING WAGES

A. *Allied Concrete & Supply Co. v. Baker*

In *Allied Concrete & Supply Co. v. Baker* (2018) 904 F.3d 1053, 1057, the Ninth Circuit Court of Appeals decided a case involving the question of whether California Labor Code section 1720.9, which requires the payment of prevailing wages to ready-mix concrete drivers on public projects, violates the Equal Protection Clause of the U.S. Constitution. As a federal case, *Allied Concrete* is not precedential in California, but the issue was interesting and the analysis was persuasive, so I share it with you here.

Allied Concrete & Supply Co., et al. (a group of ready-mix suppliers) ("Allied") challenged Section 1720.9 on the ground that it singled out ready-mix drivers for the payment of prevailing wages, while not requiring prevailing wages for other types of drivers, and thus violated the Equal Protection Clause.

The parties agreed that the rational basis test applied for the resolution of this issue. Under the rational basis test:

> non-suspect classifications are constitutionally valid if there is a plausible policy reason for the classification, the legislative facts on which the classification is apparently based rationally may have been considered to be true by the governmental decisionmaker, and the relationship of the classification to its goal is not so attenuated as to render the distinction arbitrary or irrational.

(*Allied Concrete & Supply Co. v. Baker* (9th Cir. 2018) 904 F.3d 1053, 1060, *citing Armour v. City of Indianapolis* (2012) 566 U.S. 673, 681, (2012) [internal quotation marks omitted].)

The Court noted that one purpose of prevailing wages is to benefit and protect workers on public projects, and "the legislature could have rationally decided that the delivery of ready-mix to a public work is part of the 'flow of construction' and should be compensated as such." (*Allied Concrete & Supply Co. v. Baker, supra,* 904 F.3d 1053, 1062.) At one of the hearings on the bill to adopt Section 1720.9, a representative for the International Brotherhood of Teamsters stated:

> These workers are part of the construction process. That's what's different and unique about this from any other material coming to the job site. You can . . . it's not dumping a load of lumber or a bag of nails or whatever and leaving. They bring this commodity—which is perishable—and [it] has to be incorporated immediately and the driver participates in the incorporation process with the workers. They are part of it. They move the truck. They operate levers and equipment that moves the concrete and the rate of flow in conjunction with the construction workers. They are integral to the process.

The legislative records show that the legislators considered the above statement, and that it influenced their decision-making. One legislator offered in response, "I will be supporting the bill today. I do get the distinction between the product we're talking about and delivering in effect, dumping a delivery of pipes or paint or steel. This is a different commodity." (*Allied Concrete & Supply Co. v. Baker, supra,* 904 F.3d 1053, 1062.)

The Court also found that the legislature could have had a rational basis to believe that requiring the payment of prevailing wages for ready-mix drivers could help ensure superior projects, because the quality of ready-mix drivers is more important than the quality of other drivers for public works projects. The Court determined that the legislature could have rationally believed that "ready-mix drivers have unique responsibilities that are more important to the success of a public works project; and that ready-mix is more often used in 'structural' projects." (*Id*. at 1063.) In addition, the Court determined that the legislature could have rationally believed that the application of prevailing wages to ready-mix drivers on public projects would protect from underbidding, and allow union contractors to compete with union contractors for public contracts, and thereby ensure a certain standard of worker on public projects.

The Court concluded that the California Legislature had a rational basis for finding that ready-mix drivers are more integral to public works projects than other drivers. Thus, there is a rational governmental basis for Labor Code section 1720.9's treatment of ready-mix drivers as different from other drivers on public works projects, and thus Section 1720.9 does not violate the Equal Protection Clause of the U.S. Constitution.

V. SUBCONTRACTOR AND SUBLETTING FAIRNESS ACT

A. *JMS Air Conditioning & Appliance Service, Inc. v. Santa Monica Community College District*

JMS Air Conditioning & Appliance Service, Inc. v. Santa Monica Community College District (2018) 30 Cal. App. 5th 945 was filed on December 17, 2018 by the Second Appellate District. The Santa Monica Community College District ("District") entered into a construction contract with Bernards Bros., Inc. ("Bernards") for a new facility. Bernards listed JMS Air Conditioning & Appliance Service, Inc. ("JMS") as a subcontractor on the project, which was designated to install the HVAC system for the facility. After the contract was awarded, Bernards contacted the District to request permission to substitute out JMS as a subcontractor on the grounds that JMS has "failed or refused to perform its subcontract obligations and may not be properly licensed for portions of its work pursuant to the contractor's license law." (*JMS Air*

Condition & Appliance Service, Inc. v. Santa Monica Community College District (2018) 30 Cal. App. 5th 945, 952.)

Substitutions of subcontractors on competitively bid projects are governed by Public Contract Code section 4107, which sets forth the conditions under which substitutions may be made. As pertinent to this case, under Section 4107(a)(3) an agency may consent to the substitution of a subcontractor in the event the subcontractor fails or refused to perform the work. Further, under Section 4107(a)(6) an agency may consent to the substitution of a subcontractor; the subcontractor is not licensed under the contractor's license law.

The District forwarded Bernards' request to JMS, who objected, and thus triggering a Labor Code section 4107 substitution hearing. The District set the hearing date and designated the Santa Monica Community College facilities manager as the hearing officer.

At the heart of the matter, Bernards stated that there was plumbing and boiler work required for the job, which JMS could not perform without specialty licenses for those trades.

At the hearing Bernards presented an expert (a former Contractor's State License Board attorney) who opined that JMS was not properly licensed to perform the work under the contract, and in particular, that JMS's C-20 HVAC contractor license was not sufficient for the boiler work called for in the contract and that such work required a C-4 Boilers license.

Bernards' expert did not opine on whether plumbing work could be performed under JMS's C-20 license.

Following the hearing, the hearing officer sent out a letter approving Bernards' substitution request on grounds that JMS has failed to perform the work under the subcontract, and because JMS was not properly licensed for the boiler or plumbing work. The hearing officer's letter also stated that the boiler and plumbing work was not incidental or supplemental to the HVAC work and thus could not be covered by JMS's C-20 HVAC license, and those categories of work.

JMS challenged the hearing officer's decision by filing a writ of mandamus in the superior court. JMS argued that the hearing officer lacked jurisdiction to hold the substitution hearing, that it was denied due process, and that the hearing officer's decision was not supported by the evidence.

On appeal to the California's Second District Court of Appeal, the Court found that the hearing officer had authority to hear the appeal. JMS argued that in every other place in Section 4107, where the statute refers to the "awarding authority" it includes, "or its duly authorized officer." However, where the statute requires a hearing under Section 4107(a)(9), the statute only states that the "awarding authority" shall make the decision, and omits the phrase "or its

duly authorized officer." On those grounds, JMS argued that the legislature only intended for the legislative body of the District to be able to hold a substitution hearing.

The Court rejected this argument by JMS, finding instead that the overarching purpose of the Subcontracting and Subletting Fairness Act is to prevent bid shopping and bid peddling, and that allowing the District to have its authorized officer conduct the substitution hearing would facilitate that goal. The Court also rejected JMS's due process claims, noting that a substitution hearing did not concern a vested or fundamental right and that JMS has other legal recourse under its contract with Bernards to address its rights.

VI. BONUS TIPS – READING THE RINGS OF YOUR PUBLIC WORKS CONTRACTS

Just like an arborist can tell how old a tree is by looking at its rings, I can tell how out of date your public contract template is by reading its metaphorical rings as well. Here's a few things I look for when I first glance though a clients' public works front-end documents, in order to "date" the template:

1. **2 Years Out of Date** – If your subcontractor listing form does not include a space for the contractor to include the subcontractor's DIR registration numbers, then your contract documents may be 2 years, or more, out of date. Public Contract Code section 4104(a)(1) was updated effective June 27, 2017 to require that DIR contractor registration numbers be provided on all subcontractor forms submitted with bids.

2. **5 Years Out of Date –** If your notice inviting bids does not include a statement requiring contractor registration, then your contracts may be 5

years, or more, out of date. Labor Code section 1771.1 was added in 2014 and requires notice in all bid invitations that contractors must be registered pursuant to Labor Code section 1725.5 to be qualified to bid on a public project.

3. **7 Years Out of Date** – If your contract references a "Non-Collusion Affidavit," then your construction contract documents may be 7 years, or more, out of date. Public Contract Code section 7106 was updated in 2012, changing the name of the attestation to a "Non-Collusion Declaration" and providing new mandatory statutory language.

4. **9 Years Out of Date** – If your Payment Bond references Civil Code section 3181, your contracts may be 9 years, or more, out of date. The Legislature renumbered all the bond code sections in 2010, including moving Civil Code section 3181 to 9100.

Ehrlich Resurrected: Public Art Ordinances Once Again Under Attack

Wednesday, May 8, 2019 General Session; 3:15 – 4:45 p.m.

Thomas B. Brown, City Attorney, St. Helena, Partner, Burke, Williams & Sorensen LLP

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Notes:_____

BURKE, WILLIAMS & SORENSEN, LLP

Ehrlich Resurrected: Do *Nollan*/*Dolan*/*Koontz* And The First Amendment Apply To Public Art Ordinances. . . And Other Ordinances?

League of California Cities
City Attorneys' Spring Conference
May 8, 2019

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Ehrlich Resurrected: Do *Nollan*/*Dolan*/*Koontz* And The First Amendment Apply To Public Art Ordinances. . . And Other Ordinances?

1. Introduction.

In 1996, in *Ehrlich v. City of Culver City* ("*Ehrlich*"),[1] the California Supreme Court rejected a takings challenge to Culver City's "art in public places" ordinance, which required that developers spend a specified and modest percentage of a project's construction costs on art that is to be accessible at the project to the public. In so doing, the Court rejected the argument that such a challenge was subject to "heightened scrutiny" for exactions, such as dedications of property or installation of a public improvement, under the Supreme Court's *Nollan* and *Dolan* decisions.[2] California cities have relied on *Ehrlich* ever since, and today many cities have adopted similar ordinances.[3]

23 years later, the Building Industry Association (Bay Area) ("BIABA") has brought a new challenge to the City of Oakland's newly-enacted public art ordinance. BIABA resurrects the *Nollan*/*Dolan* challenge, arguing that the issue is again "in play" post *Lingle* and *Koontz*.[4]

In addition, BIABA now brings a new argument. Premised on the uncontroversial fact that art constitutes protected speech, BIABA contends that art in public places ordinances constitute "compelled speech" in violation of the First Amendment because they force developers to purchase, display and maintain art. The District Court rejected BIABA's claims,[5] and upheld the ordinance, and BIABA has appealed to the Ninth Circuit.

This paper will address the applicable takings and First Amendment legal issues that could have widespread implications for California cities, perhaps beyond public art ordinances.

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[1] *Ehrlich v. City of Culver City*, 12 Cal.4th 854, 886 (1996), *cert. denied*, 117 S.Ct. 299.

[2] *Nollan v. California Coastal Comm'n*, 483 U.S. 825 (1987), and *Dolan v. City of Tigard*, 512 U.S. 374 (1994). See generally Municipal Law Handbook, Sections VIII and XIII for more background on these cases and dedications, exactions and fees.

[3] Some 18 other California cities have adopted similar ordinances, including Beverly Hills, Culver City, Los Angeles, Mountain View, Pomona, San Diego, San Francisco, San Pablo, Santa Monica, West Hollywood, Emeryville, Albany, Richmond, San Luis Obispo, Berkeley, Fremont, Palm Desert, and Oakland. In addition, as of 2015, 35 of the 50 most populous cities in the country had such programs. Asmara M. Tekle, *Rectifying These Mean Streets: Percent-for-Art Ordinances, Street Furniture, and the New Streetscape*, 104 KENTUCKY L.J. 409, 428 (2015).

[4] *Lingle v. Chevron U.S.A.*, 544 U.S. 528, 546 (2005); *Koontz v. St. Johns River Water Mgmt. Dist.*, 570 U.S. 595, 605 (2013)

[5] *Building Industry Association-Bay Area v. City of Oakland*, 289 F.Supp.3d 1056 (N.D. Cal. 2018)

2. Background: *Ehrlich v. City of Culver City* Establishes That Public Art Ordinances Do Not Impose Exactions Subject To *Nollan*/*Dolan* Heightened Scrutiny.

Ehrlich involved two requirements imposed by the City of Culver City: (1) a $280,000 recreational mitigation fee and (2) a $33,200 "art in public places" fee. The recreational mitigation fee was to be used "for additional recreational facilities" to replace the facilities "lost" when Ehrlich ceased using his property for commercial recreational purposes. The amount of this fee was based on Culver City's estimate of the cost of building public recreational facilities. The "art in public places" fee was imposed under Culver City's ordinance that required commercial projects with a value in excess of $500,000 to either provide art work for the project in an amount equal to one percent (1%) of the total value of the building or pay an equal amount to the City art fund. 12 Cal.4th 854, 862.

With respect to the $280,000 recreational fee, the California Supreme Court first rejected the argument that *Nollan*/*Dolan* heightened scrutiny only applies in the context of land use permit conditions requiring the conveyance of interests in real property. Presaging *Koontz*, the Court ruled to the contrary that *Nollan*/*Dolan* heightened scrutiny applies with equal force to permit conditions requiring the payment of monetary exactions as well. 12 Cal.4th at 874-75.

Having ruled thatNollan/Dolan heightened scrutiny applies to monetary exactions, the *Ehrlich* Court then ruled that the $280,000 recreational fee did **not** satisfy *Nollan*/*Dolan* scrutiny. However, the Court remanded the matter to the city to determine whether a fee in **some** amount might satisfy *Nollan*/*Dolan* scrutiny. 12 Cal.4th at 884-885.

Finally, after spending the first 30 or so pages of its opinion addressing the $280,000 recreational fees, the *Ehrlich* Court devoted less than one page to upholding Culver City's art in public places requirement. The Court first held that the art requirement "**is not a development exaction of the kind subject to the *Nollan–Dolan* takings analysis**." 12 Cal.4th at 886; emphasis added. Rather, the Court concluded that the ordinance constituted regulation on the use of property, i.e. zoning:

> [T]he requirement to provide either art or a cash equivalent thereof is more akin to traditional land use regulations imposing minimal building setbacks, parking and lighting conditions, landscaping requirements, and other design conditions such as color schemes, building materials and architectural amenities. Such aesthetic conditions have long been held to be valid exercises of the city's traditional police power, and do not amount to a taking merely because they might incidentally restrict a use, diminish the value, or impose a cost in connection with the property.

12 Cal.4th at 886.[6]

[6] The Supreme Court applied the same reasoning 2015 in rejecting BIA's argument that inclusionary housing requirements constitute exactions subject to *Nollan*/*Dolan*/*Koontz*. *California Bldg. Indus. Assn. v. City of San Jose*, 61 Cal.4th 435, 460-61 (2015), *cert. denied* 136 S. Ct. 928.

3. The City of Oakland Relies On Ehrlich In Adopting Its "Public Art Requirements for Private Development" Ordinance.

In 2017, relying on *Ehrlich*, the City of Oakland City Council adopted a "Public Art Requirements for Private Development" ordinance ("Ordinance;" OMC chapter 15.78). In the Ordinance's recitals, the City offers findings outlining the need for, and purpose of, the Ordinance. Among other things, City found:

- "public art enhances the quality of life for Oakland's citizens, residents, visitors and businesses …."
- "the legislative requirement to provide either art or an in lieu [that] generally applies to all developers … is a permissible land use regulation and a valid exercise of the City's traditional police powers."
- "the City has broad authority, under its general police power, to regulate the development and use of real property … to promote the public welfare."
- "through the inclusion of public art or payment of an in lieu fee, developers of benefitting land uses will address at least a portion of the impact of their developments on aesthetics."

PRACTICE TIP: *California Bldg. Indus. Assn. v. City of San Jose*, *supra*, 61 Cal.4th 435, 460-61 explicitly holds that similar regulations need only advance the community's general welfare, and need not mitigate specific impacts created by projects. Public art ordinances should recognize that constitutional standard. Nevertheless, some communities also adopt findings that explain how the ordinance does mitigate project-related impacts.

The Ordinance thus establishes a policy requiring owners and developers of specified private developments that are subject to the City's design review process "to use a portion of building development costs for the acquisition and installation of freely accessible works of art for placement on the development site or on the right of way adjacent to the development site … as a condition of project approval."

The Ordinance provides for (1) nonresidential developments involving 2,000 or more square feet of new floor area to devote 1% of building development costs to publicly-accessible art, and (2) residential projects involving 20 or more dwellings to devote 0.5% of building development costs to publicly-accessible art. § 15.78.070(A). Developers may opt to pay an in-lieu fee. § 15.78.070(B).

PRACTICE TIP: To avoid a claim that the ordinance authorizes third persons onto otherwise private property in violation of *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 426, 435 (1982), public art ordinances should be clear that the art need only be visible from areas that the property owner otherwise keeps open to the public.

The Ordinance includes an appeal procedure, through which the City Administrator may reduce or eliminate the contribution requirement. § 15.78.080.

PRACTICE TIP: Providing a meaningful administrative appeal can make it difficult to state a viable facial claim. *Home Builders Association of Northern California v. City of Napa*, 90 Cal.App.4th 188, 194 (2001); *San Mateo County Coastal Landowners Assn. v. County of San Mateo*, 38 Cal.App.4th 523, 547 (1995).

4. BIABA's New Challenge To Public Art Requirements: *Building Industry Association-Bay Area v. City of Oakland*.

BIABA sued to challenge the Ordinance. BIABA's lawsuit alleges two claims:

First, it contents the Ordinance constitutes a taking in violation of the unconstitutional conditions doctrine described in the "*Nollan*/*Dolan*/*Koontz*" line of cases.

Second, it contends the Ordinance, by requiring developers and property owners to install art (which is protected speech) visible in publicly accessible areas, constitutes "compelled speech," in violation of the First Amendment under cases such as *Wooley v. Maynard*, 430 U.S. 705 (1977).

The District Court granted the City's motion to dismiss, and BIABA's appeal is pending before the Ninth Circuit. We explain below why the District Court's decision was correct.

A. The City's Public Art Ordinance Does Not Constitute A Taking Or An Unconstitutional Condition Because It Does Not Impose An Exaction.

As was the argument 20 years earlier in *Ehrlich*, BIA--Bay Area's ("BIABA") challenge to Oakland's public art ordinance again asserts a *Nollan*/*Dolan* taking claim. This claim is premised on the assumption, required for liability under *Nollan*/Dolan, that public art requirements impose an exaction. BIABA has framed its appeal as follows:

> Whether BIABA states a valid claim that a City of Oakland (City) ordinance (Ordinance) imposes an **unconstitutional exaction** on property owners, in violation of the principles set out in *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987), and *Dolan v City of Tigard*, 512 U.S. 374 (1994), by requiring them to purchase and display art, or pay an in-lieu fee, in order to obtain development permits?

(Emphasis added.)

BIABA subsequently doubles down on that point as follows:

> The Ordinance is specifically designed and intended to **exact** public art (in the amount of .5% or 1% of development costs) from developers before they can obtain permits.

(Emphasis added.)

Later, BIABA continues:

> Contrary to the City's position, **the Ordinance's public art requirements qualify as exactions** subject to review under *Nollan* and *Dolan*. The Ordinance is not a standard land use restriction, like a zoning ordinance. *Cf. City of Monterey v. Del Monte Dunes at Monterey, Ltd.*, 526 U.S. 687, 703 (1999) (*Nollan*/*Dolan* not designed to apply when "the landowner's challenge is based not on excessive exactions but on denial of

> development"). It is expressly **designed to extract property** from developers to mitigate an alleged development impact. ER 85. As such, the Ordinance is constrained by *Nollan* and *Dolan*, despite its legislated and broad character. *Koontz*, 570 U.S. at 606; *Del Monte Dunes*, 526 U.S. at 703; *Commercial Builders of Northern California v. City of Sacramento*, 941 F.2d 872 (9th Cir. 1991).

(Emphasis added.)

BIABA explains its theory that the ordinance imposes an exaction as follows:

> The City's public art mandate is an exaction because it demands that developers install and perpetually maintain City-approved art on a publicly accessible portion of their properties, which is a textbook physical-occupation taking. See *Nollan*, 438 U.S. at 831–32 (granting the public a right in private property extinguishes fundamental rights therein and cannot be characterized as "a mere restriction on its use"); *see also Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 426, 435 (1982) (A regulation requiring owners of apartment buildings to allow cable company to install a 4" cable box and wires on their properties constituted a categorical physical taking.); *Kaiser Aetna v. United States*, 444 U.S. 164, 179–80 (1979) (government taking by declaring the public has a right to access private lagoon). The fact that the Ordinance vests ownership of the City-approved art in the property owner does not change the fact that the public access is a taking. Art is property. *Altmann v. Republic of Austria*, 142 F. Supp. 2d 1187, 1202–03 (C.D. Cal. 2001), *aff'd Republic of Austria v. Altmann*, 541 U.S. 677 (2004) (recognizing property interest in art). The owner of art has a right to exclude the public from his or her private holdings. *Nollan*, 438 U.S. at 831–32. Simply put, the Ordinance exacts property because it takes a part of a wall, a courtyard, or a foyer for public art, which constitutes an easement for public use. Since such an easement is a recognized and protected property interest, its compelled dedication under the Ordinance qualifies as an exaction of property.

Thus, BIABA's argument is that the public art requirement imposes an exaction simply because it is required to allow the public to view art that is privately owned by the developer or property owner from otherwise publicly accessible places. In addition, BIABA argues that the requirement constitutes a form of physical occupation taking under *Loretto*, simply because it allows the public to view the art that the developer or property owner always owns.

The City and *amici* have responded by pointing out that an exaction by definition, and in every case in which heightened scrutiny has been applied, is a requirement that that a project applicant convey or dedicate land or money to the government or to someone else. *Nollan* and *Dolan* are designed to address development **exactions**, i.e., demands for a transfer of property interests or money in exchange for development approvals. (*Koontz*, 570 U.S. at 604; *Lingle*, 544 U.S. at 546-547; *City of Monterey v. Del Monte Dunes at Monterey, LTD*, 526 U.S. 687, 702-703 (1999); *Dolan*, 512 U.S. at 385; *Ehrlich*, 12 Cal.4th at 886; *McClung v. City of Sumner* ("*McClung*"), 548 F.3d 1219, 1226-1228 (9th Cir. 2008).)

BIABA never explains, however, how the public art requirement satisfies the accepted and intuitive definition and concept of an exaction. Nor does it explain how the public art

requirement is anything other than a zoning regulation. For example, it is well-accepted that cities may require a developer to obtain, install and maintain landscaping so that the public may see it, in order to enhance the project's aesthetics. Similarly, projects may be required to purchase, install and maintain lighting and building materials for similar design/aesthetic reasons. Again, the California Supreme Court explained the point clearly in *Ehrlich*:

> [T]he requirement to provide either art or a cash equivalent thereof is more akin to traditional land use regulations imposing minimal building setbacks, parking and lighting conditions, landscaping requirements, and other design conditions such as color schemes, building materials and architectural amenities. Such aesthetic conditions have long been held to be valid exercises of the city's traditional police power, and do not amount to a taking merely because they might incidentally restrict a use, diminish the value, or impose a cost in connection with the property.

Ehrlich, 12 Cal.4th at 886.

As to BIABA's physical occupation argument, BIABA's reliance on *Loretto* is misplaced. In *Loretto*, the property owner was required to allow a third party to access and permanently use the owner's private property. Public art requirements do no such thing, and instead require only that property owners install and maintain art that they at all times own, for viewing by the public from areas that are otherwise designated by the owners as publicly accessible. In other words, *Loretto* does not apply because the ordinance does not require owners to allow third party artists to access the owners' property and install their art, nor does the ordinance require the owners to create additional areas for public access to view the owners' art.

In short, most public art ordinances act as run-of-the-mill zoning regulations that do nothing more that require developers to spend money to make (and keep) their projects more attractive. They are not exactions because they take nothing and do not require a conveyance. And the are not physical occupations because they do not require or allow the public onto or into any areas that are not otherwise accessible to the public.

B. Heightened Scrutiny Under *Nollan*/*Dolan Koontz* Applies Only To Ad Hoc, Adjudicative Decisions, Not To Facial Claims To Legislation.

Even if the Ordinance imposed an exaction (it does not, as discussed above), heightened scrutiny under *Nollan*/*Dolan*/*Koontz* is limited to situations involving the imposition of exactions through ad hoc, adjudicative land use decisions. It does not apply to exactions imposed legislatively across the board to all projects.

The District Court ruled explicitly on this point:

> But the Supreme Court has only applied this exactions doctrine in cases involving a particular individual property, where government officials exercised their discretion to require something of the property owner in exchange for approval of a project. And the Court has consistently spoken of the doctrine in terms suggesting it was intended to apply only to discretionary decisions regarding individual properties. See, e.g., *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528, 546–47 … . Moreover, the Ninth Circuit and the

> California Supreme Court have expressly stated that a development condition need only meet the requirements of *Nollan* and *Dolan* if that condition is imposed as an "individual, adjudicative decision." *McClung v. City of Sumner*, 548 F.3d 1219, 1227 (9th Cir. 2008)… .

What is the basis for the distinction between exactions imposed legislatively and on an ad hoc basis? In *San Remo Hotel L.P. v. City and County of San Francisco*, 27 Cal.4th 643 (2002), the California Supreme Court provided the following explanation:

> A city council that charged extortionate fees for all property development …would likely face widespread and well-financed opposition at the next election. Ad hoc individual monetary exactions deserve special judicial scrutiny mainly because, affecting fewer citizens and evading systematic assessment, they are more likely to escape such political controls.

San Remo Hotel, 27 Cal.4th at 671. The Court reiterated this rationale in 2015 in *CBIA v. San Jose*, 61 Cal.4th at 460-61.

Indeed, as the District Court pointed out, the majority and concurring opinions in *Ehrlich*, 12 Cal. 4th 854, 876–81; 899–900 make the same point:

> [W]hen the fee is ad hoc, enacted at the time the development application was approved, there is a greater likelihood that it is motivated by the desire to extract the maximum revenue from the property owner seeking the development permit, rather than on a legislative policy of mitigating the public impacts of development or of otherwise reasonably distributing the burdens of achieving legitimate government objectives.

The Supreme Court in *Penn Central* says the same thing: In contrast to cases of individualized, ad hoc exactions, when an ordinance applies to "a large number of parcels," there are "assurances against arbitrariness." *Penn Central Transportation Co. v. City of New York*, 438 U.S. 104, 135 n. 2 (1978).[7]

Presaging possible future Supreme Court input on the issue, the District Court stated:

> Perhaps reasonable arguments could be made for expanding the reach of the exactions doctrine so that it can be invoked in facial challenges to a generally applicable regulations, rather than merely discretionary decisions regarding an individual property by land-use officials. *See Calif. Building Industry Association v. City of San Jose*, —– U.S. ——, 136 S.Ct. 928, 928–29, 194 L.Ed.2d 239 (2016) (Thomas, J., concurring in cert. denial). But the point, for purposes of this motion, is that it would be an expansion

[7] The District Court also rejected BIABA's argument that *Levin v. City and County of San Francisco*, 71 F.Supp.3d 1072, 1083 n. 4 (N.D. Cal. 2014) required it to apply the exactions doctrine in a facial challenge, essentially holding that *Levin* had misconstrued *Koontz*. 289 F.Supp.3d at 1058-59. At the hearing on the City's motion to dismiss, in discussing *Levin*, Judge Chhabria noted that he had written the ordinance that Judge Breyer had invalidated in *Levin*. In his subsequent written opinion, Judge Chhabria, tongue well in cheek, characterized the ordinance as "**well-drafted**." 71 F.Supp.3d at 1058 (emphasis added).

> of the doctrine. If that occurs, it should be in the Supreme Court, not the Northern District of California.

Having ruled out the applicability of heightened scrutiny under *Nollan*/*Dolan*/*Koontz*, the District Court ruled that the Ordinance was subject to, and easily satisfied the takings review standard applicable to all generally-applicable zoning regulations under the *Penn Central* decision:

> Since the ordinance applies generally to a broad swath of nonresidential and multifamily developments, whether the ordinance facially violates the Takings Clause should be evaluated under the regulatory takings framework. But the Association has not (and cannot) plead a viable facial regulatory takings challenge to the ordinance, because—at a minimum—the fee required by the ordinance is no more than one percent of building development costs. *See Penn Central Transportation Co. v. City of New York*, 438 U.S. 104, 124 … (1978). This cost, which is only triggered if a developer chooses to build certain types of nonresidential and multifamily construction, does not cause a large enough loss of value to amount to a facial regulatory taking. *See Keystone Bituminous Coal Association v. DeBenedictis*, 480 U.S. 470, 495 … (1987); Penn Central, 438 U.S. at 124–26.

289 F.Supp.3d at 1059.

As a corollary to the rule that *Nollan*/*Dolan*/*Koontz* do not apply to exactions that are imposed on all projects through generally-applicable legislation, the Ninth Circuit has similarly ruled that a plaintiff simply cannot present a facial claim under the *Nollan*/*Dolan*/*Koontz*. For example, in *Garneau v. City of Seattle*, 147 F.3d 802, 811, 812 ("*Dolan* applies only to as-applied takings challenges, not to facial takings challenges," because whether any exaction is roughly proportionate to the impacts of development necessarily requires consideration of particular facts regarding a project, and because a take by an exaction can only occur when the legislation is applied); *Mead v. City of Cotati*, 389 F.App'x 637, 638–39 (9th Cir. 2010) (facial takings challenge to an inclusionary zoning ordinance that requires developers to incorporate affordable housing into projects or pay an in-lieu fee is not permitted under the *Nollan*/*Dolan* doctrine; whether the ordinance could violate the Takings Clause requires a fact-specific inquiry that may only be made in an as-applied challenge); *Tahoe-Sierra Pres. Council* 216 F.3d 764, 772 n.11 (9th Cir. 2000), aff'd 535 U.S. 302 (2002), overruled on other grounds in *Gonzalez v. Arizona*, 677 F.3d 383, 388 (9th Cir. 2012) (*Nollan*/*Dolan* framework only applies to regulatory takings claims predicated on approval conditions requiring dedication of property to public use).[8]

[8] The Tenth Circuit concurs, as does the California Supreme Court. *Alto Eldorado* Partnership v. City of Santa Fe, 634 F.3d 1170,1178-79 (10th Cir. 2011) (plaintiff could not present a facial challenge under *Nollan*/*Dolan* to ordinance requiring developers to include affordable housing in new subdivisions or to pay an in-lieu fee, including because (i) regulating the manner in which developers use land, even if costly, is not the equivalent of a per se take subject to *Nollan*/*Dolan*, (ii) the *Nollan*/*Dolan* doctrine protects the right to just compensation and does not provide for a facial claim to invalidate legislation, and (iii) plaintiffs' theory is an improper attempt "to turn *Nollan* and *Dolan* into loopholes in the *Lingle* rule that challenges to regulation as not substantially advancing a legitimate governmental interest are not appropriate under the Takings Clause); *CBIA v. San Jose*, 61 Cal.4th at 460-61 (plaintiffs could not present facial challenge under *Nollan*/*Dolan* to ordinance that requires developers to incorporate affordable housing into projects or to pay an in-lieu fee); accord *Ehrlich*, 12 Cal.4th at 868-69, 885-86 (rejecting application of *Nollan*/*Dolan* to legislatively imposed requirement to incorporate art into project or pay in-lieu fee).

Indeed, in *Nollan*, *Dolan* and *Koontz* themselves, the Supreme Court held that a fact-specific inquiry is necessary to determine if the nexus and rough proportionality test is met. *Nollan*, 483 U.S. at 825; *Dolan*, 512 U.S. at 374; *Koontz*, 570 U.S. at 618; *Garneau*, 147 F.3d at 807, 811; *Mead*, 389 F.Appx. at 638-39 ("[T]he proper framework for analyzing whether such a fee constitutes a taking is the fact-specific inquiry developed by the Supreme Court in *Penn Central Transportation Co. v. City of New York* …."); see also *Koontz Coalition v. City of Seattle*, 2014 WL 5384434 at *4 (W.D. Wa. 2014) ("this 'inquiry cannot be made in a vacuum'").

In sum, the City argued, and the District Court agreed, that under Ninth Circuit precedents and persuasive authority, a facial challenge to legislation may not be brought under the *Nollan*/*Dolan*/*Koontz*. Such a fact-intensive inquiry can only take place in the context of an as-applied challenge.

BIABA contends on appeal that the Ninth Circuit ruled in *Commercial Builders of N. Cal. v. City of Sacramento*, 941 F.2d 872 (9th Cir. 1991), that a facial *Nollan*/*Dolan* challenge may be made to legislation. That argument lacks merit.

In *Commercial Builders*, the Ninth Circuit assumed without deciding that a facial *Nollan*/*Dolan* case could be made (and, in any event rejected the takings challenge). Thus, the case is of no precedential value for BIA's proposition that it may present a facial challenge, and it yields to the on-point authority discussed above. *Hart v. Massanari*, 266 F.3d 1155, 1171 (9th Cir. 2001) ("Once a panel resolves an issue in a precedential opinion, the matter is deemed resolved, unless overruled by the court itself sitting en banc, or by the Supreme Court").

In sum, in many cases since *Commercial Builders*, the Ninth Circuit has unequivocally held, as have other courts, that *Nollan*/*Dolan* does not apply to facial challenges.

C. BIABA's New Theory: Public Art Requirements Constitute Compelled Speech In Violation of the First Amendment.

(1) The Protections of the First Amendment Do Not Apply to the Ordinance Because It Does Not Regulate Speech or Implicate "Expressive Conduct."

As noted above, BIABA argues that because all art is protected speech, the Ordinance's requirement that developers purchase, display and maintain art compels developers' speech in violation of the First Amendment. As we discuss below, that is not the case. But BIABA's First Amendment claim fails for a preliminary, more fundamental reason.

The first step in the analysis is whether the Ordinance regulates conduct or speech at all. The City argues that where, as here, the Ordinance does not regulate speech, and only regulates conduct, First Amendment protection does not apply to conduct that is not "inherently expressive." *Rumsfeld v. Forum for Academic & Institutional Rights, Inc.*, 547 U.S. 47, 62 (2006) ("*FAIR*"); *Interpipe Contracting, Inc. v. Becerra*, 898 F.3d 879, 896 (9th Cir. 2018).

Conduct is inherently expressive if it "is intended to be communicative and ... in context, would reasonably be understood by the viewer to be communicative." *Feldman v. Arizona Secretary of State's Office*, 843 F.3d 366, 386-387 (9th Cir. 2016) (*citing Clark v. Cmty. for Creative Non-Violence*, 468 U.S. 288, 294 (1984)). For instance, burning the American flag and wearing an unauthorized military medal are expressive conduct within the scope of the First Amendment. *Feldman*, 843 F.3d 366, 386-387 (*citing Texas v. Johnson*, 491 U.S. 397, 406 (1989), and *United States v. Swisher*, 811 F.3d 299, 314 (9th Cir. 2016) (*en banc*)). Regulations on non-expressive conduct will not implicate the First Amendment even if the conduct was in part initiated, evidenced, or carried out by means of language, whether spoken, written, or printed. *National Assn. for Advancement of Psychoanalysis v. California Bd. of Psychology*, 228 F.3d 1043, 1053 (9th Cir. 2000).

Thus, "Congress . . . can prohibit employers from discriminating in hiring on the basis of race. The fact that this will require an employer to take down a sign reading "White Applicants Only" hardly means that the law should be analyzed as one regulating the employer's speech rather than conduct." *FAIR*, 547 U.S. at 62. Stated another way, not every regulation of conduct that indirectly affects protected speech gives rise to a First Amendment claim. See, e.g., *Arcara v. Cloud Books, Inc.*, 478 U.S. 697, 706-07 (1986) ("One liable for a civil damages award has less money to spend on paid political announcements or to contribute to political causes, yet no one would suggest that such liability gives rise to a valid First Amendment claim").

The Ordinance is wholly focused on conduct, not speech. It simply requires project developers to include some form of art in the publicly-accessible areas of their projects, or at some off-site location, or to pay an in-lieu fee so the City can choose and display art elsewhere. It does not prohibit anyone from speaking about any issue. To the extent the Ordinance requires projects to include some speech, in the form of art, it reserves that choice solely and exclusively to the project developer. It also gives applicants the ability to install no art by choosing the in-lieu fee.

The fact that the Ordinance incidentally "involves" art as protected speech is of no First Amendment significance. Subjecting every incidental impact on speech to First Amendment scrutiny "would lead to the absurd result that any government action that had some conceivable speech-inhibiting consequences, such as the arrest of a newscaster for a traffic violation, would require analysis under the First Amendment." *Arcara*, 478 U.S. at 708 (O'Connor, J., concurring). BIA cites no case suggesting that legislation like the Ordinance that is focused on conduct, not speech, warrants First Amendment protection, and we have found none.

BIABA thus must, but cannot, establish that the act of developing real property is inherently expressive. However, BIABA makes no such argument, nor has it ever cited any case that supports such a notion.

Moreover, the decision in *Committee for Responsible Regulation of Lake Tahoe v. Tahoe Regional Planning Agency*, 311 F.Supp.2d 972 (D. Nev. 2004) ("*CFRR*") strongly suggests otherwise. There, in a facial First Amendment challenge to building design regulations, the Court held that in the absence of allegations that BIA's members intend to convey some message in their projects' architecture and design, the Court would assume the contrary is true. The Court thus concluded:

> Typically, a person remodeling her house has no intent to convey a particular message, nor is any particular message likely to be understood by those who view it. Although some residential remodels or rebuilds may involve an intent to convey an artistic, political, or self-expressive message, the great majority of remodeling or rebuilding projects involving residential housing are functional in nature and are not commonly associated with expression. Since plaintiff brings a facial challenge, we find that the ordinance does not on its face implicate patently expressive or communicative conduct.

Id. at 1004-05.

As in *CFRR*, BIABA neither alleges nor argues that its members' development projects are inherently expressive. Rather, as in *CFRR*, BIABA's members' projects are functional in nature and not associated with expression.

In short, the Ordinance does not regulate speech, and the conduct at issue is not inherently expressive. Under *FAIR* and its progeny, BIA's First Amendment claim fails for this reason alone.[9]

(2) If BIABA's First Amendment Challenge Warrants Some First Amendment Scrutiny, the Relaxed Rational Basis Standard Applies.

The District Court disagreed with the foregoing argument, that under *FAIR*, the Ordinance does not implicate the First Amendment at all. Instead, because the Ordinance requires project developers to purchase and display art, which is protected by the First Amendment, the Ordinance is subject to some level of First Amendment protection. However, the District Court concluded that because the Ordinance regulates neither speech nor expressive conduct, deferential rational basis review applies. 289 F.Supp.3d at 1059-60 (quoting Justice Breyer's concurring opinion in *Expressions Hair Design v. Schneiderman*, __ U.S. __, 137 S.Ct. 1144, 1152 (2017), for the proposition that "virtually all government regulation affects speech"); see also *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626, 651 (1985); *Beeman v. Anthem Prescription Mgmt., LLC*, 58 Cal.4th 329, 363-64 (2013). The District Court then correctly concluded that the Ordinance easily satisfies that relaxed standard because it serves to advance the City's interest in aesthetics and increasing property values, and to mitigate the adverse effects development can have on both. *Id*., *citing Berman v. Parker*, 348 U.S. 26, 33 (1954), and *Village of Euclid, Ohio v. Ambler Realty Co.*, 272 U.S. 365, 388–89 (1926); *see also CFRR*, 311 F.Supp.2d at 1006.

Thus, the City's position is that under *FAIR* the Ordinance does not implicate the First Amendment at all, but that if any degree of First Amendment scrutiny is warranted, it is rational basis, as the District Court concluded, based on the cases it cited.

Without discussing the District Court's decision with respect to the standard of review, or the cases cited, BIABA argues that the Ordinance should be subjected to "exacting" scrutiny. BIABA cites but one case, the Supreme Court decision in *Janus v. AFSCME*, 138 S.Ct. 2448,

[9] The District Court rejected the City's argument that the ordinance was not entitled to any First Amendment protection, and instead upheld the ordinance based on what it concluded was a deferential rational basis review standard. 289 F.Supp.3d at 1059-60.

2464-65 (2018).[10] The City's view is that *Janus* does not support BIA. *Janus* was a compelled subsidy case in which non-union public employees objected to a requirement that they pay an "agency fee" to the union whose political positions they opposed. *Janus* applied exacting scrutiny specifically and explicitly because the required agency fee subsidy constituted a "significant impingement" on the non-union employees' First Amendment right not to subsidize political views with which they disagree. *Id*. at 2464. Because BIABA can show no such significant impingement with respect to the Ordinance here, which reserves to developers to exclusive discretion to choose their art and its content, or if they choose, to display no art and instead pay an in-lieu fee, rational basis is the applicable review standard.

(3) The Oakland Ordinance Does Not Compel Speech.

BIABA argues that the Ordinance compels speech, citing *Wooley v. Maynard*, 430 U.S. 705 (1977) and other decisions. But compelled speech principles under *Wooley* have no application here. The Ordinance's requirement to incorporate art into development projects over a certain size, or pay an in-lieu fee, is a well-settled form of land use regulation on the design of development, and on its face compels neither speech nor expression.

The "right of freedom of thought protected by the First Amendment against state action includes both the right to speak freely and the right to refrain from speaking at all." *Wooley*, 430 U.S. at 714; see also *FAIR*, 547 U.S. at 61 ("freedom of speech prohibits the government from telling people what they must say"). The government may not select a factual or ideological message and force a person or entity to speak or host it. *FAIR*, 547 U.S. at 62; *Riley v. Nat'l Fed'n of the Blind*, 487 U.S. 781, 796 (1988). Thus, for example, when a person is ordered to say the pledge of allegiance or is criminally punished for refusing to disseminate a government-approved ideological slogan, the State "invades the sphere of intellect and spirit" that is "reserve[d] from all official control." *Wooley*, 430 U.S. at 715. The government may not compel people or entities "to profess a specific belief." *Agency for Int'l Dev. v. All. for Open Soc'y Int'l, Inc.*, 133 S.Ct. 2321, 2330 (2013); see also *Riley*, 487 U.S. at 795-96 (invalidating statute that required charitable fundraisers to deliver specific, government-favored factual information in the course of their "fully protected speech"). The test "is whether the individual is forced to be an instrument for fostering public adherence to an ideological point of view he finds unacceptable." *Frudden v. Pilling*, 742 F.3d 1199, 1205 (9th Cir. 2014) (invalidating a public school regulation that required students to wear a uniform bearing the mandatory message "Tomorrow's Leaders," quoting *Wooley*).

The Ordinance in no manner compels any particular message. It simply requires BIABA's members to either provide some art on or off their project sites or pay an in-lieu fee. That is no different from requiring BIABA's members to adhere to design and other zoning standards. See *Ehrlich*, 12 Cal.4th at 885-886 (public art requirements are "akin to traditional land use regulations imposing minimal building setbacks, parking and lighting conditions, landscaping

[10] In *Janus*, the Supreme Court recounted past cases that had applied an intermediate "exacting" scrutiny short of strict scrutiny to compelled speech, and that under such "exacting" scrutiny, a compelled subsidy must "serve a compelling state interest that cannot be achieved through means significantly less restrictive of associational freedoms." 138 S.Ct. at 2464-65. The *Janus* Court expressed skepticism whether that standard is correct, but did not resolve the issue, deciding instead that the Illinois agency shop "scheme" did not even satisfy the most relaxed scrutiny. *Id*.

requirements, and other design conditions such as color schemes, building materials and architectural amenities"); see also *CFRR*, 311 F.Supp.2d at 1005. The Ordinance on its face does not dictate what art is required or acceptable, or might be approved or rejected during design review.

The decision in *FAIR* is instructive again, to illustrate that the Supreme Court finds a compelled speech violation only where, unlike the case here, speech is actually compelled in a manner that offends the principles above. In *FAIR*, several law schools brought a compelled speech challenge against a federal statute (the Solomon Amendment) requiring them to give military recruiters the same access to students as all other civilian recruiters. In rejecting that argument, the Supreme Court observed that "[t]he compelled speech to which the law schools point is plainly incidental to the Solomon Amendment's regulation of conduct ..." and explained that "[c]ompelling a law school that sends scheduling e-mails for other recruiters to send one for a military recruiter is simply not the same as forcing a student to pledge allegiance, or forcing a Jehovah's Witness to display the motto 'Live Free or Die,' and it trivializes the freedom protected in [*Board of Education v.*] *Barnette* [(1943) 319 U.S. 624] and *Wooley* [v. *Maynard* (1977) 430 U.S. 705] to suggest that it is." *FAIR*, 547 U.S. at 62 (emphasis added).

By its use of the verb "trivialize," the Court affirmed what eludes BIA here—that not every law that implicates speech in some way violates the Constitution. Rather, *FAIR* establishes that while many laws implicate speech in some manner, only those laws that actually force someone to support, profess, or adhere to a specific belief, will violate compelled speech principles. The Ordinance does no such thing.

To the extent BIABA argues the Ordinance compels its members' speech by requiring them to allow artists' work to occupy their property, that argument fails under settled law. A regulation does not violate the compelled speech doctrine simply by requiring a property owner to allow another person or organization onto the owner's property to express their speech, because the owner remains free to disassociate himself from those views and is "not ... being compelled to affirm [a] belief in any governmentally prescribed position or view." *FAIR*, 547 U.S. at 64-65 (*citing PruneYard Shopping Center v. Robins*, 447 U.S. 74 (1980)); *see also Environmental Defense Center v. E.P.A.*, 344 F.3d 832, 849-50 (9th Cir. 2003) (rejecting *Wooley* compelled speech claim where regulation did not compel specific speech, and the regulated bodies were not prohibited from expressing their own views). Here, the Ordinance does not even go that far, in that it reserves to developers the sole discretion to choose their art, and thus the content of the speech.

BIABA cites *Constr. & Gen. Laborers' Local Union No. 330 v. Town of Grand Chute*, 834 F.3d 745, 754 (7th Cir. 2016), for the proposition that there "are negative reactions even to great art." The City does not dispute this general point, even though it was dictum and was not raised in anything even remotely resembling the factual context of this case. But the point is of no relevance, as both the *FAIR* and *PruneYard* decisions found no compelled speech violation even though the plaintiffs held negative views of the speech they were required to host.
The Ordinance compels no speech at all, much less any specific speech. To the extent any of BIABA's members may be concerned that they may somehow be associated with a "negative" message that the on-site art they themselves chose is important or even good, they have full

power to post or otherwise spread their own message disassociating themselves from art generally or as installed on site.

Further, through the in-lieu fee option, the Ordinance allows property owners to choose not to provide any art at all, allowing them to opt out of speech.

BIABA also cites several cases for the similarly uncontroversial proposition that the First Amendment protects art, *citing White v. City of Sparks*, 500 F.3d 953, 954, 956 (9th Cir. 2007) and other cases. BIABA's point, apparently, is that because the First Amendment protects art, BIABA and its members have the First Amendment right not to buy or display it. No case supports this argument, and BIABA offers none. As established above, the mere fact that the Ordinance concerns art does not mean it compels speech or otherwise gives rise to a First Amendment claim. *FAIR*, 547 U.S. at 62; *Arcara*, 478 U.S. 697, 706-707.

The Ordinance does not limit or regulate art, as was the situation in BIABA's cases. It promotes it. While the First Amendment would preclude the City from requiring BIABA's members to purchase and install the art work of the City's preferred artists, it is not implicated by the Ordinance's requirement that project applicants either buy and show art of their own unilateral choice, or pay an in-lieu fee.

To the extent BIABA also argues that the Ordinance's in-lieu fee forces them to subsidize a message with which they disagree, that argument fails. First, BIABA incorrectly characterizes the in lieu fee as compulsory. It is not, but instead is available as an alternative project which applicants may in their total and unilateral discretion select if they would prefer not to acquire and display art at their projects or at another location. Even if the fee were compulsory, under the government speech doctrine, compelled subsidies are permissible when they are used to fund government speech. *Johanns v. Livestock Marketing Ass'n*, 544 U.S. 550, 562 (2005) (assessment on beef sales/importation used to support government beef promotional campaigns). Individuals cannot object to compelled subsidies where the government exercises "effective control" over the challenged speech. *See Delano Farms Co. v. Cal. Table Grape Comm'n*, 586 F.3d 1219, 1223 (9th Cir. 2009) (assessments on shipments of grapes used to fund generic grape promotional activities by state commission). As BIABA must concede, under the Ordinance the City exercises not just "effective control," but complete control over the in lieu fees and the art it funds.

While BIABA suggests the City may in its application of the Ordinance dictate the selection of either the art or the artists, that worry is not before the Court in this facial challenge. BIABA may not predicate a facial claim on speculation how the Ordinance might be applied in the future. *Koontz Coalition*, 2014 WL 5384434 at *5; *cf. Thomas v. Anchorage Equal Rights Comm'n*, 220 F.3d 1134 (9th Cir. 2000) (facial free speech challenge to legislation prohibiting advertising referencing a marital status preference not justiciable); *Hallandale Professional Fire Fighters Local 2238 v. City of Hallandale*, 922 F.2d 756, 760-61 (11th Cir. 1991) (no justiciable controversy where plaintiff has not demonstrated present injury caused by guidelines governing criticism of public officials).

In short, no case has suggested that the imposition of art and design requirements as a part of a city's regulation of land use development applications constitutes compelled speech. Indeed, as in *FAIR*, the very argument "trivializes" those decisions which did involve actual compelled speech.

5. Conclusion.

For 23 years, cities nationwide have relied on the decision in *Ehrlich* not only with specific respect to art in public places ordinances, but also more broadly with respect to all land use regulations that impose costs on developers that advance the public's interest in ensuring that development satisfies a community's aesthetic standards. In *BIABA v. City of Oakland*, BIABA would undermine that reliance, and set back the constitutional assumption on which *Ehrlich* was based. Moreover, BIABA would introduce a new First Amendment compelled speech threat.

Essential Skills: Developing the City Attorney and City Council Relationship

Wednesday, May 8, 2019 General Session; 3:15 – 4:45 p.m.

Attorney Development and Succession Committee Members with help from a few friends

DISCLAIMER: *These materials are not offered as or intended to be legal advice. Readers should seek the advice of an attorney when confronted with legal issues. Attorneys should perform an independent evaluation of the issues raised in these materials.*

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Notes:_____

Orienting New Council Members to the Role of the City Attorney

Attorney Development and Succession Committee
League of California Cities
Spring 2019 Conference

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Introduction

This presentation and paper are designed to provide you with information on how to prepare an orientation for new Council Members to introduce them to your role as the City Attorney. By providing an introduction to the legal framework and encouraging Council Members to communicate often and early about any questions or concern, you will avoid, or at least reduce, the number of surprises in a public meeting. New Council Members may be unfamiliar with the role of the City Attorney and may not understand that the City Attorney does not serve each Council Member individually. Furthermore, a Council Member may have expectations that exceed the scope of what the City Attorney may be allowed to do.

To help avoid these problems, this paper and the panel attempt to help the City Attorney educate new Council Members regarding the role of the City Attorney and key laws early in order to avoid legal and ethical violations. It is important to inform Council Members of the consequences of their actions, which may involve fine or imprisonment, rescission of actions, or the appearance of impropriety. While the City Attorney helps the City Council navigate through legal issues, the City Attorney must understand the political dynamics of the City Council and maintain a relationship with each of the Council Members. The City Attorney must take great care to remain impartial because the City is the client, yet remain responsive to each Council Member because the City Attorney serves at the discretion of the City Council. In this current environment, where technology and social media make it easy for individuals to broadcast or comment about public meetings in real-time, the City Attorney is tasked with the increased pressure to respond immediately, concisely, and courteously while being recorded and uploaded to the Internet. This presentation is designed to help you meet those challenges.

This presentation is not just about educating Council Members on how they should act, but about how the City Attorney can act to prevent problems and address them when they eventually occur. The Committee has prepared three vignettes in which a beleaguered attorney's interaction with a new Council Member raises an ethical issue, conflict of interest, or waiver of the attorney-client privilege. After each vignette is acted out, a team of experts comprised of in-house and contract City Attorneys will discuss their experiences and perspectives in addressing each type of problem. The goal of these conversations is to demonstrate that each City Attorney will have a unique way to approach a delicate problem, and that there are various ways to solve them. It is our goal to provide you with different approaches and resources, so that you will be armed with more options in navigating through these challenging situations.

To that end, we have compiled sample policies on the relationship between the City Attorney and the City Council and sample City Council orientation materials. At the end, there is a list of websites links to additional orientation materials and local government resources. We hope this material will prove useful as you assess and design the content you would like to cover in your orientation with new Council Members given your City's needs and goals.

Attorney Development and Succession Committee
League of California Cities

Illustrating the Issues that Arise Between the City Attorneys and New City Council Members

Three Vignettes

Below are summaries of the three vignettes or illustrations of interactions between the City Attorney and a new Council Member that may arise and create a conflict to highlight issues to cover in orienting new Council Members. Each of these vignettes will be acted out. Then, a panel of experts, comprised of an in-house attorney at a small city, an in-house attorney at a large city, and contract attorneys will discuss the potential issues from each of their perspectives and how they would address them.

Vignette 1 – Summary

A new Council Member is upset that the City Attorney informed him at yesterday's Council meeting that he could not vote on a use that is located a block away from where the Council Member lives. The City Attorney must explain that the City Attorney serves the City, not any individual Council Member, and that certain laws preclude a Council Member from taking action on items in which he has a conflict of interest.

Vignette 2 – Summary

A new Council Member is upset with the outcome of a City Council decision to approve a use which he opposed. The Council Member is pressuring the City Attorney into reviewing a letter he has written to a newspaper editor opposing the use and has suggested that if the Attorney does not review the letter, the Attorney's job is at risk. The City Attorney must remind the individual Council Member that his or her client is the City. The City Attorney also wants to avoid the appearance that he or she is making a policy decision.

Vignette 3 – Summary

A new Council Member has asked the City Attorney for an update on what happened in a closed session at which the Council Member was not present. The Council Member requests that the City Attorney send future updates by text message directly to the Council Member. In the course of conversation, the City Attorney learns that the Council Member disclosed confidential information to her father. The City Council Member gives the City Attorney a gift certificate. The City Attorney must remind the individual Council Member of the importance of the confidential information the City Attorney provides and that gifts may be inappropriate.

The vignettes illustrate the various conflicts that can occur – the City Council Member's personal conflicts, a Council Member's confusion over who the City Attorney's client is, and the protection of the attorney-client privilege.

Sample Policies that Address the Relationship between the City Attorney & the City Council

City of Benicia

Under policy direction of the City Council, [the City Attorney] acts [as] a legal advisor to and a counsel for the City Council and City officials in matters relating to official City duties, may represent the City in litigation, and performs related work as required. The City Attorney serves as primary legal advisor to the City Council with day-to-day direction and general guidance of the City Manager. The position requires aggressive and creative problem solving ability and emphasizes practice of preventative law while keeping City Council and City Staff well informed and up to date on all matters regarding legal implementation, compliance and legislative impacts.

City of Davis

The City Attorney is the legal advisor for the City Council, City Manager and department heads. The general legal responsibilities for the City Attorney are to: 1) provide legal assistance necessary for formulation and implementation of legislative policies and projects, 2) represent the City's interest, as determined by the City Council, in litigation, administrative hearings, negotiations and similar proceedings, 3) prepare ordinances, resolutions, resolutions, contracts and other legal documents to best reflect and implement the purposes for which they are prepared and 4) to keep City Council and staff apprised of court rulings and legislation affecting the legal interest of the city.

City of Desert Hot Springs

The City Attorney is the chief legal advisor for the City and the City Council. The City Attorney is appointed by the City Council and is responsible directly to that body.

The City Attorney's office represents and advises the City Council, City Commissions, and City Officers on a wide range of legal issues pertaining to their offices. The City Attorney's office renders legal opinions as necessary, prepares and reviews memorandums, contracts, deeds, leases, permits and other legal documents necessary to transact the City's daily business.

Since the City Council also acts in a legislative capacity, the City Attorney prepares all proposed ordinances requested by the City Council. The City Attorney also prepares resolutions for the City Council and Planning Commission as required to memorialize their decisions.

Finally, the City Attorney's office represents and appears for the City in lawsuits in which the City is a party.

The City Attorney also functions as the City Prosecutor involving alleged violations of the Municipal Code.

City of Sacramento

A. The City Attorney provides legal counsel to the council, city manager, and all departments, offices, boards, and commissions of the city. The city attorney represents the city in litigation and prosecutes city code violations.

B. The City Attorney reports directly to the City Council. The City Council is responsible for hiring, evaluating, and terminating the City Attorney.

C. The City Attorney shall not cause or allow any practice, activity, decision, or organizational circumstance that is illegal, unethical, imprudent, or in violation of commonly accepted business and professional ethics.

D. The City Attorney shall provide applicable monitoring reports to the City Manager for consolidation into a comprehensive citywide report.

E. The City Attorney shall treat the council as a whole and be responsive to individual council members except where substantial resources are required to fulfill a request.

F. With respect to the council, the city manager, and those reporting directly to the council, the city attorney shall:

    1. Give his or her advice and legal opinion whenever necessary or deemed required.
    2. Inform the council and city manager of potential or future material legal issues impacting the city.
    3. Provide counsel to the council as well as to individual council members regarding conflicts of interest and ethical matters.
    4. Assist the council in complying with applicable statutes and laws.
    5. Inform the council of developments that have the potential of exposing the city to legal or reputational risk.

G. The city attorney shall not provide legal counsel to any council member or employee except in their official city capacity.

Specific Responsibilities of the City Attorney
(compiled from various sources)

- Prepares or reviews ordinances, resolutions, contracts, agreements, deeds, leases, pleadings and other legal documents
- Reviews all claims and serving as a board member or alternate to the joint risk authority and assisting with the various risk management functions
- Represents the City in court in civil matters or oversees outside attorneys representing the City and criminal matters such as *Pitchess* motions to protect the confidentiality of the personnel files of our police officers
- Provides advice to the City Council, Commissions, Boards and staff on the Brown Act, Public Records Acts, conflicts of interest, public contracting, insurance, financing and Proposition 218 (tax) issues, land use and environmental laws, employment and other municipal matters.
- Renders legal opinions to the City Council, City Manager, and City Staff as requested.
- Attends all City Council meetings and meetings of other boards and commissions as required and renders legal advice on matters on the agenda.
- Confers with and renders assistance to the City Manager and City Staff in establishing departmental policies by developing and applying legal points and procedures.
- Recommends changes in policies and procedures in order to meet legal requirements.
- Monitors and analyzes legislation affecting the City.
- Assists in resolving code enforcement issues and securing compliance.
- Assists in the conduct of legislative and administrative hearings conducted by the Council and Commissions.
- Prepares election documents for general and special municipal elections.
- Prepares, justifies, and administers the City Attorney's budget.
- Supervises and reviews the work of legal and clerical support staff.
- Assists with negotiations involving contracts, zoning issues and property transactions.

Sample Script about the City as the Client

Generally, the City Attorney is appointed by the City Council and serves at the pleasure of the City Council. The City Attorney's client is the City Council as an entity, acting through the City Council. Therefore, while the City Attorney may assist an individual Council member with legal issues, the Attorney's professional obligation is to the City as an entity, and not to any individual Council Member.

Sample Neutrality Script

Except for the few cities in California with elected city attorneys, most city attorneys do not get involved in politics to preserve their role as a neutral officer charged with rendering impartial opinions on legal matters. Therefore, please do not be offended if I do not attend fundraisers or other political events.

Policy of Placing Items on Agenda

OVERVIEW OF AGENDA PROCESS & STAFF REPORT DEADLINES

No single staff work product is more central to good decision-making than Staff Reports. Staff Reports help the City Council define projects, understand complex problems, consider alternative solutions and determine courses of action. Staff Reports forward recommendations involving public assets, and assure that our administrative processes are managed in a fair and open manner. In addition, Staff Reports are used by the public to understand and participate in the decision-making process of the community.

City Staff is expected to adhere to the *Agenda Guidelines Administrative Policy* that covers various aspects of the agenda preparation process, streamlines the process while providing internal flexibility, expeditious processing of City Council agenda items, ensuring coordination between Departments, effectively delegating of staff resources, compliance with the Ralph M. Brown Act.

We strive to maintain consistency in the delivery and appearance of agenda material when presented to the City Council, and City Boards, Committees, and Commissions.

Staff Reports are submitted and routed electronically for approvals through the SIRE System.

6.0 AGENDA PREPARATION

6.1. City Manager

It shall be the responsibility of the City Manager, assisted by the City Clerk, to prepare all City Council meeting agendas, including the various boards, committees or commissions that the City Council-body may sit as.

Requests for placement of an item on agenda must be submitted to the City Manager by staff.

The City Manager shall have sole discretion as to the agenda content, with the exception of those items submitted and/or requested by Council as per Exhibits A and A-1.

Exhibit A

WORKFLOW TO ADD ITEMS TO ANY CITY COUNCIL AGENDA

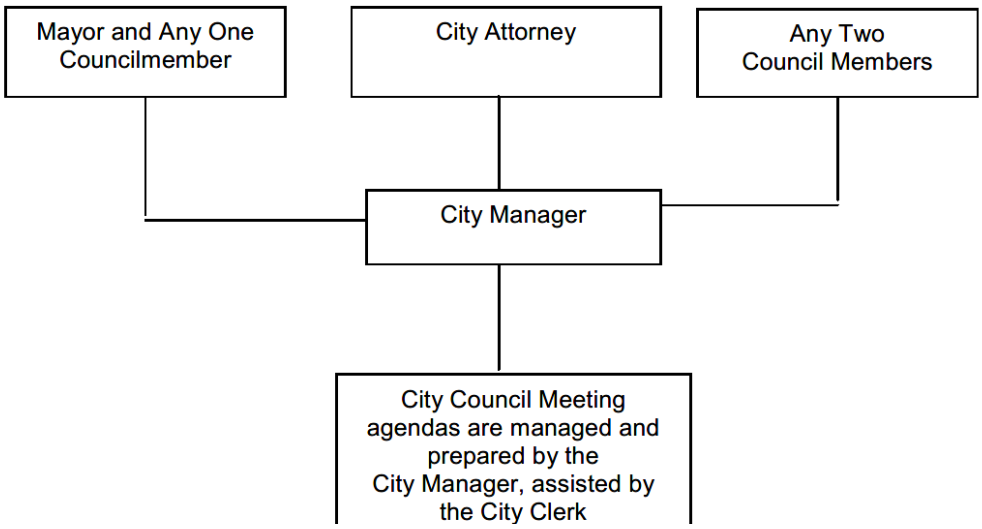
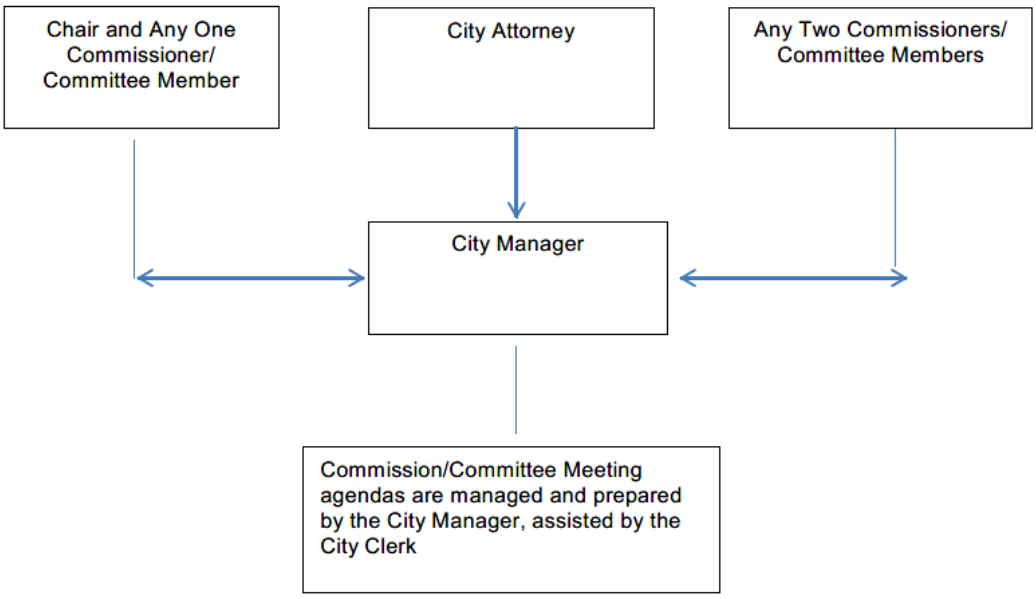


Exhibit A-1

WORKFLOW TO ADD ITEMS TO ANY COMMISSION OR COMMITTEE AGENDA



Agenda Guidelines

1. PURPOSE

This policy has been prepared in an effort to fully acquaint City staff with the various aspects of the agenda preparation process, streamline the process while providing internal flexibility, expedite processing of City Council agenda items, ensure coordination between Departments, effectively delegate staff resources, and to comply with the Ralph M. Brown Act.

We wish to maintain consistency in the delivery and appearance of agenda material when presented to the City Council, and City Boards and Commissions.

2. APPLICATION

This policy applies to all Departments and City employees, with accountability falling on the respective Department Head.

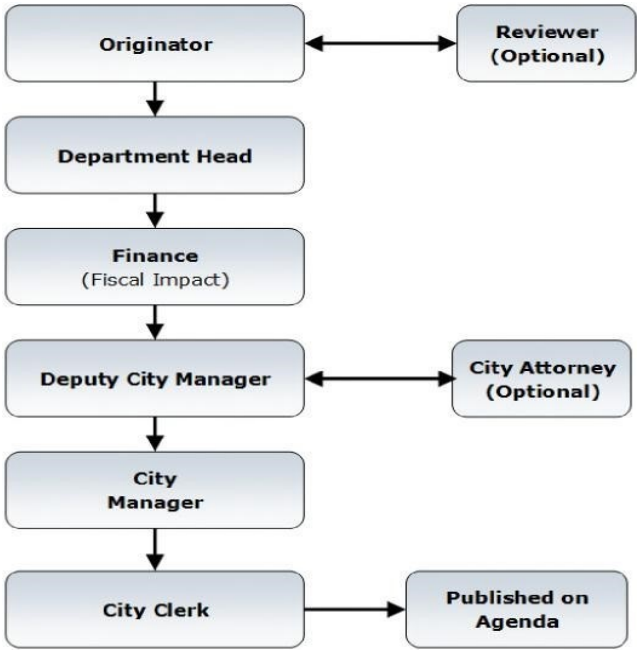
3. PROCESS & DEADLINES

Staff reports are submitted and routed electronically for approvals through the SIRE WebCenter System.

For instructions on how to enter a Staff Report, refer to the SIRE Agenda Workflow Manual.

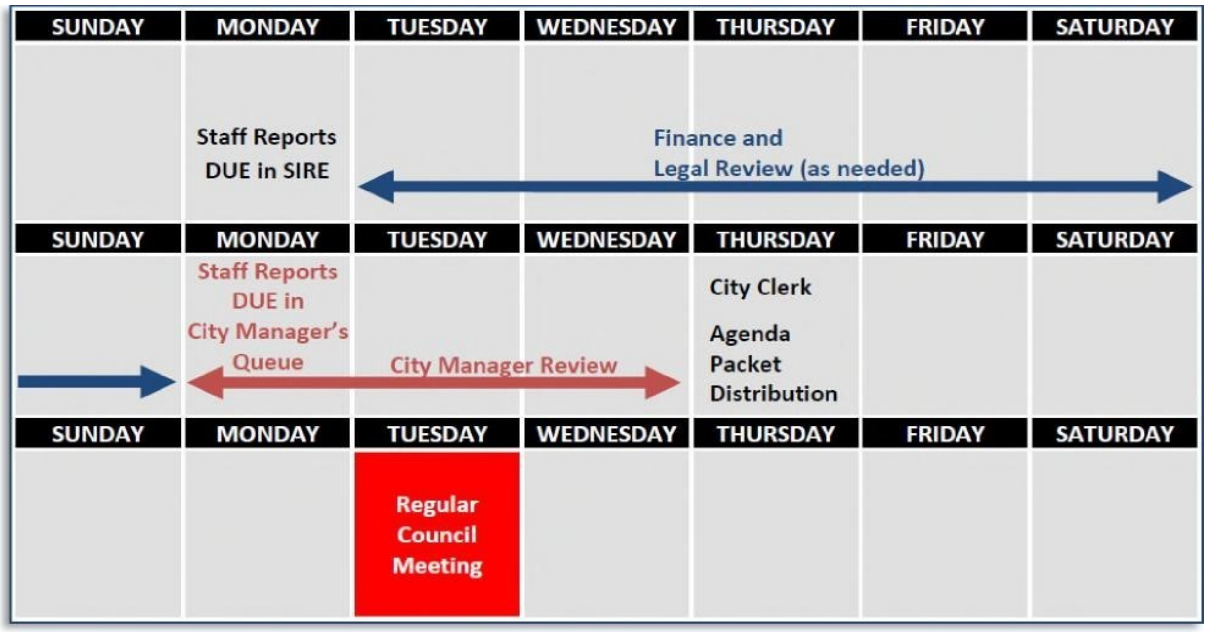
Long Range Agenda Planning (Executive Management Team Meetings)
On the 1st and 3rd Wednesdays of each month, designated staff members shall meet to discuss future agenda items.

SIRE Agenda Item Review and Approval Workflow:



Deadlines:

The agenda schedule is structured to ensure adequate time for review and to distribute a complete final agenda packet to the City Council Members by the end of the business day on Thursday.



1) **Monday (15 days prior to the City Council meeting):**

The initiating department (originator) shall enter agenda item title, recommendation, staff report, and supporting documentation (exhibits) in SIRE.

2) **Monday (8 days prior to the City Council meeting):**

The report will be examined for conformance to completeness of content, inclusion of exhibits, format, etc.

Generally, any agenda item requiring amendments to the staff report or incomplete staff reports or attachments after Tuesday will be removed and placed on the next available agenda.

3) **Thursday (prior to the City Council meeting):**

Following City Manager approval, agenda items shall be routed to the City Clerk for final compilation, website publication, and distribution. Posting of the agenda will be in accordance with the Brown Act.

Generally, any agenda item requiring amendments to the staff report or incomplete staff reports or attachments will be removed from the agenda and placed on the next available meeting.

Adherence to the Schedule:

Adherence to this schedule is necessary and expected. On the occasion when an item must be late, the originating department shall notify the City Clerk and obtain the approval of the City Manager or his/her designee.

Note Regarding Urgency Items:

- The City Council is prohibited from taking action on any item not appearing on the posted agenda unless a majority of the body determines that an "urgency" situation exists, and by a 2/3 vote that the need to take action came to the City's attention subsequent to the posting of the agenda, and there is an immediate need to take action on the item. **An item cannot be considered if the City Council or staff knew about the need before the agenda was posted.**

- Urgency Items must meet two requirements: 1) make the finding that the item came to the attention of the City after the posting of the Agenda and, 2) that there is an immediate need to take action on the item before the next regular City Council Meeting.

4. PLACEMENT

All agenda items fall under one of the following categories:

Presentations:

Proclamations, certificates of recognition and other forms of formal recognition initiated by the Mayor, a member of the City Council, or City Manager (or his/her designee) shall be listed on the agenda and presented during this time of the meeting.

Public Hearing:

Public hearings must be noticed in advance with both formal legal advertising and/or mailings. See *Public Notice Guidelines* under Reference Material or consult the City Clerk's Office and/or City Attorney's Office.

Consent Calendar:

The Consent Calendar is intended for non-controversial and routine items that can be approved by a single motion. (Example: minutes, treasurer's report, payment register, informational items, 2nd reading ordinances, etc.) Individual items will not be discussed or debated unless pulled from the Consent Calendar for discussion and separate action taken. Per City Council policy, agreements shall not be placed on the Consent Calendar.

Administrative Calendar:

This section is for all other items that do not fall into the other categories.

Sample City Council
Orientation Materials

Sample Orientation Outline I

THIS DOCUMENT IS SUBJECT TO THE ATTORNEY-CLIENT AND/OR ATTORNEY WORK PRODUCT PRIVILEGES. DO NOT STORE WITH PUBLICLY ACCESSIBLE RECORDS

TO: **CC:**

FROM:

DATE:

RE: Background and Pending Issues

Congratulations and welcome to the City Council! The following is a brief outline of some issues to cover during an initial orientation meeting. Please feel free to call or email anytime if you have follow up questions, or wish to discuss any legal matters.

CITY ATTORNEY'S OFFICE:

--Role of City Attorney

--General Counsel to the "corporation"

--work for Council as a whole, with CM and Department heads/staff

--conflict analysis "exception"

--Attend City Council meetings and other meeting as needed e.g. PC

--Legal document preparation/review

--Litigation (plaintiff v. defense, covered v. non-covered)

--Criminal Prosecution (civil enforcement v. City Prosecutor)

--Nuts and bolts

--Contract

--office hours

--office location

--Means of Communication—what is your preference?

--Other Law firm contracts for worker's comp, bond counsel, Civil Service, specialty litigation (tax, etc.), and conflict counsel (upcoming)

--City Charter

--comprehensive v. compact

--Municipal Affair v. matter of statewide concern

--Council powers

--sets policy

--individual vs. acting as a majority

--vote (impact of abstention), agenda setting policy

--City Manager form of Government

--implements policy

--chief personnel officer

--Highlight of some Legal Issues

--Brown Act (serial meetings, closed sessions)

--no meeting without agenda

--no private meeting unless closed session

--Conflicts (FPPC, 1090, common law, gifts)

--Attorney/Client communications/closed sessions

--City holds privilege

--Liability Issues (personal v. covered, privileges)

--indemnification if within scope

--Public Records Act (most documents, personal devices)

--Mass Mailing prohibitions

--Upcoming projects

[BRIEF DISCUSSION OF MAJOR UPCOMING COUNCIL AGENDA ITEMS]

Sample Orientation Outline II

Information you should include in your orientations with new Council Members:

- Confidentiality
  - Who is the client?
- Conflicts of Interest
  - Political Reform Act
  - Government Code § 1090
  - Form 700
    - Gifts, Honoraria
    - Income
  - FPPC
  - Attorney General's Office
- Open Government
  - Brown Act
    - Social media
  - Public Records
- Council Meetings
  - Procedure
  - Rules of Order
  - Civility
- Legislative
  - Municipal Code
- Decisions
  - Land use
  - CEQA
  - Claim's Process

1 **The City Attorney's Office**
Contact Information
Organizational Chart
Job Descriptions
City Attorney Contract

2 **The City Attorney's Office Website**
"The Quick List"

3 **Monthly Reports**
Monthly Claims and Litigation Status Report
Project List
Outside council Fees

4 **Year End Report**

5 **Open Government**
The Brown Act
The Public Records Act & Supplement
Benicia Municipal Code, Title 4
Penal Code: Vote Trading/Intimidation

6 **Council Meetings**
Council's Rules of Procedure
Open Government Tips/How To:
Motions/Ex Parte/Conflicts/Records
Your Guide to: Benicia City Council Meetings
Tips for Promoting Civility

7 **Council Member Conduct**
Code of Conduct
Whistleblower Policy
Anti- Harassment Policy
DFEH Pamphlet

8 **Conflict of Interest**
Conflict of Interest Code
"Political Reform Act" by the FPPC
Form 700: Statement of Economic Interest
Gifts, Honoraria
Ticket Distribution Policy

9 **Maps of Council Member's Real Property Interests**

10 **Common Acronyms**

Sample Reminder about Brown Act applying before Council Member is Seated

Dear Council Member-Elect,

Although the election results have not been certified, you appear to be a presumptive City Council Member-elect. I look forward to working for the new City Council.

I realize that you are already familiar with the City, but you will be receiving additional background materials in a binder from the City, as well as a memorandum from me. However, I want to bring to your attention the following:

1. Brown Act -- The Brown Act (state law) applies to any person who has been elected to serve on the council but who has yet to assume the duties of the office. (Cal. Gov't Code section 54952.1) Accordingly, prohibitions on a majority of the city council meeting outside of a noticed public meeting apply to meetings with newly elected -- but not yet seated -- council members. For example, a presumptive new Council Member (like yourself) cannot meet with two other Council Members to discuss City business outside of a public meeting even before the election is certified or you are sworn in.

2. State-mandated AB 1234/Ethics training – The law requires completion of the training within one year of taking office. However, I strongly encourage you to complete the training quickly as it is a beneficial "Public Service 101" course. The online course is available at no charge and can be found at http://localethics.fppc.ca.gov.

Please contact me if you have any questions about these matters. I look forward to setting up a time when we can talk as you transition to your new position. Please let me know when you would be available. In addition, once you are seated as a new Council Member, I can brief you regarding litigation and other legal matters involving the City.

Sample Introduction Email from City Attorney to City Council

Congratulations on your election to the _____ City Council. It has been my honor to serve as the _____ City Attorney since _____, and I look forward to serving you in your new position on the Council.

I thought you might appreciate receiving a summary of the important legal issues facing the City in advance of our meeting on _____. In addition, I wanted to introduce you to the role of the _____ City Attorney as established by the _____ Municipal Code and State law and to describe for you my approach to fulfilling that role. I have tried to provide enough information in this memo to alert you to key issues, but additional detail on these matters will of course be provided to you in the future. On _____, we will have the opportunity to discuss this memo and I can answer any questions you may have.

Sample Orientation Memorandum I

TO: Council Member-Elect

FROM:

DATE: _____, 2019

SUBJECT: ***Confidential: Attorney-Client Privilege*** **Laws Governing Service on the City Council**

This memorandum aims to give new Council Members a general outline of the legal framework in which they will be operating during their terms of office.

Please be certain to complete the state-mandated ethics training (AB 1234). The law requires completion of the training within one year of taking office. However, I strongly encourage you to complete the training quickly as it is a beneficial "Public Service 101" course. The online course is available at no charge and can be found at http://localethics.fppc.ca.gov. Upon completion of the training, please print out the certificate of training and forward a copy to the City Clerk's Office. These certificates are public records and would be provided if a Public Records Act request was submitted for compliance with this training requirement. AB 1234 training is also available at the League of California Cities' new council member conference.

The Institute for Local Government (the research arm for the League and California Counties Association) has also prepared materials on its website to assist in orienting newly elected local officials: http://www.ca-ilg.org/OrientationMaterials

As I indicated in an earlier email, **please remember that the Brown Act applies to any person who has been elected to serve on the Council but who has yet to assume the duties of the office. (Cal. Gov't Code section 54952.1) Accordingly, prohibitions regarding meetings of a majority of the City Council outside of a noticed public meeting apply to meetings with newly elected, but not yet seated, council members.** For example, a presumptive new Council Member can't meet with two other existing Council Members to discuss City business outside of a public meeting even before the election is certified or the new Council Member sworn in. More on the Brown Act follows.

I. WHAT EXACTLY IS A CITY?

A city is a municipal corporation. ____ was incorporated in ___ and like most of the cities in California, is a "general law" city. This means that the City's powers are defined and limited by state law. In some cases, the Council may not be able to enact an ordinance on a particular point because of state law. "Charter" cities, on the other hand, have more flexibility and are not as dependent on state law for their legal authority. The point to remember is that the City is restricted and guided by state law in its operations.

The position of Mayor in is rotated among council members as opposed to the directly-elected mayor in some other cities. The Mayor serves as the presiding officer/chair at the City Council meetings and appoints commissioners and board members subject to the approval of a majority of the City Council. The Vice Mayor is also chosen by the Council and fills in for the Mayor when absent.

There are also a separate Local Successor Agency to the Redevelopment Agency and a Joint Powers Financing Authority on which the Council Members serve as Board Members.

II. HOW DOES THE CITY RUN?

_____ was established as a council/manager form of government with the City Council as the governing body. The City Council establishes the policies of the City to address both short-term and long-term needs of the community. The City Council acts by majority decision (at least 3 votes for a particular action). Therefore, Council Members should be careful to distinguish if they are speaking for the Council (majority viewpoint) or as an individual, particularly if appearing before another governmental agency.

It is the responsibility of the City Manager to apply and administer the Council's policies to the day-to-day operations of the City. The City Manager oversees the total City operations and is the liaison between the Council and the City staff. Another way to look at the distinction is that the Council determines ***what*** is to be done and the City Manager and staff determine ***how*** it is to be done. The council-manager approach seeks to enhance the effectiveness of local policy-making and municipal operations by bringing together skilled lawmakers, community representatives and experts in municipal administration and management.

If a Council Member has an issue regarding a staff member, the issue should be raised with the City Manager privately. If you have an issue with me, I hope that you will discuss it with me directly.

III. DOES A CITY ATTORNEY DRAFT WILLS FOR ALL OF THE RESIDENTS?

There is sometimes a great deal of confusion about my role as City Attorney. Residents have assumed that I will handle their divorces or wills, because they are residents of the City and I am the “City” Attorney. Therefore, I think it is helpful to describe the role of a city attorney up front.

The City Attorney and the City Manager are the two employees directly hired by the Council. Both are directly responsible to the City Council; serve at the pleasure of the Council; and do not work for each other. However, their roles are quite different.

The City Manager and all of the department heads and staff members are typically hired to get things done: identify objectives; develop strategies to obtain those objectives; and hopefully get the job done on-time and under budget. In contrast, the City Attorney is primarily hired to keep the City out of trouble – to prevent negative consequences. Therefore, I tend to be focused more on the process – how things are done -- so that the City can make decisions that are legally defensible and to protect its rights including contractual rights.

In particular, the City Attorney is responsible for:

- preparing or reviewing ordinances, contracts, leases and other legal documents
- reviewing all claims and serving as a board member or alternate to the joint risk authority and assisting with the various risk management functions
- representing the City in court in civil matters or overseeing outside attorneys representing the City (typically lawsuits against the City but sometimes responding to subpoenas in private matters) and criminal matters such as *Pitchess* motions to protect the confidentiality of the personnel files of our police officers
- providing advice to the City Council, Commissions, Boards and staff on the Brown Act, Public Records Acts, conflicts of interests, public contracting, insurance, financing and Proposition 218 (tax) issues, land use and environmental laws, employment and other municipal matters

My client is the City, which is the municipal corporation as a whole. When I raise potential legal issues, it is not to sink a favored project or delay implementing a favored course of action – it is to protect the City. I am an advocate for the City, but I am also an advisor to the City and, unfortunately, the law is not always clear-cut. Sometimes my advice cannot be “yes-no” but “here are the risks with the different options before you.”

I take my direction ultimately from the majority of the City Council. Therefore, I must still implement and defend a decision made by a 3-2 Council vote, even if the dissenting two Council Members are bitterly opposed or even if I personally do not

agree with the decision. As an attorney and officer of the court, I have certain ethical and prosecutorial duties as well.

As is the City's general policy, if I provide information or an opinion to one Council Member on a matter of general interest, I will provide it to all unless the Council has designated the Mayor or a subcommittee to be "point" on a particular item. I welcome telephone calls and personal visits, as I recognize that the City is often grappling with difficult issues for which you may have questions. I can make myself available in the early mornings or evenings, as I realize that Council Members also have busy work and family schedules, in addition to your Council service. Like health care, an ounce of legal prevention is often worth a pound of cure afterwards.

Except for the few cities in California with elected city attorneys, most city attorneys do not get involved in politics to preserve their role as a neutral officer charged with rendering impartial opinions on legal matters. Therefore, please do not be offended if I do not attend fund-raisers or other political events.

IV. **WHAT DOES IT MEAN TO MAKE A MOTION?**

Within the framework of state laws for a general law city, the City Council can take action by adopting ordinances (often codified in the _____ Municipal Code), resolutions or motions. Often state law dictates whether a city acts through ordinance, resolution or motion. An affirmative vote of three council members is required to adopt an ordinance, resolution or motion.

Ordinances are the laws of the city and are separate written documents that require certain public noticing. Approval of an ordinance requires a first reading (e.g. "motion to introduce the ordinance") and a second reading (e.g. "motion to adopt the ordinance") with at least 5 days between readings (except for an urgency ordinance). The ordinance (or summary) is then published in a local newspaper and becomes effective 30 days after adoption. This 30-day period is known as a referendum period, which is the time frame during which any citizen may file a petition challenging the legality of the adopted ordinance. An ordinance can only be repealed or amended by a subsequent ordinance.

The Municipal Code is found at _____. The Municipal Code sets forth the regulatory, penal and administrative ordinances of general application to the City. The Municipal Code is divided into the following categories and within each Title, the provisions may be further divided into chapters, articles and sections:

Title 1: General Provisions
Title 2: Administration and Personnel
Title 3: Revenue and Finance
Title 4: [reserved]
Title 5: Business Taxes, Licensee and Regulations
Title 6: Animals

Title 7: [reserved]
Title 8: Health and Safety
Title 9: Public Peace, Morals and Welfare
Title 10: Vehicles and Traffic
Title 11: [reserved]
Title 12: Streets, Sidewalks and Public Places
Title 13: Public Services
Title 14: [reserved]
Title 15: Buildings and Construction
Title 16: Subdivisions
Title 17: Zoning
Title 18: Signs

Resolutions are separate written documents, but do not require the same level of public noticing. A resolution typically expresses city council direction on certain types of procedural or administrative actions (e.g. "motion to adopt the resolution approving the contract"). A resolution requires only one council action and may be changed by subsequent resolution.

Motions are typically just reflected in the minutes of the meeting and are often used for more routine business matters. In addition, the city council will sometimes adopt a proclamation, which is often the council's endorsement of a special event or happening.

During a meeting, please try to conduct a fair hearing. Sometimes you may be inclined to blurt out that you disagree (or agree) with someone, but try to allow the speaker to comment or make a presentation first, so that there is not an obvious appearance that your mind was made up ahead of time. In the same vein, public statements that one would never vote for a particular project or a particular decision can raise issues later if a proponent contends that due process and a fair hearing were not provided. If you are asked an opinion on a matter ahead of time, especially on a land use (development) project, an appropriate response is to say something along the lines of: "As you know, I have consistently raised concerns about traffic [*or whatever*] issues in this City and have questions along those lines regarding this project, but as the law requires I will maintain an open mind until all evidence is presented at a public hearing."

V. **I AM ETHICAL, SO WHY DO I NEED TO WORRY ABOUT ETHICS LAWS?**

As you learned (or will be learning) with the required state-mandated ethics training, there are a number of ethical principles that underlie governmental proceedings and public service. These principles have been codified into state law to create a "floor" for conduct as a public servant. These principles are: avoiding personal financial gain or other perks as a result of public service (e.g. Political Reform Act and Government Code section 1090); governmental transparency (e.g. Brown Act and Public Records Act); and fair processes (e.g. public contracting laws, incompatible offices doctrine, campaign

contribution regulations). I do not doubt that you are an ethical person and some of these laws are intuitive, but not always.

We will be providing additional materials on these principles; however, I do want to highlight a few concepts about conflicts of interest.

Conflict of interest laws create a baseline for ethical conduct and protect both actual impropriety and the *appearance* of impropriety. To that end, there are laws that require public officials to disclose financial interests annually (Form 700 which is distributed by the City Clerk); prohibit public officials from having an interest in a contract entered into by the governmental body (Government Code section 1090); restrict receipt of gifts and honoraria; bar a public official from making a governmental decision in which he or she has a financial interest (the Political Reform Act); and prohibit a public official from holding multiple incompatible public offices.

A. **Political Reform Act**

The Fair Political Practices Commission has adopted a 4-step conflict of interest analysis under the Political Reform Act to determine whether a disqualifying conflict of interest exists:

(1) Step One: Is it reasonably foreseeable that the governmental decision will have a financial effect on any of the public official's financial interests?

Do you or your immediate family have a financial interest involved in the decision, such as real property, a source of income or of a gift, business investment, employment or management position, or other personal financial interest?

(2) Step Two: Will the reasonably foreseeable financial effect be material?

There are complicated regulations regarding materiality, but generally the effect of the decision is deemed material if it affects a source of more than $500 of income to you in a year (lower amounts for gifts) or if the decision affects property within 500 feet of your property line. If a pending project is located within 500 feet of your property, you cannot participate in the decision unless you receive written approval in advance from the Fair Political Practices Commission. If your property interest is located beyond 500 feet, then the question is whether the decision would cause a reasonably prudent person to believe that the governmental decision would influence the market value of the official's property. There are other regulations regarding leases and common areas with HOA (homeowners' association) properties.

(3) Step Three: Can the public official demonstrate that the material financial effect on the public official's financial interest is indistinguishable from its effect on the public generally?

Would a significant segment of the public be affected by the decision in the same manner as you are? For example, the city council's consideration of generally applicable design guidelines would trigger this exception, but the design review for a building next to a council member's home would not.

(4) Step Four: If after applying the three step analysis and determining the public official has a conflict of interest, absent an exception, he or she may not make, participate in making, or in any way attempt to use his or her official position to influence the governmental decision.

A council member with a conflict of interest should publicly identify the financial interest creating the conflict, "recuse" or disqualify himself or herself from acting on the matter and leave the room (not just the dais) until the matter is concluded. The council member is not counted for the quorum when disqualified for a conflict of interest. This is different from abstaining when a council member is counted for the quorum, but is basically going along with the majority vote (e.g. approving minutes for a council meeting when the council member did not attend that meeting) However, even if disqualified/recused, the council member is allowed to address the council on the matter as to his or her personal interest, such as the council member's business or property, and remain in the room (but not on the dais) before speaking.

A violation of conflict of interest laws may subject a public official to criminal or civil penalties and *lead* to scrutiny of the underlying governmental action. The City Attorney's Office can provide guidance, but only the Fair Political Practices Commission (FPPC) can provide a definitive opinion that confers immunity from liability under the Political Reform Act. However, obtaining FPPC opinions takes weeks and sometimes months, so these matters should be discussed as early as possible with the City Attorney's Office. Many believe that the best advice in these situations is: "*When in doubt, sit it out."*

B. **Incompatible Offices**

Another kind of conflict of interest arises when one person holds multiple governmental positions that create the potential for a clash of duties or loyalties. This often occurs because one position exercises regulatory, supervisory or removal powers over the other position or both offices oversee overlapping territory. For such a conflict to exist, both positions must be public "offices" and not merely public employment (although some job positions can be public offices such as a city manager). If a public official has accepted two incompatible public offices, then the first office is deemed automatically vacated. If you are considering another governmental office, it would be best to contact the City Attorney first.

C. **Bias**

Beyond financial conflict of interests, as a decision-maker, Council Members are required to be fair and impartial. This means considering a matter with an open mind. A Council Member may have opinions or strong feelings, but should not have a

preconceived, unalterable view of the outcome that precludes the Council Member from weighing the evidence or information presented.

In some cases, council members may believe that they can be fair, but it may be more appropriate not to participate because of an appearance of impropriety. For example, the conflict of interest laws do not require disqualification if a financially independent child or sibling is a project proponent. However, depending on the circumstance, you may want to recuse yourself in those situations because of the appearance of impropriety.

VI. CAN THE COUNCIL EVER MEET IN PRIVATE?

Adopted after revelations of government business taking place at secret meetings, the Brown Act attempts to ensure that deliberations and actions of local government are conducted openly and with the opportunity for public participation. Violations of the Brown Act may result in invalidation of actions taken, and in extreme cases, civil or criminal charges.

A. Public Noticing

The City follows the Brown Act's requirements regarding public noticing. Agendas are prepared and limit the actions that the Council may take. The purpose of this prohibition is to provide a mechanism for informing the public of pending actions and the opportunity to comment on the matter before the action is taken. The public also has the right to comment on a matter within the body's jurisdiction even if that particular item is not on the body's agenda (this typically occurs during the initial public comment portion of an agenda).

There are regular meetings (first and third Monday at 6:00 p.m.), which require 72 hours of advance notice/agenda posting. Staff strives to have your agenda packets available by the end of day on Thursday before a Monday Council meeting. Occasionally additional information may be emailed to you before the meeting or waiting for you on the dais. There are often closed sessions scheduled before the 6:00 p.m. meetings for the Council to discuss litigation and other matters privately as allowed by the Brown Act.

There are also special meetings, which require 24 hours of advance notice/agenda posting. A special meeting can be called to hold a study session/workshop at which formal action is typically not taken or to address a particular issue on the agenda that cannot wait for a regular meeting or may require so much time that a dedicated meeting for the subject is most efficient. Emergency meetings are also allowed in critical emergency situations as defined by state law (e.g. significant natural disaster).

B. Open Meetings

The Brown Act prohibits a majority of a governmental body from reaching a decision outside of a regularly scheduled meeting. This issue typically arises when a majority (quorum) of the body discusses an issue that falls within the subject matter of that body, but that discussion occurs outside of a regularly scheduled meeting. For example, a

consensus reached among Council Members at a holiday party about a pending project or item would violate the Brown Act, as would emails about a pending project among a Council majority.

1. *Serial Meetings.* A "serial meeting" is when a majority of the governmental body participates in a decision without being physically present in one place at one time. Such a meeting is prohibited under the Brown Act. An example of a serial meeting would be a discussion between council members A and B outside of council meeting, in which a consensus is reached on a matter before the council, which is then communicated to council member C in an attempt to convince C to join in the position that A and B have reached. Again, this prohibited discussion can occur in person or through electronic means like email.

2. *Spoke and Wheel Meetings.* A "spoke and wheel" meeting is when one person separately contacts a majority of the governmental body to relay information and opinions to create a consensus on a matter. Such a meeting also violates the Brown Act, whether the "wheel" person is a constituent, reporter or staff member. In addition, when a public hearing is held or the Council is acting in a quasi-judicial role (most typically in land use and permitting kinds of situations), these conversations can also raise "due process" concerns that not all of the information upon which a decision is based has been considered in a public forum.

A common example of this situation is when a project applicant individually contacts council members about a project and relays the opinions of each council member, as opposed to simply providing "one-way" information about the project to a council member. If a council member chooses to have such conversations with project applicants or opponents, he or she should avoid expressing a definitive opinion on the project and should disclose the fact of the conversation, and any additional information provided, at the public meeting.

C. **Closed Sessions**

The Brown Act allows for limited situations in which a public body can meet in private, typically to discuss issues with legal counsel. These situations include certain personnel matters; meetings with legal counsel to discuss pending litigation involving the public entity; certain real property negotiations; meetings with the public entity's labor negotiator; addressing threats to public security; and license applications by persons with criminal records.

These limitations make it difficult for city attorneys to counsel their client cities in the same way a corporate attorney may counsel a board of directors of a business. In open session with the public watching and the cameras rolling, I still try to provide advice by the way I frame a response or point out a procedural requirement, but it is necessarily guarded particularly in the context of a public hearing on a land use project. It can be challenging to explain the downsides of a particular action without providing potential plaintiffs with a road map for suing the City. Therefore, please listen carefully to what I

say, read any materials that I may have provided in advance, and contact me ahead of time with any questions.

When the council is allowed to go into closed session, the confidentiality of the closed sessions (and other attorney-client communications) cannot be over-emphasized. It should be treated like discussions with your own private attorney. You will be dealing with highly sensitive information and will be making decisions affecting millions of dollars. Discussing the information given to the City Council in closed session with other people could seriously harm the City and, in turn, the public. Accordingly, Council practice is that you return any closed session materials at the end of the closed session.

D. **Other Meetings, Conferences and Social Events**

The Brown Act acknowledges practical considerations about the role of government officials in their community. Council members may attend a meeting of another governmental body or a meeting hosted by a group providing information about local issues, so long as the meeting is publicized and is not used as an opportunity to caucus. All council members can attend a conference or social event, again so long as the group is not using the gathering to reach a consensus on a matter within its jurisdiction.

E. **Public Records Act**

Related to the concept of open meetings and the Brown Act is the Public Records Act, which allows every person to inspect public records of any state or local agency. State law defines a public record as any document containing information relating to the conduct of the people's business that is prepared, owned, used or retained by the City regardless of physical form or characteristics. Therefore, an email may be a public record. You will be provided with a City email address and I recommend that you use this account for just City business and have a separate email for personal matters. Otherwise, you may find yourself having to disclose personal matters that are on your City email account.

VII. **I AM JUST A VOLUNTEER TRYING TO DO MY BEST HERE, CAN'T YOU STOP THOSE NASTY PUBLIC COMMENTS?**

Libel and slander are topics that can arise in the political context. Generally, slander is defined as a spoken false statement of a fact about a person which damages his or her reputation, with libel being a written false statement. While you are attending City Council meetings, there are certain immunities which you have that help to defend you and the City from libel and slander lawsuits. However, the best course of action is to try to avoid libeling or slandering anyone. In particular, avoid accusing a person of having committed a crime.

Ironically, now that you are a public official, it is legally easier for people to libel and slander you. In the case of two people, if one is not in the public limelight, the test of libel or slander is whether the person making the false comment has made it

negligently, that is, unreasonably. However, in order for a public official to be libeled, the comment must be made with reckless disregard for the truth, or with a malicious intent. The reason for this rule is to allow criticism of public officials without the fear of libel or slander lawsuits. The proverbial “thick skin” is useful as a council member, particularly during the public comment portion of a meeting agenda.

I do suggest that the Council view the “public comment” portion of a public meeting as more of a one-way communication from the public to the City Council. This approach avoids Brown Act violations if the Council responds to the comment and reaches a decision on an item not on the meeting agenda. This approach also limits the Council from being dragged into more of a debate with a member of the public, which can be difficult for the Chair of the meeting (typically the Mayor) to control.

VIII. WHY WOULD A JUDGE KNOW WHAT IS BETTER FOR THIS CITY?

Almost every decision you make as a Council Member can be challenged in court. Depending on the type of case, judges may use one or two standards of review. The judges may either review the record and determine if the Council acted reasonably based on the record, or they may review the record and make their own independent judgment on what the outcome should be.

This is why city attorneys in general will often slavishly want to "protect the record" and make sure that the council "makes findings". In other words, all relevant information should be presented to the council. The council should then weigh that evidence and reach a conclusion often memorialized in a resolution or ordinance. When this type of record is preserved, it will be much easier for a judge to see how and why the council reached its decision, and the judge will be less inclined to substitute his or her own judgment for that of the council.

In some cases, you personally may not care if the decision of the Council is upheld or reversed. Remember, however, that in many of these cases, a successful plaintiff may have attorneys’ fees and costs awarded against the City, and an adverse decision could cost the City significantly, in addition to an order changing the Council's original decision.

IX. IF SOMEONE IS HURT IN THE CITY, IS IT ALWAYS THE CITY’S FAULT?

Sometimes it seems as though people feel that the City should be responsible for every unfortunate situation that occurs within the City’s limits. However, the law provides immunities for cities to protect the taxpayers of the city. For example, a city is generally not responsible for the condition of public property unless there was a “dangerous condition” (i.e. creates a substantial risk of injury) and that condition was due to the negligent act of a city employee or the city had notice of the dangerous condition in sufficient time to have taken protective measures. In addition, the person suffering the damage must have acted reasonably and with due care. Nonetheless, with increasing frequency, people are suing cities for injuries or property damage. Before they can bring

suit, they must file a claim for damages against the city, which gives the city a chance to approve, reject or compromise (settle) the claim before litigation need be filed.

Due to the loss of private liability insurance for cities in California (except for some higher levels of excess coverage), _____ belongs to a self-insurance pool called the _____ with a number of other cities (mostly in _____ is governed by a board of directors, with one representative from each city. The representatives are senior staff members. The ____ is completely self-funded by "premiums" paid by member cities. This means that typically every dollar paid to an injured person is a tax dollar, with no money coming from a private insurance company. For liability claims (e.g. sidewalk trip and fall, police excessive force claims), the _____ pays for losses above $ ____, which means that the City self-insures the first $1 or has in essence a deductible of $_____.

By Resolution No. _____, the City Council delegated to the City Manager the authority to send required notices to claimants; to approve payments or settlements to claimants for claims covered by ____ or less; and to approve payments or settlements of other claims or litigation of $ ___ or less. I handle the daily interaction with _____ and claimants regarding claims and report settlements to the Council periodically. These monies are typically paid out of the general fund. The has authority to settle cases for higher amounts. Those monies are paid out of the _____ funds, and will be reflected in our City's "premium" the following year.

Certainly some claims are legitimate or simply would cost too much to litigate and are paid or compromised. Unlike some public agencies, I do not automatically recommend rejecting every claim initially, but investigate each claim at some level. The practice here in _____ send a confidential memorandum to the City Council regarding the particular claim recommended for rejection. If a Council Member has a question, he or she should talk to me ahead of time. If the Council Member believes the matter should be discussed by the entire Council, then the matter should be pulled off the consent calendar and set for closed session at a future meeting.

Often, the rejection of a claim will be a formality, and the claims adjusters will continue to negotiate with the claimant despite the fact that a claim has been rejected. If a lawsuit is eventually filed, the case is usually referred to a private law firm retained by the _____. However, I remain involved in overseeing and reviewing the matter.

In closing, I believe that good Council-attorney communications are essential. My door is always open, and I welcome your comments and questions as I want you to be successful as a City Council Member.

cc: Mayor and City Council
City Manager

Sample Orientation Memorandum II

LEGAL ISSUES AND ETHICS

There are many local, state and federal laws protecting the democratic process as it is practiced by City Councils at the municipal level.

There are several legal issues that Council Members should be mindful of in fulfilling their roles and responsibilities in municipal government. Each is designed to protect fair access of the citizens to their government officials and due process (a fair hearing procedure).

The following is an introductory overview of information. For a more detailed discussion on these issues, please confer with the City Attorney.

Ralph M. Brown Act

The Ralph M. Brown Act, commonly referred to as the "Brown Act," is California's "sunshine" law for local government.

The Brown Act mandates that local government business be conducted at open and public meetings, except in certain limited situations (i.e. closed sessions). The central provision of the Brown Act requires all "meetings" of a "legislative body" to be open and public.

Whenever a quorum (majority) of the City Council or a City commission (or even a subcommittee of less than a quorum) is discussing City business, it is a meeting as defined by the Brown Act. The public must receive notice of subjects being discussed at the meeting and be given an opportunity to comment. Closed meetings are only allowed to discuss sensitive matters such as litigation, personnel and real estate matters. The Brown Act applies to even informal get-togethers or casual conversations about City business, which is why it is so important that conversations concerning City business be confined to officially noticed meetings.

The full text of the Ralph M. Brown Act (codified in the California Government Code beginning at Section 54950), which is designed to protect the public's right to know, is included in the end of this section.

"Serial" meetings are also prohibited

A "serial" meeting is defined as a situation when City Council Members individually meet, telephone, email, fax or otherwise communicate among each other or through a common person about a topic that will eventually involve the commitment or action of a quorum.

Confidentiality of Closed Sessions

In 2003, the Legislature passed Assembly Bill 1945 ("AB 1945") which added a new statute to the Brown Act, Government Code Section 54963. Under this new section, no

person may disclose confidential information that has been acquired by being present in a closed session, unless authorized by the body holding the closed session.

Economic Conflicts of Interest

The Political Reform Act of 1974 defines the economic conflict of interest law for the Mayor and City Council Members. As stated in the Government Code "No public official at any level of state or local government shall make, participate in making or in any way attempt to use his official position to influence a government decision in which he knows or has reason to know he has a financial interest." The interests of spouses and dependent children must also be considered.

Economic interest is defined broadly and includes:

- Sources of income
- Real property interest worth $2,000 or more
- Investments such as stocks or bonds
- Interest in business entities worth $2,000 or more
- Any business entity in which the individual is a director, officer, partner, trustee, employee or any position of management
- Interest in trusts
- Loans
- Gift or gifts from any single source with an aggregate value of $50 or more (up to $460) in a calendar year.
- Any other economic interest that might benefit, directly or indirectly, the individual or his or her immediate family

A disqualified member of the City Council cannot attempt to influence the vote on the matter by lobbying the Mayor, the remaining members of the Council, or staff.

Note: Refer to Resource Material section of binder for publication "A Local Official's Guide to Ethics Issues".

What to do if you're in doubt

Whenever a Council Member believes that there may be an economic conflict of interest, he or she should seek a written opinion from the Fair Political Practices Commission. Obviously, this means that members need to be looking ahead at upcoming issues and obtaining an opinion before the item requires action. At any time, it is always safest to err on the conservative side and to publicly identify the conflict, and then abstain from votes on issues that you believe might pose an economic conflict of interest. Whenever a Council Member recuses, the reason for the recusal must be declared for the public record.

Penalties
Violations of the Political Reform Act can be prosecuted as misdemeanors. Elected public officials cannot hold office for four years after conviction.

Statement of Economic Interests (FPPC Form 700)

Pursuant to Government Code Section 87200, elected officials are required to file an Annual Statement of Economic Interests (FPPC Form 700) and must report all monetary conflicts of interest within the City of Desert Hot Springs, such as:

- Investments-Stocks, Bonds and Other Interests
- Investments, Income, and Assets of Business Entities/Trusts
- Interests in Real Property
- Income, Loans and Business Positions
- Income-Gifts (Reportable at $50 or more. $470 limit from a single source)
- Income-Travel Payments, Advances, and Reimbursements

Newly elected Council Members must file an Assuming Office Statement that discloses any investments or interests in real property held by the member on the date he or she assumed office. The statement must also disclose income received during the 12 months prior to the date office was assumed. (Filers that go from one Government Code Section 87200 position to another, within the same entity and no break in service, are exempt from filing an "assuming office" statement. The filer would continue to file an annual statement).

The City Clerk administers disclosure statements and maintains file copies of all statements. The original statements are forwarded to the Fair Political Practices Commission. These statements are public documents. Any member of the public who wishes to inspect and copy them will be permitted to do so.

The City Clerk will remind filers in advance of reporting deadlines – though ultimately, each filer is responsible for timely filing.

Please also be aware that, pursuant to Government Code Section 91013, the City Clerk may impose on an individual a fine for any statement that is filed late. The fine is $10 per day up to a maximum of $100. Late filing penalties may be reduced or waived under certain circumstances. Persons who fail to timely file their Form 700 may also be referred to the FPPC's Enforcement Division (and, in some cases, to the Attorney General or district attorney) for investigation and possible prosecution. In addition to the late filing penalties, a fine of up to $5,000 per violation may be imposed.

Helpful Websites

MATERIALS FOR ORIENTING NEW COUNCIL MEMBERS

The Institute for Local Government has great resources for orienting new council members. Below are a few, but a full list is here: http://www.ca-ilg.org/newly-elected-officials-orientation-materials

City Organization

- Municipal Code and/or Charter (let the Councilmember know it exists and can be found on the City's website)

- California Association of Council of Governments
  - www.calcog.org

- California Association of Joint Powers Authorities
  - www.cajpa.org

- California Association of Local Agency Formation Commissions
  - www.calafco.org

- California Association of Council of Governments
  - www.calcog.org

- California Association of Joint Powers Authorities
  - www.cajpa.org

- California Association of Local Agency Formation Commissions
  - www.calafco.org

- California Special Districts Association
  - www.csda.net

- California State Association of Counties
  - www.csac.counties.org

- Fair Political Practices Commission
  - www.fppc.ca.gov

- Institute for Local Government

  - "Orientation Materials for Introducing Local Government to New Audiences"
    - https://www.ca-ilg.org/newly-elected-officials-orientation-materials

- "How Your Agency Counsel Should Advise You When Agency Contracts Represent a Conflict of Interest"
  - https://www.ca-ilg.org/sites/main/files/file-attachments/how_your_agency_counsel_should_advise_you.pdf

- "Types and Responsibilities of Local Agencies"
  - http://www.ca-ilg.org/sites/main/files/file-attachments/types__responsibilities_of_local_agencies.pdf

- "How Local Agencies Make Things Happen"
  - http://www.ca-ilg.org/sites/main/files/file-attachments/how_agencies_make_things_happen_0.pdf

- "Leadership & Governance: Tips for Success"
  - http://www.ca-ilg.org/sites/main/files/file-attachments/leadership__governance_tips.pdf

- League of California Cities
  - www.cacities.org

- Senate Governance & Finance Committee: The Quick List: An Annotated Glossary of Local Government Statutes
  - https://sgf.senate.ca.gov/sites/sgf.senate.ca.gov/files/TheQuickList2009.pdf

<u>Ethics</u>

- Travel and Expense Policy for the City

- Conflict of Interest Code for the City

- Any City Code of Conduct

- "Ethics Law Principles for Public Servants"
  - http://www.ca-ilg.org/sites/main/files/file-attachments/ethics_booklet_final.pdf

- "The Ethics of Speaking One's Mind" (due process issues)
  - http://www.ca-ilg.org/sites/main/files/file-attachments/the_ethics_of_speaking_ones_mind.pdf

<u>Meeting Procedures</u>

- Any City-specific rules of procedure

- "The ABCs of Open Government"
    - http://www.ca-ilg.org/sites/main/files/file-attachments/abcs_of_open_government_0.pdf

- Rosenberg's Rules of Procedures
    - http://www.cacities.org/UploadedFiles/LeagueInternet/77/77d4ee2b-c0bc-4ec2-881b-42ccdbbe73c9.pdf

- "Preparing for Public Hearings"
    - http://www.ca-ilg.org/sites/main/files/file-attachments/resources__25908.preparing_for_public_hearings.pdf

- "Tips for Promoting Civility at Public Meetings"
    - http://www.ca-ilg.org/sites/main/files/file-attachments/tips_for_promoting_civility_in_public_meetings_1.pdf

<u>Municipal Finances</u>

- "Municipal Finance Quick Reference"

- "Understanding the Basics of County and City Revenues"
    - http://www.ca-ilg.org/sites/main/files/file-attachments/basics_of_municipal_revenue_2016.pdf

<u>Land Use</u>

- General Plan of the City

- "Understanding the Basics of Land Use and Planning: Nuts and Bolts of Project Review"
    - http://www.ca-ilg.org/sites/main/files/file-attachments/2010_-_landusenutsbolts_tab.pdf

- "Understanding the Basics of Land Use and Planning: Guide to Local Planning"
    - http://www.ca-ilg.org/sites/main/files/file-attachments/2010_-_landuseplanning_1.pdf
      this is 83 pages with shorter summaries available here:
      http://www.ca-ilg.org/post/land-use-one-pagers-uso-de-la-tierra-hojas-informativas

Navigating Housing Development in the New Era

Thursday, May 9, 2019 General Session; 9:00 – 10:30 a.m.

Barbara Kautz, Partner, Goldfarb & Lipman
Diana Varat, Of Counsel, Richards, Watson & Gershon

DISCLAIMER: *These materials are not offered as or intended to be legal advice. Readers should seek the advice of an attorney when confronted with legal issues. Attorneys should perform an independent evaluation of the issues raised in these materials.*

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Notes:_____

Navigating Housing Development in the New Era

League of California Cities
Annual City Attorneys Conference
Monterey, California
May 9, 2019

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I. Introduction

To address the State's housing crisis, the California Legislature substantially amended housing and planning laws in 2017 and 2018. These changes to State law shape the way cities plan for housing development and determine the processes that cities use to review and approve housing projects. Both planners and city attorneys need to understand the challenges in implementing these laws, especially given the State's expanded enforcement role.

On the planning side, cities now face significant challenges in complying with Housing Element Law. In the next Housing Element cycle - which begins in 2019 - new site requirements will make it more difficult for cities to identify appropriate parcels to accommodate their local share of the regional housing need. Furthermore, changes to the "No Net Loss" provisions require staff to continually monitor housing production and ensure adequate site capacity at all times for all income levels. As of January 1, 2019, these obligations apply to all California cities, including charter cities.

On the project approval side, cities have less discretion to deny, or reduce the density of, proposed housing projects that meet the city's objective standards, under the revised Housing Accountability Act. This loss of discretion is both politically and practically challenging. Already, YIMBY groups have started filing litigation based on recent changes to the statute. Even more than before, city attorneys must be aware of the requirements of the Housing Element Law, No Net Loss provisions, and Housing Accountability Act.

This paper summarizes the most recent changes to these laws. In addition, we will identify practical challenges to complying with these laws and provide tips for city attorneys to minimize legal exposure, reduce the potential for State enforcement actions, respond to public concerns, and defend litigation. In this paper, we will provide examples of how to collaborate with staff to plan proactively to promote housing development, retain some local control, and implement these laws effectively. Finally, we will briefly discuss the possibility of citizen initiatives and referenda in response to these changes in State law.

We recognize that this is not the end of the story. In the current 2019 legislative session, over 200 bills have been introduced dealing, in various ways, with the State's critical housing shortage. While many of these bills will limit local discretion further and impose onerous mandates on cities, our goal in this paper is to explain the current state of the law.

II. Housing Element Site Identification and Upzoning Requirements[1]

"Housing elements" are parts of cities' general plans intended to identify local housing needs, adopt programs to meet housing needs, and identify adequate sites for all types of housing. (§ 65583; *see generally* §§ 65580 *et seq.*) In recent years the focus of housing element

[1] All references in this paper are to the California Government Code, unless otherwise specified.

preparation and review has been the adequate identification and (up)zoning of sites suitable for development of lower income housing.

Amendments to housing element law adopted in the 2017 and 2018 legislative sessions will substantially affect the "sixth cycle" housing elements. City and county housing elements for the sixth cycle will begin to be due in 2019 (41 jurisdictions), with San Diego County (the SANDAG region) and likely Southern California (the SCAG region) and Sacramento region (SACOG) due in 2021, the Bay Area (ABAG) in 2023, and other jurisdictions between 2020 and 2023.[2] In many cities, these amendments will require that more and more sites be upzoned to meet housing demand, significantly increasing the potential for local opposition and litigation.

A. Basic Housing Element Concepts

The key requirement for housing elements is to show that a city has enough land zoned for housing at appropriate densities to accommodate its Regional Housing Need Allocation (RHNA). (§ 65583(c)(1).) The RHNA represents the expected need for housing in the city, usually over the next eight years (although there may be a five-year RHNA in smaller regions) and is usually calculated by the local council of governments (COG). (*See generally* §§ 65584 – 65584.09.) The RHNA is further divided by income category. Typically about 40 percent of the assigned need is for lower income housing (affordable to households with incomes less than 80 percent of the area median), 20 percent for moderate income housing (for households with incomes between 80 percent and 120 percent of the area median), and 40 percent for above moderate income housing.

To show that there is enough land zoned for housing to “accommodate” the RHNA, a city must do an inventory of land zoned for housing that identifies specific sites, describes existing uses and the density permitted, and states specifically how many units can be accommodated on each site. (§§ 65583(a)(3); 65583.2.)

Additionally, the city must identify whether the site is suitable for lower, moderate, or above moderate income housing. (§ 65583.2(c).) Certain densities are ‘deemed appropriate’ for lower income housing (often called the "default density"). In metropolitan areas, these densities are 20 to 30 units per acre. (§ 65583.2(c)(3)(B).)[3]

If the inventory does not identify enough sites at appropriate density to meet the RHNA, the city must identify specific sites and rezone them in the next three years (four years if certain findings can be made).[4] (§§ 65583(c)(1)(A), (f).) The rezoning must allow a housing development containing 20 percent lower income housing to be developed ‘by right.’

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[2] The schedule for the sixth cycle housing element update can be viewed on HCD’s website: http://www.hcd.ca.gov/community-development/housing-element/docs/6th_web_he_duedate.pdf.

[3] Theoretically, cities may present evidence to the Department of Housing and Community Development (HCD) that a lower density will accommodate the need for lower income housing. (§65583.2(c)(3)(A).) However, HCD rarely approves these requests.

[4] As discussed below, amendments to the Housing Accountability Act may allow development at the density shown in the housing element even if the rezoning has not yet taken place. (*See* § 65589.5(j)(4).)

(§ 65583.2(h).) 'By right' means that no review is required under the California Environmental Quality Act (CEQA), unless a subdivision is required, and the project can only be reviewed using 'objective' design standards. (§ 65583.2(i).)[5] Practically this means that the 'by right' provision is limited to rental housing with no condominium map.

The Department of Housing and Community Development (HCD) reviews each city's housing element (in draft and final form) and opines on whether the element is in substantial compliance with state law. (§ 65585.) HCD may revoke a finding of compliance if a city does not implement its housing element and may refer transgressors to the Attorney General. (§§ 65585(i), (j).)

B. A Perfect Storm: Recent Amendments

The amendments adopted in 2017 and 2018 are likely to make it much more difficult for many cities, especially those without substantial vacant land, to find enough sites that HCD agrees can 'accommodate' lower income housing to satisfy the city's RHNA. In particular:

- The RHNA is likely to be higher;
- The obligation to "affirmatively further fair housing" will create pressure to place more housing in higher income cities and neighborhoods;
- Limitations on the use of non-vacant land, HCD's strict definition of 'vacant,' and other requirements will make it difficult to find enough sites that are suitable for lower income housing;
- 'No net loss' requirements, explained in the next section, effectively require cities to upzone substantially more sites than are required to satisfy the city's RHNA; and
- A newly emboldened HCD intends to undertake much more rigorous scrutiny of housing elements.

1. *Revised RHNA Allocation Process*

The total housing needs assigned to each region are likely to be substantially higher because the amount of housing required to correct overcrowding and overpayment of *existing* households will be added to projected household growth. (§§ 65584.01(b)(1)(C), (H).) HCD makes the final determination of total regional need [§ 65584,01(c)(3)]; and HCD staff members have indicated that the total need for some regions could be as much as 50 percent higher as in the last housing element planning period.[6]

In distributing the regional need to individual cities, new factors required to be considered by the COGs include low-wage jobs in the community, overcrowding and overpayment, and the need to 'affirmatively further fair housing' (discussed below). Existing zoning and growth limits (except for agricultural preservation), past failure to meet the RHNA,

[5] Despite this provision, the Coastal Commission requires that any necessary Coastal Development Permit be obtained within the coastal zone.

[6] Total need in the San Diego County (SANDAG) region is 18 percent higher for the sixth cycle than it was in the fifth cycle, even though it did not include the adjustment for overpayment.

and a stable population cannot be considered. These changes were clearly intended to assign more units to low-growth cities. While HCD may review and comment on the methodology for allocating the need among cities in a region (a new provision), the COG makes the ultimate decision. (§ 65584.04.)

After the methodology is adopted, the COG submits draft allocations to each city or county. Any city can appeal its own allocation or the allocation of any other city, and HCD can also appeal any allocation. Again, the final decision is made by the COG. (§ 65584.05.) The increased involvement of HCD, and the ability of agencies to challenge each others' allocations, could make the next round of RHNA allocations highly contentious. However, despite the potential for significant political battles, the Court of Appeal decided in *City of Irvine v. Southern California Ass'n of Governments*[7] that RHNA allocations to individual cities are not justiciable.

2. *Obligation to Affirmatively Further Fair Housing*

The RHNA plan and each local housing element must 'affirmatively further fair housing.' (§§ 65584(d)(5), 65583(c)(9).)[8] 'Affirmatively furthering fair housing' means "taking meaningful actions…that overcome patterns of segregation and foster inclusive communities free from barriers that restrict access to opportunities." (§§ 8899.50(a)(1); 65584(e).)

There are no guidelines regarding how this will be implemented in the housing element context. However, the Tax Credit Allocation Committee (TCAC) has prepared opportunity maps for the entire state assigning census tracts into categories ranging from those with the highest resources (education, proximity to jobs, high environmental quality etc.) to those with the least opportunities and characterized by high segregation and poverty.[9] It can be expected that COGs and cities will be expected to place more lower income sites in high opportunity cities and neighborhoods, which tend to be higher income and wealthier (and in many cases more opposed to multifamily housing).

3. *New Site Inventory Requirements*

In many communities, the most controversial task is to identify sites suitable for lower income housing that are zoned (or intended to be zoned) to allow development at the 'default density' of 20 to 30 units per acre. New amendments will make it more difficult to find enough sites in many cities, particularly those with few vacant sites.

- *More Evidence to Justify All Non-Vacant Sites.* Previously, in order to include non-vacant sites in the site inventory, cities had to discuss local development trends, regulatory incentives to encourage housing development, and the extent to which existing uses are an impediment to housing development. Now, for each

[7] (2009) 175 Cal. App. 4th 506.

[8] The provision applicable to the RHNA applies only if HCD has not yet made a final determination of regional need and so is not applicable to the San Diego County (SANDAG) region. The provision applicable to housing elements applies to housing elements due after January 1, 2021 and so does apply to the SANDAG region.

[9] *Available at: https://haasinstitute.berkeley.edu/sites/default/files/mappings/TCAC/opportunity_map_2019.html.*

non-vacant site, cities also must identify any applicable leases and existing contracts for current uses, market demand for the existing use, and prior experience converting non-vacant sites to higher density residential. (§ 65583.2(g)(1).)

- *Emphasis on Vacant Sites for Lower Income Housing.* If more than 50 percent of the lower income housing need is shown to be met on non-vacant sites, then:

  > The "*existing use shall be presumed to impede additional residential development*, absent findings based on substantial evidence that the use is likely to be discontinued during the planning period." (§ 65583.2(g)(2).)

  It is not clear what evidence will satisfy HCD. For housing elements completed late in the fifth cycle planning period, HCD required letters of interest from each property owner. Without such an expression of interest, this requirement assumes that cities can find substantial evidence that a particular use is likely to be discontinued in the next 8 years – something cities cannot do realistically. There is no exception for cities that simply do not have enough vacant sites to accommodate 50 percent of their lower income housing need.

- *Strict Interpretation of 'Vacant.'* In a recent review of a housing element, HCD indicated that the following sites were not 'vacant':

  - A large vacant site that had not yet been subdivided from the non-vacant part of the site.
  - A large vacant site containing a high-voltage power line.
  - Sites used for agriculture.
  - A large vacant site containing one vacant, abandoned single-family home.

  These strict interpretations will make it even more difficult to meet the 50 percent vacant site threshold.

- *Limits on Site Size.* Sites smaller than 0.5 acre or larger than 10 acres are not considered to be suitable for lower income housing without evidence that the site can be developed for lower income housing. (§ 65583.2(c)(2).)

- *Limits on Reuse of Sites.* If a vacant site was identified in the site inventory in two previous housing elements, or a non-vacant site was identified in one previous housing element, it will not be considered suitable for lower income housing unless it is zoned to permit 'by right' development at the default density for a project with 20 percent lower income housing. (§ 65583.2(c).)[10]

[10] In addition, if development is proposed on any site listed in the housing element, at all income levels, the city must require that any rental housing that existed on the site in the past five years and was occupied by

- *More Scrutiny of Site Capacity.* Each site must individually have access to water, sewer, and dry utilities (or a plan must have been adopted to provide those services). More detail is required regarding site constraints, and cities need to provide information regarding the density of projects on similar sites in the jurisdiction. (§§ 65583.2(b)(5), (c)(2).)

4. *An Emboldened HCD*

HCD's new authority to 'decertify' housing elements and refer cases to the Attorney General (§§ 65585(i), (j)), as well as Governor Gavin Newsom's emphasis on housing production, has resulted in an HCD team determined to look closely at local housing elements. There will be no 'streamlined review' as was possible in the last housing element cycle. In particular, HCD at conferences has indicated its intent to scrutinize local development standards (such as height, parking, setbacks, and lot coverage) to determine if they actually allow development at the asserted densities and to determine if the standards are "objective." In one recent review letter, HCD specified necessary changes (such as an increased height limit) in those standards to achieve HCD approval. If faced with similar demands from HCD, cities may be faced with making unpopular changes to achieve an HCD finding of substantial compliance or risk housing element litigation. While cities are not required to accept HCD's recommendations and may make their own findings explaining why their element is consistent with state law (§ 65585(f)), a housing element found not in compliance by HCD is vulnerable to a legal challenge for over three years. (§ 65009(d).)

C. Practice Tips

In many communities, adoption of the sixth cycle housing element is likely to be controversial, with city councils and staff buffeted by the need to comply with state law and possible community opposition to what is required. The city attorney will likely be called upon to support the city council regarding unpopular actions it may be required to take (or, alternatively, to develop strategies for opposing HCD requests). Some specific suggestions are:

- To avoid an excessive allocation of units, ensure that the city is involved early in the COG's RHNA allocation process and encourage staff to closely monitor and participate in meetings regarding the allocation.
- To defend against housing element litigation, ensure that the housing element contains *every* provision required by state law and that there is substantial evidence in the record to support each of the conclusions reached.
- If significant upzoning is required, CEQA review may add substantial time to housing element preparation time. If the element is not adopted within 120 days of the due date, the element will be due every four years instead of every eight years. (§ 65588(e)(4).) Work on the housing element should be started well before the due date, in particular regarding the site inventory. Professional

lower income households be 'replaced' as defined in density bonus law. (§§ 65583.2(g)(3); 65915(c)(3).) This in effect is an important exception to the Ellis Act, which normally does not allow a city to require the replacement of existing rental housing on a site.

services agreements with technical consultants may be entered into early in the RHNA planning process, if necessary. Since many parts of the housing element can be prepared even before the RHNA allocation is finalized, staff may want to begin the process of identifying sites and updating the housing element even before the COG has finalized the RHNA allocation.

- Consider joint efforts among cities to prepare portions of the housing element that are not city-specific. For instance, in San Mateo County the '21 Elements' group has prepared joint analyses of existing emergency shelters, issues involving the developmentally disabled, and other issues.
- HCD's level of scrutiny tends to relate to correspondence received and to the community's reputation. Ensure that any consultant hired is familiar with the changes to housing element law and has a good working relationship with HCD. It is worthwhile for planning staff and consultants to meet with HCD regarding strategies proposed by the city. Be sure to respond to all letters sent to HCD commenting on the city's housing element.
- If it does not appear that HCD will certify the housing element, closely examine the evidence supporting the city's position and make the written findings contained in Section 65585(f) explaining why the element substantially conforms with State law despite HCD's findings.

III. Maintaining Adequate Capacity for New Housing Units - The "No Net Loss" Principle

As described in the previous section, cities must begin each housing element cycle by demonstrating that they can accommodate the projected housing need for the jurisdiction during the coming planning period. A separate section of State law, known as the "No Net Loss" provision, ensures that each city maintains adequate capacity to accommodate its allocated regional housing need during the entire eight-year planning period. (§ 65863.)

With the 2017 Housing Package, the State expressed a clear intent to ensure that planning efforts result in the actual production of housing units, not simply planning for housing on paper. The changes made to the No Net Loss requirements in 2017 are no exception. As amended in 2017, Government Code Section 65863 now requires that cities monitor housing production as the planning period progresses, and ensure no net loss in capacity by income level, as described in the following sections.

A. General Requirements under Government Code Section 65863

In 2017, the State expanded the scope of the No Net Loss requirements. Previously, Government Code Section 65863 required that jurisdictions maintain adequate capacity with respect to the *total number* of dwelling units. In accordance with the State's current focus on producing more dwelling units, and specifically, producing more *affordable* units, the No Net Loss provisions now require that each city maintain unit capacity for specific income levels. While adequate capacity in connection to the *total* number of units remains important, Section 65863 now also requires that each city maintain unit capacity to meet each income level required by the city's RHNA allocation.

In addition, the State's focus on production of units has resulted in an increased focus on how planning does (or does not) result in the production of the number and affordability category of units that were imagined by the city's planning efforts. The city's obligation to maintain unit capacity arises in two contexts: (1) when the City reduces the allowable density on a site identified in the city's Housing Element site inventory to a "lower residential density," and (2) when an applicant obtains an entitlement to develop a site identified in the Housing Element site inventory, but where the entitlement authorizes fewer units by income level than were identified as possible on that site in the Housing Element site inventory, or at a "lower residential density," as defined by statute. Each of these contexts is described below.

1. *Down-Zoning - Reducing the Allowable Density on a Site Inventory Site*

If a city plans to reduce the allowable density on a site that is identified in the Housing Element site inventory as available for housing development, the city must comply with the No Net Loss requirements. As an over-arching rule, each city must ensure that there is always adequate capacity during the entire planning period for the number of units required to meet the City's remaining unmet share of the RHNA numbers for all income levels. (§ 65863(a).)

In addition, a city may only reduce the maximum allowable density for a specific site inventory site to a "lower residential density" if it finds that doing so would be consistent with the city's adopted General Plan, including the housing element, and more importantly, only if the city can demonstrate that the remaining sites in the site inventory provide adequate capacity to meet the city's RHNA needs for each income level. (§ 65863(b)(1).) If the remaining sites are not adequate to meet the RHNA need at each income level, the city must *simultaneously* identify "sufficient additional, adequate, and available sites with an equal or greater residential density in the jurisdiction so that there is no net loss of residential unit capacity." (§ 65863(c)(1).)

These obligations will play out differently in different jurisdictions because of the definition of the term "lower residential density," provided in Section 65863(g), which depends on whether the city has a timely-adopted and compliant housing element.[11]

For ***compliant*** jurisdictions, "lower residential density" simply means fewer units than the housing element's projections for the specific site. For these cities, therefore, staff should compare the number of units that would be allowed under the proposed maximum allowable density to the number of units that were identified for that site in the Housing Element site inventory. If the number of units that would be allowed on the site under the proposed (reduced) maximum density is ***less than*** the number identified as possible in the site inventory, the city must make the finding that there is adequate remaining capacity on the remaining site inventory sites, or find other sites to upzone simultaneously to meet the RHNA for each income

[11] For these purposes, "timely-adopted and compliant" means that the housing element was adopted within 90 days of the original deadline and the housing element was in "substantial compliance" with Housing Element Law within 180 days of the deadline.

level. For jurisdictions that do ***not*** have a timely-adopted and compliant housing element, however, the definition of "lower residential density" is more complicated.[12]

In order to ensure that a city maintains adequate capacity consistently during the planning period, and that there is never a "net loss" in capacity, city planning department staff should analyze the remaining capacity of site inventory sites *before* proposing any down-zoning in the city.

2. *Approving a Project on a Site Identified in the Site Inventory*

In the wake of the 2017 changes, the No Net Loss requirements also may be triggered when a city approves a project on a site that was identified in the site inventory as available for housing development. The statute establishes two distinct, but overlapping obligations.

First, Section 65863 states that a city may not "allow development of any parcel at a, lower residential density," unless the city makes the necessary finding that there is adequate capacity to meet the RHNA at each income level. (§ 65863(b)(1).)[13] Second, if a city allows development of a site inventory site with "fewer units by income category than identified in the jurisdiction's housing element for that parcel," then the city must make the necessary finding. (§ 65863(b)(2).) For either scenario, if the remaining sites in the site inventory are ***not*** adequate to meet the remaining unmet need of the city's RHNA allocation, ***at each income level***, then the city has 180 days in which to upzone other sites to ensure adequate capacity remains.

In light of this requirement, the approval of a project with fewer units by income category than were identified in the site inventory triggers the obligation to make a finding of adequate remaining capacity, or if that finding cannot be made, to upzone other sites within 180 days.

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[12] Non-compliant jurisdictions should be mindful of the complications created by the definition of "lower residential density" in Section 65863(g)(2). As described previously, Section 65583.2(c)(3) establishes density levels that are ***deemed sufficient*** to meet a jurisdiction's RHNA share, known as "default density" levels. The "default density" for a particular jurisdiction depends on whether it is incorporated or unincorporated, and whether it is located within a metropolitan or nonmetropolitan county. Under housing element law, a city may zone sites to allow for density levels *greater than* the default density, but it also may adopt lower maximum density levels if lower densities are justified by an analysis showing that the densities adopted allow the city to meet its RHNA share. For non-compliant jurisdictions, if a city allows for a density level higher than the default density, a "lower residential density" for the purpose of the no net loss provisions would be anything less than 80 percent of the maximum allowed density. If the city allows for a density lower than the default density (as justified by an analysis), or allows for the applicable default level, a "lower residential density" would be anything less than 80 percent of the default level applicable under 65583.2(c)(3).

[13] Approving a project at a "lower residential density" in a ***compliant*** jurisdiction does not create any additional obligation. In a ***non-compliant*** jurisdiction, however, even if the project that is approved contains more than the number of units indicated in the site inventory as available for housing development, staff should still compare the number of units approved with the number of units that would meet 80 percent of the default density. In the latter instance, the city will need to make the necessary findings under No Net Loss and may need to upzone other sites.

B. Application of the No Net Loss Provision to Charter Cities (SB 1333)

Prior to January 1, 2019, the No Net Loss provisions did not apply to charter cities. With the adoption of Senate Bill 1333, however, the No Net Loss requirements - as well as a number of other provisions in the Planning & Zoning Law - now expressly apply to charter cities. (§ 65863(i).) As of January 1, 2019, even charter cities must maintain adequate capacity for site inventory sites and make the appropriate findings each time the city approves a project on a site that is identified in the city's Housing Element or down-zones a site inventory site.

For many cities, especially larger charter cities, maintaining adequate capacity to comply with the No Net Loss provisions may require a greater level of coordination within the planning department. As described above, each city must ***quantify*** the remaining unmet need for each RHNA income level when it makes findings under the No Net Loss provision. For many cities, especially larger charter cities with diverse and separate planning areas, quantifying the unmet housing need may require a shift in internal recordkeeping. We recommend that city attorneys of cities of all sizes proactively coordinate with planning department staff to ensure that resolutions approving developments on site inventory sites include the appropriate quantification of unmet RHNA needs and the required findings.

C. Additional Practice Tips for Compliance with the No Net Loss Provisions

The easiest way to ensure that a city complies with the basic requirement of the No Net Loss provision - i.e., to maintain adequate housing capacity during the planning period - is to begin the housing element cycle with a ***surplus*** of adequate sites in the Housing Element site inventory. The larger the surplus, the more likely the city will be able to make the required No Net Loss finding that there is adequate remaining capacity, and the less likely the city will have to scramble to upzone other sites in a 180-day period. Without a surplus, cities may be faced with constant upzonings, which may be practically and politically challenging.

In light of the specific requirements of the No Net Loss provisions, we recommend that every local planning department maintain a spreadsheet identifying the Housing Element site inventory sites. For each site inventory site, the spreadsheet should identify the number of units – and the appropriate income level – of the units identified in the Housing Element as possible for each site. Planning department staff should monitor re-zonings, for both site inventory sites and non-site inventory sites, in order to continue to quantify the city's remaining unmet housing need by income level at any moment.

In addition, if a city receives a development application for a site identified in the site inventory, planning staff should immediately begin considering how to comply with the No Net Loss provisions. First, staff should compare the number and income level of the units proposed by the applicant with the number of units and income level identified as possible for the site in the site inventory. If the proposed project would develop the site at a "lower residential density," the city must make the necessary finding that the city has adequate capacity elsewhere to accommodate the differential in capacity. If the city will not have adequate remaining capacity, staff should identify replacement sites that may need to be upzoned as soon as possible, especially in light of the 180-day window in which to complete any necessary

CEQA analysis and planning or zoning amendments. (§ 65863(c)(2).) To that end, staff may wish to maintain a list of potential alternative sites that are not listed in the site inventory, which could be used as replacement sites.

Consistently maintaining a tally of the city's remaining unmet need should now be a regular task for planning department staff. Maintaining adequate data regarding the city's unit capacity and unit production also will allow staff to more easily prepare the housing element annual progress report, which must be provided to the city council and submitted to the State by April 1 each year, pursuant to Government Code Section 65400. While all of these new requirements may create additional burdens on staff, monitoring the city's progress as the housing element cycle proceeds, both with respect to zoning capacity and unit production, may allow staff to plan more strategically for future housing element cycles.

IV. The Housing Accountability Act ("HAA")

A. Basic HAA Provisions

The Housing Accountability Act (HAA; § 65589.5) applies to **all** "housing development projects," whether or not affordable, and to emergency shelters. It is applicable to charter cities. (§ 65589.5(g).) A "housing development project" includes:

- Residences only;
- Transitional and supportive housing;
- Mixed use projects with at least two-thirds the square footage designated for residential use. (§ 65589.5(h)(2).)

The HAA applies only when a local agency is considering a "specific construction proposal" and does not include the approval or disapproval of a specific plan or other legislative action. (*Chandis Sec. Co. v. City of Dana Point*.[14]) But the definition of a "housing development project" does not require that the project contain any affordable housing, and the courts have rejected contentions to the contrary.[15] In fact, all of the published cases except one interpreting the HAA have involved market-rate, not affordable, projects.

Prior to January 1, 2018, the key provisions of the HAA were as follows:

1. *A Housing Project May Usually Not be Denied or Reduced in Density if It Conforms with All "Objective" Standards*. This key provision requires that *if* a housing project complies with all "objective" general plan, zoning, and subdivision standards, it may only be denied or have its density reduced if a city or county can find that the project would have a "specific adverse impact" on public health and safety.

[14] (1996) 52 Cal. App. 4th 475, 486.

[15] *See Honchariw v. County of Stanislaus* (2011) 200 Cal. App. 4th 1066, 1077; *North Pacifica, LLC v. City of Pacifica* (N.D. Cal. 2002) 234 F. Supp. 2d 1053, 1058.

A "specific adverse impact" is a "significant, quantifiable, direct, and unavoidable impact, based on objective, identified written public health or safety standards" in effect when the application was deemed complete; and there is no feasible method to mitigate the impact. (§ 65589.5(j)(1).)

2. *Additional Findings Must be Made to Deny an Affordable Project*. If a project is also "housing for very low-, low- or moderate-income households," additional findings need to be made to deny the project, reduce the density, or add a condition making the project infeasible—even if the project does not comply with all "objective" standards. (§ 65589.5(d).)

   Affordable developments include projects where at least 20 percent of the units are affordable to lower income households (incomes up to 80% of median) or 100% are affordable to either moderate-income households (120% of median) or middle-income households (150% of median). (§ 65589.5(h)(3).)

B. Key Amendments to the HAA

Amendments adopted in 2017 and 2018 were intended to make it more difficult for cities to deny or reduce the density of all housing developments. The Legislature stated explicitly:

> "The Legislature's intent in enacting this section in 1982 …was to significantly increase the approval & construction of new housing for all economic segments of California's communities by meaningfully and effectively ***curbing the capability of local governments to deny, reduce the density of, or render infeasible housing development projects***. This intent has not been fulfilled." (§ 65589.5(a)(2)(K).)

The major changes were these:

1. *Applicants Must be Informed of Any Inconsistencies within 30-60 Days after the Application is Complete*. Cities and counties must identify any inconsistencies with any applicable "plan, program, policy, ordinance, standard, requirement, or similar provision" within 30 days after an application for 150 units or less has been deemed complete, or within 60 days for projects with more than 150 units. If the local agency does not identify an inconsistency within the required period, the project will be "deemed consistent." (§§ 65589.5(j)(2).)

2. *Projects Receiving Density Bonuses Are Consistent with Objective Standards*. Receipt of a density bonus is not a basis to find a housing project inconsistent with applicable development standards. (§ 65589.5(j)(3).)

3. *Projects Consistent with the General Plan, But Not Inconsistent Zoning, Are Consistent.* If the zoning for the site is inconsistent with the general plan, but the housing project is consistent with 'objective' general plan standards and criteria, the project is considered consistent, and no rezoning is required.

(§ 65589.5(j)(4).) This may mean that a project could be built at the density shown in the housing element even before consistent zoning is completed.

4. *Less Deference to Local Government Findings of Inconsistency*. A housing project "shall" be deemed consistent with applicable standards if there is substantial evidence that would allow a reasonable person to conclude that the project is consistent. (§ 65589.5(f)(4).)

   This standard allows applicants to submit their own evidence of consistency, and, if a court finds that evidence of project consistency submitted by an applicant is reasonable, the project may be found consistent even if the local government has better evidence that the project is inconsistent. Further, if staff or a planning commission has recommended approval and made findings of consistency, the agency would need to find that those findings were unreasonable or not supported by substantial evidence, making it difficult for city councils to overturn staff or planning commission recommendations for approval. On the plus side, the standard will make it more difficult for project opponents to challenge a project as inconsistent when the local government has found it to be consistent.

   Any findings made to deny or reduce the density of a housing project conforming with objective standards or to deny or reduce the density of an affordable housing project must be supported by a 'preponderance of the evidence,' which is a far less deferential standard of review than the former 'substantial evidence' standard. (§ 65589.5(d), (j).)

5. *Increased Penalties for Failure to Comply with the HAA*. The city has the burden of proof in defending against any HAA claim. (§ 65589.6.) If a city improperly denies any housing project, whether market rate or affordable, the prevailing party in a lawsuit brought under the HAA is entitled to attorneys' fees. (§ 65589.5(k)(1)(A).) In addition, if a local agency fails to comply with a court order to approve a project pursuant to the HAA, it shall be fined a minimum of $10,000 per unit. (§ 65589.5(k)(1)(B).) Penalties can increase to five times this amount if the local agency fails to comply with a court order, and the court finds bad faith. (§ 65589.5(*l*).)

C. Relationship to the Coastal Act and CEQA

The HAA provides that "[n]othing in this section shall be construed to relieve the local agency from complying with … the California Coastal Act of 1976…Neither shall anything in this section be construed to relieve the local agency from making one or more of the findings required by [CEQA]." (§ 65589.5(e).) This provision retains significant authority for cities.

Coastal Act issues: While there is no case that decides whether the Coastal Act trumps the HAA, in *Kalnel Gardens, LLC v. City of Los Angeles,*[16] the Court of Appeal in dicta concluded that, based on the language of the HAA and the Court's reasoning regarding the relationship of state density bonus law to the Coastal Act, the HAA is likely subordinate to the Coastal Act. That is, regardless of the HAA, no housing development project may be approved if it violates the Coastal Act.[17] Assuming that this conclusion is correct, projects within the coastal zone may be denied if they are inconsistent with relatively subjective provisions of the Coastal Act, such as the requirement that they be "visually compatible with the character of the surrounding area."

CEQA Issues: An HAA claim may not even be ripe until CEQA review is completed. In *Schellinger Brothers v. City of Sebastopol*,[18] the developer spent six years trying to get a development plan approved, modifying the plan by repeatedly reducing the density and paying for various versions of an EIR that was never certified. He finally sought to have a court order the City to certify the EIR, citing, in part, the HAA. The Court of Appeal held that it could not order the City to certify the EIR; that the City had not unreasonably delayed the project because Schellinger kept modifying it; that the City had always continued to process the EIR; and that the HAA would have no applicability until the EIR was certified.

Since environmental review may well substantially exceed 30 to 60 days, applicants will often receive a list of plan inconsistencies long before CEQA review is completed. That review could require the incorporation of various mitigation measures into the project, potentially resulting in major project changes. The HAA contains no provisions for submittal of revised plans, and re-review, once a project is deemed complete.

It is not entirely clear how cities should reconcile the HAA and CEQA if a required mitigation measure would make a project infeasible. In *Sequoyah Hills Homeowners Assn. v. City of Oakland,*[19] the Court of Appeal upheld the City of Oakland's determination that it was legally infeasible to approve a reduced density alternative because the City could not make the findings required by the HAA to reduce the density: none of the impacts that would be mitigated by the reduced density alternative rose to the level of "specific, adverse impacts on public health or safety." But a city in this situation might be required to adopt a statement of overriding considerations under CEQA Guidelines Section 15093. Would its refusal to do so justify denial of the project? To be determined.

D. Many Unanswered Questions

There are few published cases interpreting the HAA and none interpreting the recent amendments. Here are some of the issues we have encountered in advising cities and defending in litigation based on the HAA, which may well be resolved in future litigation:

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[16] (2016) 3 Cal. App. 5th 927.

[17] *See id.* at 944 fn.9.

[18] (2009) 179 Cal. App. 4th 1245.

[19] (1993) 23 Cal. App. 4th 704, 715-716.

1. *What Is an 'Objective' Standard?* The HAA does not define 'objective' (although SB 35 does, as discussed in the next section), nor do any of the published cases. The Court of Appeal in *Honchariw v. County of Stanislaus*[20] noted that the term "objective" was added in 1999 amendments and was intended to "strengthen the law by taking away an agency's ability to use what might be called a 'subjective' development 'policy' (for example, 'suitability')" to deny or reduce the density of a housing development project. But the Court never defined the term.

2. *Conflict with Other State Laws.* The HAA's demand that a project denial or reduction in density be based on 'objective' standards conflicts with subjective standards contained throughout state Planning and Zoning Law, such as the list of findings in the Subdivision Map Act requiring denial of a project. (§ 66474.)

3. *Use of Subjective Findings.* The findings contained in local zoning ordinances that must be made to approve projects through discretionary processes are almost all subjective (e.g., "furthers the public safety and welfare"; "is consistent with the character of the neighborhood"). It is our view that conditions of approval can be imposed (so long as they do not have the effect of reducing project density) to ensure that a city can make the required findings, but this view is challenged by advocates.

4. *May a Project be "Deemed Consistent" When It Isn't Consistent?* The HAA states that failure of staff to point out an inconsistency results in a project being "deemed consistent" even when it clearly does not meet general plan or zoning standards. This provision in effect allows amendments to general plans and zoning ordinances due to a staff member's failure to comply with a ministerial duty and without notice or due process. Consequently, it appears that challenges are available to the 'deemed consistent' provision.

5. *What Does 'Reduced Density' Mean?* Cities view the definition of density as units per acre, and the housing element statute also refers to density as units per acre. (*See, e.g.,* § 65583.2(c)(3)(B).) The HAA contains no definition of density. Plaintiffs argue that even the loss of a bedroom is a loss of density, based on this language: " 'Lower density' includes any conditions that have the same effect or impact on the ability of the project to provide housing." (§ 65589.5(j)(5).)

6. *Does the HAA Apply to One Single-Family Home on an Individual Lot?* Because a "housing development project" is defined as including "residential unit**s**" (plural), many cities have concluded that the HAA does not apply to an application for one single-family home on an individual lot. This conclusion is also consistent

[20] (2011) 200 Cal. App. 4th 1066, 1076-77.

with the purposes of the HAA; that is, issues involving the design and construction of one home on an existing lot do not relate to the creation of additional housing, only to how big or tall the house can be.

7. *Are Design Guidelines 'Design Review Standards'?* The HAA requires project compliance with "objective general plan, zoning, and subdivision standards, including design review standards." (§ 65589.5(j)(1).) Plaintiffs have argued that even objective design guidelines are not 'design review standards,' and so compliance is not required, although we do not agree with this interpretation. As a best practice, it is better to reference these 'guidelines' as 'standards' in the zoning ordinance or general plan and to make clear that they are mandatory.

E. Practice Tips

In our experience, many planners are still not aware of the requirements and implications of the HAA, in particular the need to send a letter within 30 – 60 days of the completeness determination detailing all of the inconsistencies between the project and applicable city regulations. Additionally, city councils need to be aware that, once the staff or planning commission has found that a project complies with all objective standards, the council's ability to conclude otherwise may not be upheld by the courts unless the previous conclusion is not supported by substantial evidence that would allow a reasonable person to conclude that the project is consistent. The city attorney may find him- or herself in the difficult position of explaining why the council has no choice but to approve a project.

City attorneys will need to work closely with their planning staff to ensure that they are complying with the HAA. Below are some practices adopted by cities:

1. *Determining Consistency.* Prepare a packet containing all “plans, programs, policies, ordinances, standards, requirements” to ensure that no standards are left out. Require applicants to demonstrate consistency as part of application submittal.

2. *Base Project Denials or Density Reductions on Inconsistency with 'Objective' Standards.* Review the standards to ensure that they are 'objective.' Review the record to ensure that there are not contrary findings in the record that may be considered to be reasonable. Consider adding conditions of approval (even 'redesigning from the dais') rather than denying the project, even if the conditions are not acceptable to the applicant, to address any inconsistencies with either objective or subjective standards.

3. *Attempt to Convert as Many Standards as Possible to 'Objective' Standards.* This strategy is discussed in more detail in the next section.

4. *If Litigation is Brought by a 'Housing Organization,' Understand that the Interests of the Organization and the Real Party May Not Align.* The statute allows a 'housing organization' to bring litigation on behalf of the developer

[§ 65589.5(k)(1)(A)], so long as the organization has first provided written or oral comments to the city. (§ 65589.5(k)(2).) The HAA cases we are now defending were all brought by YIMBY organizations committed to the construction of housing of all types, affordable or market-rate. However, in the context of litigation, the interests of the developer and the 'housing organization' do not necessarily coincide: the developer wants a project and a settlement in a timely fashion; the housing organization wants to make new law, get attorneys' fees, and issue a press release. This can make settlement difficult.

V. State-Mandated Ministerial Approval Processes

A. Legislative Trend - Establishing Ministerial Approval Processes for Housing

From the State's perspective, local discretionary approval processes potentially create barriers to the production of housing.[21] To reduce such barriers, the Legislature has established ministerial approval processes for various housing types. In some instances, the State has established the criteria that make a housing project application eligible for streamlined approvals. In other instances, the State has authorized cities to establish the development standards to qualify for streamlined ministerial approval.

State-mandated ministerial approval processes often require that proposed housing projects comply with a city's existing objective development standards. This section briefly describes two of the most important State-mandated approval processes. We anticipate that the Legislature will continue to encourage – and mandate – more streamlined housing approval processes.

As described below, we recommend that cities – and city attorneys – become familiar with the new State-mandated ministerial approval processes. In addition, we recommend that city planning departments reevaluate their existing (and potentially applicable) objective development standards. As the State focuses more on ministerial approval processes, locally established objective development standards may be the only way to ensure that new developments comply with local preferences for future development. Since the distinction between objective and subjective standards is not always clear, city attorneys will need to work closely with planning staff to develop and refine development standards to ensure that objective standards do not confer discretionary authority on local decision-makers unintentionally.

1. *Senate Bill 35 - Government Code Section 65913.4*

In 2017, the State enacted Senate Bill 35, establishing a streamlined ministerial approval process for qualifying multifamily housing projects. SB 35 authorizes proponents of residential developments that meet specified statutory criteria to apply for approval under a streamlined, ministerial approval process. (§ 65913.4(a).) This means that a city cannot require a conditional use permit or other discretionary approval for projects meeting these criteria. Moreover, as ministerial actions, these approvals are statutorily exempt from CEQA. (Pub. Res. Code

[21] *See, e.g.*, Gov. Code 65589.5(a)(1)(K).

§ 21080(b)(1); CEQA Guidelines § 15268.) In November 2018, HCD released guidelines intended to clarify this process.[22]

As part of the approval process, a city must determine whether the proposed project is consistent with "objective zoning standards and objective design review standards" established before the application for approval is submitted. (§ 65913.4(a)(5).) As defined in the statute, "objective standards" are those that "involve no personal or subjective judgment by a public official and are uniformly verifiable by reference to an external and uniform benchmark or criterion available and knowable by both" the applicant and the public official prior to the time the application is submitted. (*Id*.)

In light of this requirement, cities may want to evaluate their zoning regulations and design review guidelines to determine which local standards are truly "objective" and could be applied to SB 35 projects. Objective zoning standards might include setbacks, floor area ratio standards, lot coverage limitations, and maximum height. In general, most cities do not yet have adequate objective standards in place to address concerns that previously may have been addressed through the CEQA process, including concerns regarding historic, tribal cultural, and biological resources. As such, cities should consider adopting additional, broadly applicable, objective standards to ensure that typically imposed conditions of approval or mitigation measures will apply to projects approved through the ministerial process. Of course, any newly adopted standards would need to be tailored to ensure that they are clear and objective.

2. *Assembly Bill 2162 - Government Code Sections 65650 et seq.*

In 2018, the Legislature responded to the State's homelessness crisis, in part, by establishing another ministerial approval process specifically for qualifying supportive housing developments. As defined by State law, "supportive housing" means housing with no limit on length of stay, that is occupied by a defined target population—including persons with disabilities, families who are homeless, and homeless youth—and where the housing is linked to onsite or offsite services that assist residents in retaining housing, improving health, and maximizing the ability to live and, when possible, work in the community. (Health & Safety Code § 50675.14.)

AB 2162 requires supportive housing to be a "use by right" in zones where either multifamily or mixed uses are permitted, so long as the proposed housing development meets the criteria outlined below. (§ 65651(a).) A "use by right" means that the local government's review may not require a conditional use permit, planned unit development permit, or other discretionary local government review and the approval would not constitute a "project" for purposes of CEQA. (§ 65583.2(i).)

[22] These guidelines can be found at http://www.hcd.ca.gov/policy-research/docs/SB-35-Guidelines-final.pdf. Although the guidelines state that they are 'quasi-legislative,' they were prepared without public hearings, without submittal to the Office of Administrative Law, and through an informal process that did not create a record and where there is no explanation of interpretations that seem to go beyond the provisions of the statute. If there is litigation regarding these guidelines, cities should submit a Public Records Act request to determine as much as possible who influenced the guidelines and why certain decisions were made.

To qualify as a "use by right" under AB 2162, a supportive housing development application must satisfy all of the following requirements:

- Units in the development are subject to a 55-year recorded affordability restriction;
- Every unit, except the managers' unit, must be dedicated to lower income households, and the development must receive public funding to ensure affordability;
- The greater of 12 units or 25% of all units in the development, or all units if the development is under 12 units, are restricted to residents in supportive housing;
- The development must contain a specific amount of nonresidential floor area dedicated to supportive services, the amount of which depends on the number of units, as specifically stated in Government Code Section 65651(a)(5);
- Units must include a bathroom and a kitchen or other cooking facilities, including, at a minimum, a stovetop, sink, and refrigerator; and
- The developer must submit a plan for providing supportive services, identifying the entity that will provide services, specific services that will be available, proposed funding for the services, and proposed staffing levels. (§ 65651.)

Local agencies must approve supportive housing developments that comply with these requirements through a ministerial, non-discretionary review process. Local agencies must make a decision on a proposed supportive housing project within 60 days after the application is deemed complete, if the development contains 50 or fewer units, or within 120 days after the application is deemed complete, if the development contains more than 50 units. (§ 65653(b).)

For many jurisdictions, the streamlined approval process will be available only for developments of 50 units or less. For cities with a population of less than 200,000 people and where the population of persons experiencing homelessness is 1,500 or fewer (according to the most recently published point-in-time count), a supportive housing development only qualifies for the "by right" procedures if the development contains no more than 50 units. (§ 65651(d).) Cities should verify overall population - and the population of persons experiencing homelessness - before relying on the 50-unit maximum. For larger cities and for any city with a homeless population of at least 1,500 people, all qualifying supportive housing developments shall be considered a "use by right," regardless of whether the proposed development contains more than 50 units.

As with SB 35, local governments may require supportive housing developments to comply with the same objective, written development standards that apply to other multifamily developments in the zone. We recommend that local planning staff review local standards to ensure that the regularly applicable development standards for multifamily uses remain appropriate.

While this paper does not seek to explain all of the requirements for a streamlined supportive housing development, we recommend that city attorneys and local planning staff

become familiar with the application and approval requirements for supportive housing developments that qualify for the "use by right" procedures, as required by Section 65651.

B. Streamlined Ministerial Approval Processes - Challenges for Local Agencies

The Legislature continues to consider additional State-mandated ministerial approval processes for housing developments.[23] These new bills could alter the way cities plan for development in drastic ways. City attorneys and staff need to prepare for significant shifts in local control and planning frameworks.

1. *Reduced Reliance on the CEQA Process*

As the Legislature relies increasingly on ministerial project approvals, the practical impact of CEQA will be reduced. When a city relies on a discretionary decision to approve a project, they have the opportunity to revise a proposed project by imposing feasible mitigation measures to reduce significant environmental impacts through the CEQA process and impose conditions of approval through the discretionary planning process to address neighborhood compatibility, aesthetic concerns, and impacts to the City's infrastructure and public services.

If the Legislature continues to adopt State-mandated ministerial approval processes, cities will lose the ability to use the CEQA process to analyze impacts to public infrastructure and the environment. Local planning agencies should analyze their discretionary review processes and recent project approvals to determine whether there are concerns that only come to light through the environmental review process. If cities wish to continue addressing those concerns, even after the State's imposition of ministerial approval processes, they should convert standard conditions of approval into objective standards that would apply to all proposed projects. City attorneys will need to assist staff in converting potentially subjective conditions of approval and standard mitigation measures into 'objective' standards, where possible.

2. *Proactively Reviewing and Revising Objective Standards*

In addition to analyzing conditions of approval and mitigation measures that normally would be imposed through the CEQA process, city planning departments should review and potentially revise generally applicable objective zoning and design review standards. Most of the adopted and pending State-mandated approval processes rely on consistency with such standards. To the extent that cities want to maintain some control over the local development process, therefore, city planning staff should review generally applicable objective standards and update them as needed. City attorneys should be prepared to review draft amendments and ensure that the standards do not unintentionally confer discretionary authority on the reviewer, thereby converting objective standards into subjective standards.

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[23] See, e.g., Senate Bill 827, 2017-2018 Reg. Session (Wiener 2018) and Senate Bill 50, 2019-2020 Reg. Session (Wiener 2019).

VI. Potential Citizen Responses: Initiatives and Referenda

In a recent USC Dornsife/Los Angeles Times survey, only 13 percent of eligible voters believed that too little homebuilding was responsible for high housing costs, and only nine percent of voters believed that restrictive zoning rules were at fault. At the same time, 69 percent wanted to retain local control rather than provide more state control over housing production.[24] This sets up the potential for a citizens' revolt, through local initiatives or referenda, or even through statewide action, against the state's insistence that cities zone for higher densities.

Some cities already have citizen-adopted growth caps or requirements that any upzoning receive voter approval. More of these types of growth control measures could be proposed and adopted if there is sufficient opposition to the upzoning needed to meet housing element law. Alternatively, citizens may obtain signatures for a referendum to overturn an adopted housing element or rezoning.

The California Supreme Court has called the initiative and referendum power "one of the most precious rights of our democratic process," which the courts "should protect and liberally construe."[25] Historically, the Court has consistently upheld the initiative and referendum power in the land use context.[26] As relevant here, the Supreme Court has upheld a voter-adopted initiative requiring voter approval of zoning changes,[27] and the Court of Appeal upheld a similar initiative requiring voter approval of amendments to the local coastal plan, even though the Coastal Act involves statewide interests, like housing element law.[28] In the most recent case, *City of Morgan Hill v. Bushey,*[29] the Court upheld a referendum even though it resulted in an inconsistency between the general plan and zoning.

Therefore, cities should not expect the courts to intervene to stop the adoption of initiatives requiring voter approval of upzoning or referenda on housing elements, unless, in the end, these result in a fatal conflict with state law. In at least two instances, superior courts have removed these citizen-adopted requirements when they have conflicted with state law. In 2010, the Alameda County Superior Court found that the voter-adopted growth limit in the City of Pleasanton could no longer accommodate the City's RHNA and found it preempted by state law.[30] In 2019, after voters failed to approve a housing element due in 2013 in elections held in 2016 and 2018, the San Diego Superior Court ordered the City of Encinitas to adopt a housing

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[24] *See* Liam Dillon, "Experts say California needs to build a lot more housing. But the public disagrees," *Los Angeles Times* (October 21, 2018).

[25] *California Cannabis Coalition v. City of Upland* (2017) 3 Cal. 5th 924, 928.

[26] *See Associated Home Builders etc., Inc. v. City of Livermore* (1976) 18 Cal. 3d 582, 596.

[27] *See DeVita v. County of Napa* (1995) 9 Cal. 4th 763, 783.

[28] *See San Mateo County Coastal Landowners' Ass'n. v. County of San Mateo* (1995) 38 Cal. App. 4th 523, 536 fn.4, 538.

[29] 5 Cal. 5th 1068 (2018).

[30] *Urban Habitat Program v. City of Pleasanton,* Alameda County Superior Court Case No. RG06-293831, order filed March 12, 2010.

element without a vote.[31] However, plaintiffs in the suit initially attempted to stop the 2018 vote, and the court refused even though the element was five years late. Where voters make it impossible for cities to comply with state law, city attorneys can expect protracted litigation.

However, the Legislature may act to address these issues. Pending Senate Bill 330 (Skinner) would declare any requirement that voter approval be obtained to "increase the allowable intensity of housing, to establish housing as an allowable use, or to provide services and infrastructure necessary to develop housing" to be against public policy and void. Whether this provision, if adopted, would be consistent with the State Constitution's protection of the initiative power is an issue almost certain to be decided by the courts.

VII. Conclusion

City attorneys should be prepared to assist local planning staff and decision-makers as they adjust to the new planning framework in California. Decision-makers and planners alike will be frustrated with the loss of local control and the strain on local resources required to comply with new laws.

City attorneys can assist local planning staff and decision-makers by encouraging them to strategically and proactively plan for targeted density - through strategic planning and the potential adoption of objective standards for multifamily housing. Establishing additional objective standards can lead to multifamily housing development that better meets the community's vision for future growth, at least from an aesthetic perspective, than simply relying on pre-existing objective standards, which likely were intended to establish minimum requirements as a prerequisite for a discretionary review process.

In addition, city attorneys likely will need to be more engaged in the housing element review process - and interactions with HCD - as staff struggles to find adequate sites that meet statutory requirements and comply with the new fair housing requirements for the sixth cycle. When preparing the site inventory, city attorneys and staff should be thinking ahead to ensure compliance with the No Net Loss requirements.

City attorneys can minimize legal exposure by educating staff and decision-makers about the limited scope of their authority with respect to discretionary approvals for housing development projects under the HAA. In addition, city attorneys should be prepared to proactively collaborate with planning staff to ensure that the city complies with the procedural requirements of the HAA and the No Net Loss provisions, especially the need to provide applicants with letters of inconsistency, monitor the city's remaining unmet RHNA need by income level, and prepare necessary findings for project approvals.

Despite all of this advice, the best advice we can provide to city attorneys and local planning staff alike is to stay informed about *further* changes in State law. There have already

[31] *San Diego Tenants United v. City of Encinitas,* San Diego County Superior Court Case No. 37-2017-00013257-CU-WM-NC, order filed January 31, 2019.

been a myriad of bills introduced this year that would: create new streamlined approval processes for multifamily housing in transit-oriented and jobs-rich areas; potentially freeze development standards and development impact fees; and reduce local discretion further with respect to accessory dwelling units. Encouraging the development of housing remains a policy priority in Sacramento, and we anticipate that these laws will continue to change on an annual basis for some years to come.

Streamlined Processing of Ministerial Projects under SB 35

Thursday, May 9, 2019 General Session; 9:00 – 10:30 a.m.

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STREAMLINED PROCESSING OF MINISTERIAL PROJECTS UNDER SB 35

MAY 9, 2019

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STREAMLINED PROCESSING OF MINISTERIAL PROJECTS UNDER SB 35

I. BACKGROUND INFORMATION ON SB 35

California Senate Bill 35 ("SB 35"), codified at Government Code Section 65913.4[1], was signed by then-Governor Jerry Brown on September 29, 2017 and became effective January 1, 2018 (amendments were made in 2018 that became January 1, 2019). SB 35 will automatically sunset on January 1, 2026 (Section 65913.4(m)). The intent of SB 35 is to expedite and facilitate construction of affordable housing. In adopting SB 35, the Legislative found that providing affordable housing opportunities is a matter of statewide concern and declared that SB 35 would apply to all cities and counties, including a charter city, a charter county, or a charter city and county (Section 65913.4(i)(6)).

SB 35 applies to cities and counties that have not made sufficient progress toward meeting their affordable housing goals for above-moderate and lower income levels as mandated by the State. In an effort to meet the affordable housing goals, SB 35 requires cities and counties to streamline the review and approval of certain qualifying affordable housing projects through a ministerial process.

The California Department of Housing and Community Development ("HCD") is responsible for determining whether a local agency has made sufficient progress toward its above-moderate and lower income housing goals. HCD's determination is based on whether the locality has issued fewer building permits than its pro-rata share of the regional housing need, by income level, for that reporting period. The "reporting period" is defined as either the first half or the second half of the regional housing needs assessment cycle (Section 65913.4(i)(10)) and is based upon the locality's annual progress report ("APR"). This determination remains in effect until HCD's determination for the next reporting period.

Refer to HCD's website, SB 35 Statewide Determination Summary, for list of the local agencies subject to SB 35 streamlining provisions. As of the date of this paper, the current Determination Summary represents Housing Element Annual Progress Report data received as of January 31, 2018. According to this data, 13 jurisdictions have met their prorated Lower (Very-Low and Low) and Above-Moderate Income Regional Housing Needs Assessment (RHNA) for the reporting period and are not currently subject to the streamlined ministerial approval process. All other cities and counties are subject to at least some form of SB 35 streamlining.

[1] Unless otherwise noted, all references in this paper are to Government Code Section 65913.4.

There are 378 jurisdictions that have made insufficient progress toward their Above Moderate income RHNA numbers and/or have not submitted their latest Housing Element Annual Progress Report (2016) and there are 148 jurisdictions that have made insufficient progress toward their Lower income RHNA numbers (Very-Low and Low income).

II. HCD GUIDELINES

In adopting SB 35, the Legislature provided HCD with the authority to prepare and adopt guidelines to implement SB 35 (Section 65913.4(j)). Draft Guidelines were issued on September 28, 2018 and final Guidelines were adopted on November 29, 2018. These Guidelines apply to SB 35 applications submitted on or after January 1, 2019 and can be found on HCD's website.

III. WHAT IS A STREAMLINED, MINISTERIAL APPROVAL PROCESS UNDER SB 35?

SB 35 requires cities and counties to streamline review and approval of eligible affordable housing projects through a ministerial approval process, exempting such projects from environmental review under the California Environmental Quality Act ("CEQA"). This process does not allow public hearings to consider the merits of the project; rather, only design review or public oversight of the development is allowed, which must be objective and strictly focused on assessing compliance with criteria required for streamlined projects as well as objective design review of the project (Section 65913.4(c)(1).

Depending on the number of housing units proposed in the project, the jurisdiction has only a short timeframe within which to review the application to determine if it is eligible for processing under SB 35 (between 60-90 days). If it is determined that the project is eligible, SB 35 specifies the timeframes within which the jurisdiction has to make a final decision on the application (between 90-180 days). These timeframes are discussed in more detail in Section V, below.

An applicant may propose a project under this streamlined, ministerial approval process but must meet the eligibility criteria identified in SB 35 as discussed in Section IV, below.

IV. WHAT ARE THE ELIGIBILITY CRITERIA FOR THE SB 35 STREAMLINED, MINISTERIAL APPROVAL PROCESS?

State housing law requires cities and counties to report their housing production annually according to the number of building permits issued within the jurisdiction by income level. SB 35 applies to localities that are unable to issue a sufficient number of building permits to meet its RHNA goals for both above income and lower income units.

Projects providing affordable housing for low income levels are eligible for the streamlined, ministerial approval process if they meet all of the following criteria:

(a) Urban Infill. Are located in an urban area, with 75% of the site's perimeter already developed (Section 65913.4(a)(2)(A) and (B)).

(b) Number of Units. Propose at least two residential units (Section 65913.4(a)(1)).

(c) Designated for Residential Uses. Have a general plan and/or zoning designation that allows residential or mixed-use with at least 2/3 of the square footage as residential use (Section 65913.4(a)(2)(C)).

(d) Location. Cannot be located on property within any of the following areas: a coastal zone, prime farmland, wetlands, very high fire hazard severity zone, hazardous waste site, delineated earthquake fault zone, flood plain, floodway, community conservation plan area, habitat for protected species, under a conservation easement, or located on a qualifying mobile home site (Section 65913.4(a)(6)).

(e) Demolition of Residential Units. The development would not demolish any housing units that have been occupied by tenants in the last 10 years; are subject to any form of rent or price control, or are subject to a recorded covenant, ordinance, or law that restricts rents to levels affordable to persons and families of moderate, low, or very low incomes (Section 65913.4(a)(7)).

(f) Historic Buildings. The development would not demolish a historic structure that is on a national, state, or local historic register (Section 65913.4(a)(7)(C)).

(g) Consistent with Objective Planning Standards. Must meet all objective general plan, zoning, subdivision and design review standards in effect at the time the application is submitted. Objective standards are those that require no personal or subjective (discretionary) judgment, and must be verifiable by reference to an external and uniform source available prior to submittal (Section 65913.4(a)(5)).

(h) Prevailing Wages. If the development is not in its entirety a public work, as defined in Government Code Section 65913.4(a)(8)(A), all construction workers employed in

the execution of the development must be paid at least the general prevailing rate of per diem wages for the type of work and geographic area. (Section 65913.4(a)(8)(A)). This requirement does not apply to projects that include 10 or fewer units and is not a public work project (Section 65913.4(a)(8)(C)).

(i) Skilled and Trained Workforce Provisions. A skilled and trained workforce must complete the development if the project consists of 75 or more units that are not 100 percent subsidized affordable housing (Section 65913.4(a)(8)(B)). This requirement does not apply to projects that include 10 or fewer units and is not a public work project (Section 65913.4(a)(8)(C)).

(j) Subdivisions. Does not involve a subdivision subject to the Subdivision Map Act, unless the development either (i) receives a low-income housing tax credit and is subject to the requirement that prevailing wages be paid, or (ii) is subject to the requirements to pay prevailing wages and to use a skilled and trained workforce (Section 65913.4(a)(9)).

(k) Parking. The project must provide at least one parking space per unit; however, no parking may be required if 1) the project is located within a) one half mile of a public transit stop, b) an architecturally and historically significant historic district, c) one block of a car share vehicle station, or 2) on-street parking permits are required but not offered to the development occupants (Section 65913.4(d)).

(l) Mobilehome Site. The project site cannot be governed by the Mobilehome Residency Law, the Recreational Vehicle Park Occupancy Law, the Mobilehome Parks Act, or the Special Occupancy Parks Act (Section 65913.4(a)(10)).

V. REVIEW AND APPROVAL TIMELINE FOR SB 35 PROCESS

Projects that elect to take advantage of this process must submit a planning application indicating the application or entitlement requested and the project's eligibility under SB 35 (see, HCD Guidelines, Article III, Section 301(b)). A locality must determine whether the project is eligible for streamlining, including whether the development conflicts with any objective planning standards, within 60 days of application submittal for projects with 150 or fewer units, and 90 days for projects with more than 150 units (Section 65913.4(b)(1)). If the locality fails to timely provide the documentation identifying conflicts with any objective planning standard, the development is deemed to satisfy all objective planning standards (Section 65913.4(b)(2)). Thereafter, project design review and consideration of any information requested of the applicant must be completed in 90 days from project application submittal for projects with 150 or fewer units and 180 days from project submittal for projects with more than 150 units (Section 65913.4(c)).

VI. PUBLIC HEARINGS ARE NOT ALLOWED ON SB 35 PROJECTS

Public hearings are not allowed on SB 35 projects because these projects are specifically identified by the statute as ministerial projects which do not require public hearings. SB 35 allows "design review or public oversight" to occur if a locality so chooses. This process may be conducted by the planning commission or equivalent board or commission responsible for review and approval of development projects, or the city council. This process must be objective and strictly focused on assessing compliance with criteria required for streamlined projects, as well as any reasonable objective design standards that were in effect before the application was submitted. This process may not in any way "inhibit, chill, or preclude the ministerial approval" allowed by SB 35 (Section 65913.4(c)(1)).

VII. STUDIES ANALYZING THE POTENTIAL IMPACTS ON THE ENVIRONMENT OR COMMUNITY MAY NOT BE REQUIRED

Because projects eligible for the streamlining provisions of SB 35 are considered ministerial by the statute, such projects are not subject to CEQA. Moreover, SB 35 was amended in 2018 to include a specific exemption from CEQA for qualifying projects (Section 65913.4(c)(2)).

Therefore, an SB 35 project applicant cannot be required to prepare any studies that would otherwise be required under CEQA (i.e., traffic, air quality, noise, etc.) Rather, a locality can only require an applicant to abide by objective planning standards that were in effect at the time the SB 35 application was submitted. If an objective planning standard requires certain studies to be performed and there are objective standards to address the preparation and results of those studies, then the applicant would be required to prepare and implement those requirements.

VIII. EXPIRATION OF AN SB 35 PROJECT APPROVAL

The expiration dates for projects approved under SB 35 are as follows:

(a) Projects that include public investment in housing affordability will not expire where 50% of the units are affordable to households making below 80% of the area median income (below moderate income levels).

(b) Projects that do not include 50% of the units as affordable to households making below 80% of the area median income (below moderate income levels) automatically expire after three years except a one-time, one-year extension may be granted if progress is being made toward construction, such as filing a building permit application.

(c) Projects shall remain valid for three years and shall remain in effect as long as vertical construction has begun and is in progress. A one-year extension to the original three year period may be granted if making progress toward construction. (Section 65913.4(e)(1-3)).

IX. WHAT IS THE RELATIONSHIP BETWEEN SB 35 AND DENSITY BONUS LAWS?

SB 35 projects can utilize benefits under state and local density bonus laws (Section 65913.4(a)(5)). When determining consistency with density requirements under SB 35, the maximum density allowed is considered consistent with objective standards and any additional density or units granted as a density bonus are considered consistent with the maximum allowable densities (See, HCD Guidelines, Article III, Section 300(c)).

State Density Bonus Law, which can be found at California Government Code section 65915 *et.seq*., requires all cities and counties to offer a density bonus, allow concessions, incentives and waivers of development standards to housing developments that include either a certain percentage of affordable housing or housing for qualified individuals. The State Density Bonus Law prevails in the event of any inconsistencies between the state law and local ordinance.

A density bonus is an increase in the number of housing units allowed under a general plan and/or zoning ("base density,") to encourage the production of affordable housing. Depending on the amount and affordability of the proposed affordable housing, a project may be allowed a density bonus between 5% and 35% above the base maximum density.

In addition to a density bonus, concessions, incentives and waivers can be requested by an applicant to assist the project in providing affordable units. Depending on the percentage of affordable housing provided, a project may be eligible to receive up to three concessions and incentives. A concession or incentive is a reduction in a site development standard or modification of zoning or architectural requirements, or any other regulatory incentives or concessions that would result in identifiable and actual cost reductions to provide affordable housing. A waiver pertains to a development standard (setback, height, etc.) that would "physically preclude" construction of the project.

X. CONCLUSION

To date, SB 35 has only been utilized by a handful of applicants in a few communities, namely, San Francisco, Oakland, Berkeley and Cupertino. Given the significant criteria thresholds an application must clear in order to be eligible for processing and approval pursuant to SB 35, it remains to be seen how many applicants will utilize SB 35. The HCD Guidelines require local governments to annually report, as part of its APR, the number of applications submitted and/or approved under SB 35, and the number of building permits issued and units constructed (see, HCD Guidelines, Article V, Section 500).

To be ready for such projects, many local agencies have already prepared objective planning standards to address SB 35 projects. HCD Guidelines now require that local agencies subject to SB 35, provide information on the application process and identify the relevant objective planning standards to be used for such projects (see, HCD Guidelines, Article III, Section 300(a)).

General Municipal Litigation Update

Thursday, May 9, 2019 General Session; 10:45 – Noon

Javan N. Rad, Chief Assistant City Attorney, Pasadena

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Notes:_____

General Municipal Litigation Update

Cases Reported from September 14, 2018
Through April 17, 2019

Prepared by
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City of Pasadena

League of California Cities
City Attorneys' Spring Conference
May 9, 2019

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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.

Wireless Facilities in Our Right of Way: Whose Streets Are These Anyway?

Thursday, May 9, 2019 General Session; 10:45 a.m. – Noon

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Notes:

Wireless Facilities in Our Right of Way: Whose Streets are These Anyway?

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League of California Cities
2019 City Attorneys’ Spring Conference

Monterey, California
May 9, 2019

Wireless Facilities in Our Right of Way: Whose Streets are These Anyway?

I. INTRODUCTION

On May 3, 2018, I presented a paper to this Conference that described the legal distinction between municipal regulatory and proprietary authority over wireless facilities in the public rights-of-way. My thesis was that, while various provisions in federal and state law curtailed local police powers, neither hindered the freedom cities enjoyed in their proprietary capacities. Less than six months later, on September 26, 2018, the Federal Communications Commission ("FCC") issued new regulations that contradicted the United States Constitution, the federal Communications Act, Supreme Court precedent and—of course—most everything I said on that day in May.

Part II in this paper revisits the basic California and federal statutory provisions applicable to local control over communication facilities and their relation to property rights. Part III summarizes the FCC's 2018 rulemakings, their impacts on the law and the litigation and legislative responses to these changes. Finally, Part IV offers some perspective on the current state of municipal property rights over their ROW infrastructure and a few practical pointers.

II. STATUTORY CONTEXT

A. California Law

Public Utilities Code § 7901 grants telephone corporations the right to operate within the public rights-of-way without a local franchise.[1] Early court decisions interpreted § 7901 as a "statewide franchise" for telephone and telegraph companies. Local governments cannot require telephone corporations to obtain a local franchise fee as a precondition to access.[2] Likewise, municipalities cannot charge a revenue-generating fee in connection with encroachment or other permits issued to telephone corporations.[3] These limitations extend to wireless service providers.[4]

However, the so-called statewide franchise covers only the real property that comprises the public rights-of-way and does not compel municipalities to grant access to their personal property, such as street lights, traffic signals and other street furniture.[5] This is a distinction with an important difference. Whereas § 7901 may preclude market-rate compensation for the general right to use the public rights-of-way, municipalities may charge a market rate for telecommunications equipment attached to their infrastructure

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[1] *See T-Mobile W. LLC v. City and Cnty. of San Francisco*, S238001 (Cal. Apr. 4, 2019).
[2] *See Western Union Tel. Co. v. Hopkins*, 116 P. 557, 561 (Cal. 1911).
[3] *See* CAL. GOV'T CODE § 50030; *Williams Communications, LLC v. City of Riverside*, 8 Cal. Rptr. 3d 96, 106 (Ct. App. 2003) (invalidating fees charged as "rent or an easement or license fee in consideration for such use of the City's streets").
[4] *See GTE Mobilnet of Cal. Ltd. P'ship v. City & Cnty of San Francisco*, 440 F. Supp. 2d 1097, 1103 (N.D. Cal. 2006).
[5] *See, e.g.*, *NextG Networks of Cal., Inc. v. City of Newport Beach*, No. SACV 10–1286 DOC (JCx), 2011 WL 717388, at *8 (C.D. Cal. Feb. 18, 2011).

within the public rights-of-way. Indeed, the California Constitution regards government property leased at below-market rates as potentially improper gifts.[6]

B. Federal Law

1. Section 332(c)(7)

Section 332(c)(7) generally preserves local authority over personal wireless service facilities, subject to certain substantive and procedural limitations.[7] Local governments may not (1) prohibit or effectively prohibit personal wireless services; (2) unreasonably discriminate among functionally equivalent service providers; or (3) regulate personal wireless service facilities based on the environmental effects from radio frequency emissions to the extent such emissions meet FCC guidelines.[8] Local authorities must act within a reasonable time on requests for authorization to construct or alter personal wireless service facilities.[9] Denials—and the reasons for the denial—must be in writing and based on substantial evidence in the written record.[10] Federal courts from around the United States have routinely interpreted the preemptive effect under § 332(c)(7)(B) as cabined to land-use decisions or similar governmental acts undertaken in a regulatory capacity.[11]

2. Section 253

Section 253(a) bars any "State or local statute, regulation, or other State or local legal requirement" that prohibits or effectively prohibits any person's or entity's ability to provide any telecommunications service.[12] However, a safe harbor provision preserves State and local authority to manage the public rights-of-way and to require "fair and reasonable compensation" on a "competitively neutral and nondiscriminatory basis . . . if the compensation required is publicly disclosed by such government."[13]

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[6] *See* CAL. CONST., ART. XVI, § 6; *see also Allen v. Hussey*, 225 P.2d 674, 684 (Cal. Ct. App. 1950) (finding that a $1-per-year lease from an irrigation district to a private person to operate an airport constituted a "gift").

[7] *Compare* 47 U.S.C. § 332(c)(7)(A) (preserving local authority), *with id.* § 332(c)(7)(B) (listing exceptions to the local authority preserved in subsection (A)); *see also Omnipoint Communications, Inc. v. City of Huntington Beach*, 738 F.3d 192, 195 (9th Cir. 2013) ("We conclude that § 332(c)(7)(A) functions to preserve local land use authorities' legislative and adjudicative authority subject to certain substantive and procedural limitations.").

[8] *See* 47 U.S.C. §§ 332(c)(7)(B)(i), (iv).

[9] *See id.* § 332(c)(7)(B)(ii).

[10] *See id.* § 332(c)(7)(B)(iii); *see also T-Mobile So. LLC v. City of Roswell*, --- U.S. ---, 135 S.Ct. 808, 816 (2015) ("Because an entity may not be able to make a considered decision whether to seek judicial review without knowing the reasons for the denial of its application, and because a court cannot review the denial without knowing the locality's reasons, the locality must provide or make available its written reasons at essentially the same time as it communicates its denial.").

[11] *See, e.g.*, *Huntington Beach*, 738 F.3d at 199–200; *Omnipoint Holdings, Inc. v. City of Southfield*, 355 F.3d 601, 607 (6th Cir. 2004); *Sprint Spectrum LP v. Mills*, 283 F.3d 404, 420 (2nd Cir. 2002).

[12] *See* 47 U.S.C. § 253(a).

[13] *See id.* § 253(c).

The Ninth Circuit interprets § 253(a) as preempting only regulatory schemes" and not reaching contractual relationships.[14] Several lower courts have also found that § 253(a) does not preempt agreements between public agencies and telecommunications providers.[15]

3. Section 6409

Section 6409(a) requires that State and local governments "may not deny, and shall approve" any "eligible facilities request" for a wireless site collocation or modification so long as it does not cause a "substant[ial] change in [that site's] physical dimensions."[16] FCC regulations interpret key terms in this statute and impose certain substantive and procedural limitations on local review.[17] In 2014, the FCC expressly found that Section 6409 does not apply to "proprietary" decisions by state or local governments.

III. RECENT FCC RULEMAKINGS

In 2017, the Commission opened two related rulemaking proceedings intended to dramatically reinterpret provisions in the Communications Act and preempt state and local authority over wireless and wireline communications infrastructure deployments.[18] In 2018, the Commission acted on these proceedings and issued two controversial orders broadly preempting state and local authority over communications infrastructure.[19]

A. *Moratorium Order*

On August 2, 2018, the FCC adopted the *Moratorium Order*, which held that "Section 253 applies to wireless and wireline telecommunication services", "both [express

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[14] *See Qwest Corp. v. City of Portland*, 385 F.3d 1236, 1240 (9th Cir. 2004) (finding that § 253 preempts only "regulatory schemes").

[15] *See, e.g.*, *Superior Communications v. City of Riverview*, 230 F. Supp. 3d 778, 794-95 (E.D. Mich. 2017) (relying in *Mills* to find that a city's refusal to approve an upgrade to a tenant's equipment did not violate § 253(a) because the denial could not be properly characterized as "regulation"); *T-Mobile W. Corp. v. Crow*, No. CV08-1337-PHX-NVW, 2009 WL 5128562, at *16 (D. Ariz. Dec. 17, 2009) (finding that ASU's "grant of an exclusive right to NextG to install the DAS and manage facilities is the proprietary decision of a property owner, not a 'regulation' or 'legal requirement' under § 253(a)").

[16] *See* 47 U.S.C. § 1455(a).

[17] *See* In the Matter of Acceleration of Broadband Deployment by Improving Wireless Facilities Siting Policies, *Report and Order*, 29 FCC Rcd. 12865 (Oct. 17, 2014) (codified as 47 C.F.R. §§ 1.40001, *et seq.*) [hereinafter "*Infrastructure Order*"].

[18] *See Accelerating Wireline Broadband Deployment by Removing Barriers to Infrastructure Investment*, WC Docket No. 17-84, Notice of Proposed Rulemaking, Notice of Inquiry and Request for Comment, 32 FCC Rcd 3266 (2017) (hereinafter "*Wireline NPRM*"); *Accelerating Wireless Broadband Deployment by Removing Barriers to Infrastructure Investment*, WT Docket No. 17-79, Notice of Proposed Rulemaking and Notice of Inquiry, 32 FCC Rcd 3330 (2017) (hereinafter "*Wireless NPRM*").

[19] *See In re Accelerating Wireline Broadband Deployment by Removing Barriers to Infrastructure Investment*, WC Docket No. 17-84, FCC 18-111, Third Report and Order and Declaratory Ruling, -- FCC Rcd ---- (Aug. 2, 2018) (hereinafter "*Moratorium Order*"); *In re Accelerating Wireless Broadband Deployment by Removing Barriers to Infrastructure Investment*, WT Docket No. 17-79, FCC 18-133, Declaratory Ruling and Third Report and Order, -- FCC Rcd ---- (Sep. 26, 2018) (hereinafter "*Small Cell Order*").

and *de facto*] moratoria violate [S]ection 253(a) and generally do not fall within the [S]ection 253(b) and (c) exceptions."[20]

> Express moratoria refer to:
>
> > state or local statutes, regulations, or other written legal requirements that expressly, by their very terms, prevent or suspend the acceptance, processing, or approval of applications or permits necessary for deploying telecommunications services and/or facilities.[21]

This classification includes temporary moratoria imposed to protect new resurfaced roads, observe "freeze and frost" periods in colder states and to allow municipalities to develop local regulations in response to regulatory and technological changes.[22] The FCC found that Congress' safe harbor in Section 253(c) for "right-of-way management" did not encompass these purposes.[23]

> *De facto* moratoria refer to:
>
> > state or local actions that are not express moratoria, but that effectively halt or suspend the acceptance, processing, or approval of applications or permits for telecommunications services or facilities in a manner akin to an express moratorium."[24]

In the FCC's view, a *de facto* moratorium exists when "applicants cannot reasonably foresee when approval will be granted . . . ."[25] Although most examples the FCC cited to illustrate a *de facto* moratorium concerned protracted contract negotiations between municipalities and service and/or infrastructure providers, the FCC ultimately explained that fee disputes fall outside the definition for a *de facto* moratorium.[26]

Exceptions to the FCC's ban on moratoria come few and far between. For example, the FCC found that a temporary moratoria on new deployments may be permissible after a natural disaster, but only if the *state* imposes the moratorium and only if such moratorium is competitively neutral, necessary to address the disaster at hand and limited to only those geographic areas impacted by such disaster.[27] Local government right-of-way management must relate to the provider's actual uses and include functions such as coordinating construction schedules; determining insurance,

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[20] *Moratorium Order* at ¶¶ 142 and 144.
[21] *Id.* at ¶ 145.
[22] *See id.* at ¶¶ 145–148.
[23] *See id.* at ¶ 148.
[24] *Id.* at ¶ 149.
[25] *Id.* at ¶ 151.
[26] *Compare Moratorium Order* at ¶ 150 (citing vague anecdotes from Lightower, CTIA, T-Mobile and others), *with id.* at ¶ 159 ("For purposes of this Declaratory Ruling, we exclude the imposition of fees from the definition of de facto moratoria").
[27] *Id.* at ¶ 157. The FCC spills significant ink on this subject, even though the administrative record contains precisely zero evidence that any state ever imposed such a moratorium.

bonding and indemnity requirements; establishing and enforcing building codes; and tracking users and uses to prevent interference among them.[28]

B. *Small Cell Order*

On September 26, 2018, the FCC adopted the *Small Cell Order* that further limited local authority over wireless infrastructure deployments. This section summarizes the many changes in the law in this order that became fully effective on April 15, 2019.

1. Small Wireless Facilities: A New Regulatory Classification

The FCC defines a "small wireless facility" through a multi-part test that largely focuses on physical dimensions.[29] Although some criteria concern the site location, the definition does not depend on whether the facility is or would be located within the public rights-of-way.

The overall height must be less than 50 feet, no more than 10% taller than adjacent structures or no more than 50 feet or 10% taller than the support structure, whichever is greater.[30] Each antenna must be less than three cubic feet in volume, with no cumulative limit on antennas or antenna volume.[31] All non-antenna equipment, which includes any preexisting equipment plus any new equipment, must be less than 28 cubic feet in volume.[32]

The photograph below shows what a typical small wireless facility may look like. This installation includes two six-foot long antennas, each less than three cubic feet, mounted on a typical street light with a 22.5-cubic-foot equipment cabinet mounted in the parkway.

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[28] *See id.* at ¶ 160.
[29] *See* 47 C.F.R. § 1.6002(l).
[30] *See id.* § 1.6002(l)(1). This complex height restriction is derived from the FCC rules for categorical exclusion from preconstruction authorization and the FCC's obligation to conduct environmental review. *See* 47 C.F.R. § 1.1312.
[31] *See* 47 C.F.R. § 1.6002(l)(2).
[32] *See id.* § 1.6002(l)(3).

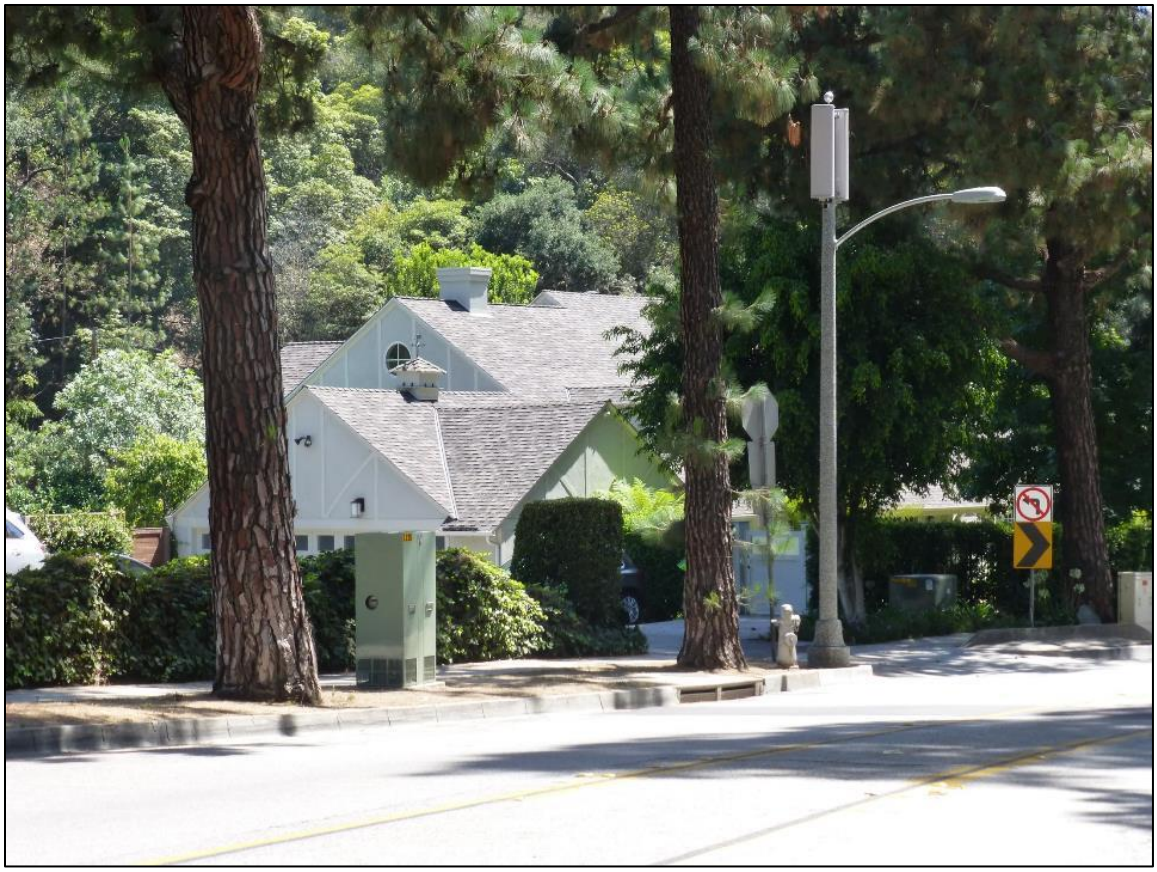

Figure 1: Sample small wireless facility on existing street light. (Photo by Dr. Jonathan L. Kramer.)

Location restrictions are mostly nominal. First, the facilities must not be subject to antenna structure registration under the FCC's rules.[33] Registration is required for any structure over 200 feet tall or within a specific distance from an airport that depends on terrain and airport size.[34] Second, the facilities must not be located on Tribal lands.[35] Finally, the facilities must not be placed or operated in a manner that violates the FCC's standards for human exposure to RF emissions.[36]

2. Abrogated Distinction Between Regulatory and Proprietary Capacities

In a departure from doctrine and precedent, the FCC declared that its regulations would be equally applicable to state and municipal proprietary conduct as it would be to regulatory conduct. The FCC stated that interpretations in the *Small Cell Order*:

> extend to state and local governments' terms for access to public ROW that they own or control, including areas on, below, or above public roadways, highways, streets, sidewalks, or similar property, as well as their terms for use of or attachment to government-owned property within such ROW, such

[33] *See id.* § 1.6002(l)(4).
[34] *See* 47 C.F.R. § 17.7.
[35] *See* 47 C.F.R. § 1.6002(l)(5); *see also* 36 C.F.R. § 800.16(x) (defining "Tribal lands").
[36] *See id.* § 1.6002(l)(6).

as new, existing and replacement light poles, traffic lights, utility poles, and similar property suitable for hosting Small Wireless Facilities.[37]

The FCC reasoned that the preemption in the Communications Act extends to proprietary conduct absent any express reservation in the statute and, in the alternative, that all state and local conduct with respect to the public rights-of-way must be regulatory because it necessarily furthers local public policies.[38] The upshot is that all state and local conduct in connection with wireless or wireline communication facilities is now potentially subject to judicial review under Section 253, Section 332(c)(7) or both.

3. Effective Prohibitions

The FCC reinterpreted the "effective prohibition" restrictions in Sections 332 and 253 to align with the FCC's 1997 decision in *California Payphone*, which held that a local ordinance violated Section 253(a) if it "materially limits or inhibits the ability of any competitor or potential competitor to compete in a fair and balanced legal and regulatory environment."[39] This "new" test purports to replace existing judicial interpretations—such as the Ninth Circuit's "significant gap" test in *MetroPCS* and "actual prohibition" test in *Sprint Telephony*—and substantially lower the bar for preemption.[40]

Perhaps because the *California Payphone* test is clear as mud, the FCC clarified its application to state and municipal fees and aesthetic regulations:

i. Restrictions on Fees

"Fees" subject to the *Small Cell Order* include one-time charges, annual charges to use or attach to municipal property and annual charges for the right to access and use the public ROW.[41] All these fees must be (1) reasonably approximate to costs, (2) objectively reasonable and (3) no higher than those charged to similarly-situated competitors in similar situations.[42]

The FCC also established fee "safe harbors".[43] One-time fees at or below $100 per collocation application or $1,000 per new pole application and annual fees at or below $270 for both access to municipal poles and the pubic ROW are "presumptively reasonable".[44] These are not fee caps. Rather, these levels set the threshold for evidentiary presumptions: the challenger bears the burden at trial when fees are at or

[37] *See Small Cell Order* at ¶ 92.
[38] *See id.* at ¶ 93–96. Both these rationales are deeply flawed.
[39] *See id.* at ¶ 37 (citing *In re California Payphone Ass'n*, 12 FCC Rcd. 14191, 14206 at ¶ 31 (Jul. 16, 1997)).
[40] *See Small Cell Order* at ¶¶ 37–40; *see also id.* at ¶ 40 n.94 ("we reject both the version of the "coverage gap" test followed by the First, Fourth, and Seventh Circuits . . . and the version endorsed by the Second, Third, and Ninth Circuits").
[41] *See id.* at ¶ 50 n.131.
[42] *See id.* at ¶ 50.
[43] *See id.* at ¶¶ 78–80.
[44] *See id.* at ¶ 79.

below these levels, whereas the local government bears the burden in a challenge to fees that exceed these thresholds.[45]

ii. Restrictions on Aesthetics and Other Non-Fee Requirements

All aesthetic and other non-fee regulations must be (1) reasonable, (2) no more burdensome than those applied to other infrastructure deployments, (3) objective and (4) published in advance.[46] The FCC attempted to explain its test as just another way to promote a cost-based regulatory scheme: unsightly infrastructure deployments impose a "cost" on communities and so communities may impose certain aesthetic restrictions to offset those costs.[47]

"Reasonable" aesthetic restrictions mean those that are "technically feasible and reasonably directed to avoiding or remedying the intangible public harm of unsightly or out-of-character deployments . . . ."[48] The "technically feasible" component is not well elaborated within the *Small Cell Order* but the FCC did mention that it would consider some undergrounding and minimum separation requirements unreasonable to the extent such requirements rendered the deployment technically infeasible.[49] However, at the same time, the FCC did not prohibit either undergrounding or minimum separation requirements.[50]

The "no more burdensome" element is ambiguously described in the *Small Cell Order* and lacks a clear definition. On one hand, the FCC says that aesthetic regulations for wireless facilities must be "no more burdensome than those applied to *other* infrastructure deployments," which appears to refer to all other infrastructure whether related to wireless facilities or not.[51] In the very next paragraph, the FCC says wireless aesthetic rules must be "applie[d] to *similar* infrastructure deployments" in order to show that the rules are "directed at remedying the impact of *wireless* infrastructure deployment."[52]

4. Shot Clocks

The *September Order* also modified the shot clock rules that interpret the presumptively reasonable time for local review. As explained below, the FCC continues to require state and local governments to do more with less time and fewer resources.

General Shot Clock Rules: The FCC created a newer, shorter shot clock for small wireless facilities and reinterpreted "collocation" to effectively cut the presumptively reasonable timeframe for most new macro sites in half. Small wireless facilities on any

[45] *See Small Cell Order* at ¶ 80.
[46] *See id.* at ¶ 86.
[47] *See id.*at ¶ 87.
[48] *See id.*at ¶ 87.
[49] *See id.*at ¶¶ 90–91.
[50] *See id.*
[51] *See Small Cell Order* at ¶ 86 (emphasis added).
[52] *See id.* at ¶ 87 (emphasis added).

existing structure (whether the structure has wireless facilities on it or not) must processed in 60 days and small wireless facilities on new structures must be processed in 90 days. Whereas “collocation” used to mean two wireless facilities in the same location, the FCC now defines it to mean a wireless facility on any existing structure whether the structure has prior-existing wireless facilities on it or not. To further complicate matters, this new definition for collocation does not apply to “collocations” under Section 6409, which still means two wireless facilities in the same location. Table 1 summarizes these classifications.

Table 1: Basic Shot Clock Classifications

Shot Clock	Application Type
60 Days	1. Section 6409 (i.e., modification to an existing wireless facility that does not cause a substantial change) 2. Small wireless facility attached to an existing structure (i.e., utility pole, tower, streetlight, traffic signal, building, etc.)
90 Days	1. Small wireless facility attached to a new/replacement structure 2. Mounting/installation of non-small wireless facility to an existing structure (i.e., rooftop, building facade, field light, etc.)
150 Days	1. New, freestanding non-small wireless facilities (i.e., tower, monopole, monopine, etc.) 2. Non-small wireless facilities on a replacement structure (i.e., replacement field light at a public park)

The shot clock begins to run when an application is submitted whether the application is complete or not. For macro sites and eligible facilities requests, the shot clock never resets, it only pauses and resumes. For small wireless facilities, the shot clock resets once if the first submittal is “materially” incomplete, but thereafter only pauses and resumes for each incomplete notice and resubmittal.

Completeness Review Rules: Incomplete notices remain subject to the same byzantine regulatory scheme as before but with shorter deadlines for small wireless facilities. Application requirements must be in some publicly stated format (*e.g.* municipal code, wireless policy, online materials, handouts, checklists, guidelines, etc.) available to the applicant prior to submittal. The first incomplete notice must contain all the missing or incomplete information and any overlooked or later-discovered incompleteness cannot be used as a basis to deem the application incomplete. The incomplete notice must specifically cite the incompleteness and the publicly stated requirement the applicant failed to meet.

Prior to the *September Order*, local officials could use the first 30 calendar days to review a submittal and determine whether to issue an incomplete notice and would always have 10 calendar days after a resubmittal to evaluate compliance with the incomplete notice. Now, for small wireless facilities, the FCC requires both the initial and any subsequent completeness reviews to be performed within 10 calendar days. Table 2 summarizes these rules.

Table 2: Summarized Completeness Review Rules

APPLICATION COMPLETENESS REVIEW		
	Small Wireless Facilities	**Other Wireless Facilities**
Initial Submittal	1. Shot clock begins on day 1 on the day after the application is submitted (i.e. if submitted on a Monday, day 1 begins on Tuesday) 2. 10 days to review for completeness 3. Must identify all incomplete/missing documentation in the first notice 4. Notice must identify incomplete/missing documentation based on publicly stated application requirements 5. Notice must reference the specific rule/regulation(s) (i.e. application requirement) that is incomplete/missing 6. Shot clock resets to **day 0** upon resubmittal if the application is deemed "materially incomplete" in a timely and valid written notice 7. Shot clock may reset only one time	1. Shot clock begins on day 1 on the day after the application is submitted 2. 30 days to review for completeness 3. Must identify all incomplete/missing documentation in the first notice 4. Notice must identify incomplete/missing documentation based on publicly stated application requirements 5. Notice must reference the specific rule/regulation (i.e. application requirement) that is incomplete/missing 6. Shot clock tolls/pauses on the date the city issues a timely and valid written notice 7. Shot clock does not reset
Resubmittal	1. Shot clock resumes on day 0 if reset 2. Shot clock resumes on the day after the application is submitted (i.e. if deemed incomplete on day 9, day 10 begins on the day after resubmittal) 3. 10 days to review for completeness to toll/pause the shot clock 4. Shot clock tolls/pauses if the application remains incomplete based on materials the city identified in the prior incomplete notice	1. Shot clock resumes on the day after the application is submitted (i.e. if deemed incomplete on day 9, day 10 begins on the day after resubmittal) 2. 10 days to review for completeness to toll/pause the shot clock 3. Shot clock tolls/pauses if the application remains incomplete based on materials the city identified in the prior incomplete notice

If the state local government fails to properly and timely issue an incomplete notice, the application is deemed complete by the operation of law. However, municipalities and applicants may "toll" (i.e., pause) the shot clock by mutual agreement.

Batched Applications for "Small Wireless Facilities": State and local governments cannot refuse to process "batched" applications for small wireless facilities. The FCC defines a "batch" as either multiple separate applications submitted at the same time or a single application submitted for multiple sites. The FCC places no upper limit on how many facilities can be included in one "batch".

The longest shot clock applicable to a single site in the batch applies to the entire batch. For example, if an applicant submits a batch of five total small wireless facilities on

existing utility poles, the entire batch is subject to one 60-day shot clock. Alternatively, if an applicant submits a batch of seven total small wireless facilities with six on existing utility poles and one on a new pole, the entire batch is subject to one 90-day shot clock.

Remedies: The FCC did not extend a "deemed granted" remedy for failures to act within the shot clock timeframe for small wireless facilities. Rather, the FCC established two evidentiary presumptions against municipalities: first, the municipalitiy is presumed to have failed to act within a reasonable time as required under § 332(c)(7)(B)(iii) and, second, the municipality's failure to act is presumptive evidence that it intended to effectively prohibit personal wireless service facilities under § 332(c)(7)(B)(i)(II). Although rebuttable, these presumptions together happen to be the common findings that federal courts rely on to grant injunctive relief and order local officials to issue the permits sought by the applicant.

C. Pending Litigation and Legislative Responses

To no one's surprise, local public agencies, municipal utilities and investor-owned utilities filed various petitions for review against both the *Moratorium Order* and the *Small Cell Order*. The litigation involves 14 separate petitions for review: nine by local public agencies, four by wireless service providers and one by investor-owned utilities. The total petitioners, intervenors and amici exceed 100 real parties in interest.

The litigation wound its way through a procedurally complex path to the Ninth Circuit. The first petition filed against the *Moratorium Order* established venue in the Ninth Circuit by a first-in-time rule.[53] In an initially successful forum-shopping gambit, several wireless providers filed petitions against the FCC's *Small Cell Order* in circuits unfriendly to municipalities.[54] These petitions each contained a single claim: that the FCC's *Small Cell Order* did not go far enough and should have included a deemed granted remedy for shot clock violations. Although the Tenth Circuit was selected by judicial lottery, the court ultimately held that the two orders constituted the "same order" for judicial review purposes and transferred the *Small Cell Order* petitions back to the Ninth Circuit.[55]

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[53] *See* 28 U.S.C. § 2112(a)(1) (establishing venue where the first petition was filed if no petition was filed within the first 10 days after publication in the Federal Register). The American Public Power Ass'n filed a petition against the *Moratorium Order* in the Eleventh Circuit, which was subsequently transferred to the Ninth Circuit and consolidated with Portland's petition.

[54] *See* 28 U.S.C. § 2112(a)(1) (triggering a judicial lottery to determine venue when multiple petitions are filed in different circuits within the first 10 days after publication in the Federal Register).

[55] *Puerto Rico Tel. Co., Inc. v. FCC*, No. 18-2063 (1st Cir. Oct. 25, 2018); *Verizon v. FCC*, No. 18-3255 (2nd Cir. Oct. 25, 2018); *Sprint Corp. v. FCC*, No. 18-9563 (10th Cir. Oct. 25, 2018); *AT&T Servs. Inc. v. FCC*, No. 18-1294 (D.C. Cir. filed Oct. 25, 2018). Although forum shopping in agency review cases is not *per se* impermissible, the alleged coordination between the FCC and wireless carriers in a plan to dilute the judicial lottery process is. On January 24, 2019, the House Committee on Energy and Commerce and the House Subcommittee on Communications and Technology requested information from the FCC on alleged coordination with the industry petitioners who challenged the *Small Cell Order* in favorable circuits. *See* Letter from Frank Pallone, Jr., Chairman, House Committee on Energy and Commerce, to Ajit Pai, Chairman, FCC (Jan. 24, 2019), https://energycommerce.house.gov/sites/democrats.energycommerce.house.gov/files/documents/FCC%20Ltr%201.24.19.pdf.

At the time this paper was submitted, the litigation was under a temporary abeyance and without a briefing schedule. The abeyance was triggered by petitions for reconsideration filed with the FCC, which allows agencies the opportunity to change their minds before further litigation ensues. The temporary status is because no one genuinely expects the FCC to change its mind. In a rare move for appellate courts, the Ninth Circuit has prudently ordered a case management conference with its most senior appellate commissioner to determine whether and at what pace the litigation should move forward notwithstanding the pending administrative proceedings.

Hijinks at the FCC have not gone unnoticed on Capitol Hill. On January 14, 2019, Representative Anna Eshoo (D-CA-18) introduced the "Accelerating Broadband Deployment by Empowering Local Communities Act of 2019" ("H.R. 530"). This bill would void the *Moratorium Order* and the *Small Cell Order*.[56] A companion bill in the Senate is expected to be introduced by Senator Diane Feinstein sometime in April. Although encouraging and well-supported by local officials, the likelihood that either bill will be signed into law seems low.

V. TAKEAWAYS AND PRACTICAL RESPONSES FOR CALIFORNIA CITIES

Taken together, the *Moratorium Order* and the *Small Cell Order* turn municipal property rights within the public ROW upside down. Municipal proprietary acts or omissions potentially subject to the same restrictions applicable to regulatory conduct. At the same time, these regulations fundamentally change the traditional zoning process—with subjective standards and public participation—into something akin to a ministerial review. To further confuse the matter, the FCC's recent regulations are currently the law but may not be for much longer. Opposition is broad, organized and fortunate to have the law on their side.

California cities should consider the following responses:

- **Narrow the Scope of Site License Agreements:** Prior to the FCC's recent rulemakings, broad "master license agreements" or "MLAs" made good sense as a vehicle to avoid potentially repetitious negotiations between carriers and cities. However, an MLA entered at this time may lock the city into a long-term agreement on regulated terms and conditions that may not be the law after judicial review of the *Small Cell Order* is completed. While cities may not be able to deny access to all their infrastructure under the current law, a more prudent approach to limit the impact of agreements for the use of city-owned infrastructure would be to proceed by a separate license for each small wireless facility (or at least a significantly shorter term if an MLA is still desirable for other reasons).

[56] H.R. 530 (Eshoo) § 2 ("Actions by the Federal Communications Commission in "Accelerating Wireless and Wireline Broadband Deployment by Removing Barriers to Infrastructure Investment" (83 Fed. Reg. 51867) and the Federal Communications Commission's Declaratory Ruling in "Third Report and Order and Declaratory Ruling" (FCC 18–111) shall have no force or effect.")

- **Skip the Negotiation Process:** If the FCC dictates the price for access to the city's infrastructure, what incentive is there to negotiate away any other protections? By developing template license agreements that include the regulated terms and conditions mandated by the FCC, the city can avoid negotiation and ensure that all other terms and conditions are protective of their rights. By the same token, this approach mitigates the lost efficiencies of an MLA versus an individual site license. The template license agreement should be a requirement for a complete application to avoid wasting staff time on applications for city-owned infrastructure if the carrier balks at the city's terms.

- **Don't Accept Less than Your Actual Costs—But Keep Your Receipts:** The FCC's "presumptively reasonable" fees are ridiculously low and, in many cases, wouldn't even cover an hour of staff time. Carriers have routinely told cities that they won't pay more than $100 per application and, when forced to pay the actual fee, do so under protest. The truth is that the FCC does allow for cost recovery but places the burden on the city to prove up their costs that exceed the presumptively reasonable threshold. If your city hasn't done a recent cost study, now would be a good time to get one underway. In any event, cities should be closely tracking their staff time and material costs to protect their right to cost recovery.

- **Adopt Flexible Regulatory Structures:** The turbulent technological and regulatory landscape suggests that whatever cities do today will be wrong six months from now. Moreover, ordinances can take time more time to develop, introduce, adopt and implement than the FCC allows for most small wireless facility permit reviews. Cities should consider amendments to their code that allow the legislative body to adopt resolutions with policies and procedures for these facilities. This more nimble and flexible structure will enable quicker responses to changes in the law or technology.

- **Consider Whether Subjective Zoning Standards Can be Rearticulated as Objective Criteria:** The *Small Cell Order* requires that aesthetic requirements be objective. This means that traditional findings for approval, such as "the use will not be injurious to neighborhood character", are no longer enforceable. Cities should take the time to think about what makes a particular use "injurious to neighborhood character" and try to articulate those criteria in an objective way. For example, if the city has invested in beautifully landscaped medians or adopted view preservation procedures, alternative objective criteria might prohibit installations in specific locations or above a specific height limit to minimize the impacts these facilities would have on those community assets.

- **Be Realistic About What the FCC Rules Allow:** The regulations in the *Moratorium Order* and the *Small Cell Order* are manifestly intended to prevent cities from exercising their traditional authority in both their proprietary and regulatory capacities. Although there is good reason to believe that the FCC overstepped its authority, these regulations are the still the law. Conversations with the public and with elected officials about whether public hearings are possible

within the timeframes allotted, whether facilities can be prohibited in residential areas and whether the carriers can be forced to provide meaningful community benefits above the cost to issue the permits will be difficult. But these are necessary conversations to have in order to develop a response that is most appropriate for your community.

FPPC Update

Thursday, May 9, 2019 General Session; 1:30 – 3:15 p.m.

Daniel G. Sodergren, City Attorney, Pleasanton

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Notes:_____

FAIR POLITICAL PRACTICES COMMISSION ("FPPC") UPDATE

League of California Cities
2019 City Attorneys' Spring Conference

May 9, 2019

DANIEL G. SODERGREN
CITY ATTORNEY
CITY OF PLEASANTON

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This update covers the time period between August 17, 2018 and April 17, 2019. I would like to thank the members of the FPPC Committee of the City Attorneys' Department for their help in preparing this update.

A. USE OF PUBLIC FUNDS FOR CAMPAIGN ACTIVITY

1. Background

One major focus of the Fair Political Practices Commission ("FPPC") has been the use of public funds for campaign activity and the FPPC's regulations related to campaign expenditures. This has led to increased enforcement activity and litigation in this area. The FPPC is also advocating for legislation amending the Political Reform Act ("Act") to authorize the Commission to bring administrative and civil actions against public agencies and public officials for impermissibly spending public funds on campaign activities.

This raises important questions related to the distinction between the legal standards that apply to campaign finance reporting under the Act and the constitutional limitations that apply to the expenditure of public funds to support or defeat a ballot measure. It also raises the question of whether there is, or should be, a blanket prohibition on use of public funds for television, radio, and electronic communications that inform residents about ballot measures.

a. Constitutional Limitations

In *Vargas v. City of Salinas* (2009) 46 Cal.4th 1, the California Supreme Court reaffirmed its holding in *Stanson v. Mott* (1976) 17 Cal.3d 206, which established that, absent clear and unambiguous statutory authority, cities may not spend public funds to assist in the passage or defeat of an initiative or other ballot measure. Nevertheless, cities may spend public money for informational purposes, to provide the public with a "fair presentation" of relevant information relating to an initiative or other ballot measure.

These cases point out that some activities "unquestionably constitute improper campaign activity" such as ". . . the use of public funds to purchase such items as bumper stickers, posters, advertising "floats," or television and radio 'spots.'" (*Stanson v. Mott*, supra, 17 Cal.3d at p. 221; *Vargas v. City of Salinas*, supra, 46 Cal.4th at p. 32.) In other cases, ". . . 'the style, tenor and timing' of a communication must be considered in determining whether the communication is properly treated as campaign activity." (*Vargas*, at p. 33 (citing to *Stanson*, at p. 222.).)

b. Campaign Finance Reporting

The Act requires political candidates and campaign committees to file written reports of election expenditures made and contributions received once certain thresholds are reached. (Government Code, §§ 84204.5, 82013.)[1]

In *Governor Gray Davis Com. v. American Taxpayers Alliance* (2002) 102 Cal.App.4th 449, the court made clear that the definition of an "expenditure" under the Act must be ". . . limited in accordance with the First Amendment mandate 'that a state may regulate a political advertisement only if the advertisement advocates *in express terms* the election or defeat of a candidate.' [Citation omitted.]" (*Id.* at p. 470.)

Taking into account this limitation, the definition of "independent expenditure" contained in section 82031 was amended in 2009 to now provide that:

> "Independent expenditure" means an expenditure made by any person, including a payment of public moneys by a state or local governmental agency, in connection with a communication which expressly advocates the election or defeat of a clearly identified candidate or the qualification, passage or defeat of a clearly identified measure, or taken as a whole and in context, unambiguously urges a particular result in an election but which is not made to or at the behest of the affected candidate or committee.

In 2009, the Commission amended Regulation 18420.1[2] to clarify when a payment of public moneys by a state or local governmental agency constitutes an "independent expenditure" for the purposes of section 82031. In doing so, the Commission incorporated both the "express advocacy" standard set forth in section 82031 and the standards set forth in the *Vargas* and *Stanson* cases. Regulation 18420.1 now reads in relevant part that:

> (a) A payment of public moneys by a state or local governmental agency, or by an agent of the agency, made in connection with a communication to the public that expressly advocates the election or defeat of a clearly identified candidate or the qualification, passage, or defeat of a clearly identified measure, as defined in Section 82025(c)(1), or that taken as a whole and in context, unambiguously urges a particular result in an election is one of the following:
>
> (1) A contribution under Section 82015 if made at the behest of the affected candidate or committee.

[1] All references to sections are to the Government Code unless otherwise noted.

[2] All references to Regulations are to Title 2 of the California Code of Regulations unless otherwise noted.

(2) An independent expenditure under Section 82031.

(b) For the purposes of subdivision (a), a communication paid for with public moneys by a state or local governmental agency unambiguously urges a particular result in an election if the communication meets either one of the following criteria:

(1) It is clearly campaign material or campaign activity such as bumper stickers, billboards, door-to-door canvassing, ***or other mass media advertising including, but not limited to, television, electronic media or radio spots.***

(2) When considering the style, tenor, and timing of the communication, it can be reasonably characterized as campaign material and is not a fair presentation of facts serving only an informational purpose.

(Emphasis added.)

2. Administrative Enforcement Actions

a. In the Matter of San Francisco Bay Area Rapid Transit District ("BART")

The FPPC and the San Francisco Bay Area Rapid Transit District ("BART") entered into a stipulation whereby BART agreed to the Commission imposing an administrative penalty against BART in the amount of $7,500. The FPPC alleged that BART used YouTube videos, social media posts, and text messages to promote Measure RR, which authorized BART to issue $3.5 billion in general obligation bonds, causing it to qualify as an independent expenditure committee. The FPPC also alleged that BART: (a) failed to timely file two late independent expenditure reports; (b) failed to timely file a semi-annual campaign statement; and (c) failed to include a proper disclosure statement in its electronic media advertisements.

b. In the Matter of County of Los Angeles, et al.

The FPPC is considering whether Los Angeles County failed to properly disclose payments made for communications that were allegedly covered by Regulation 18420.1 (described above). The communications at issue included television spots the County made to inform its residents about a March 2017 ballot measure (Measure H), a sales tax measure to fund homeless services and prevention. Measure H passed with approximately 69% of the voters approving. This matter is also now the subject of litigation (*Howard Jarvis Taxpayers Association v. County of Los Angeles* (Los Angeles County Superior Court Case No. BC714579) filed on July 17, 2018 (see below)).

3. Litigation

a. *Howard Jarvis Taxpayers Association v. County of Los Angeles* (Los Angeles County Superior Court Case No. BC714579)

In this case, the Howard Jarvis Taxpayers Association alleges that the County of Los Angeles' use of public funds for communications it made to inform its residents about a March 2017 ballot measure (Measure H), a sales tax measure to fund homeless services and prevention, violated the California Constitution and various statutory provisions. Specifically, the case alleges that the County: (a) expended public funds for "campaign" activity in violation of the California Constitution; (b) violated Government Code section 54964, which prohibits an officer, employee, or consultant of a local agency from using public funds to support or oppose a ballot measure; (c) violated the "mass mailing" provisions of the Political Reform Act; (d) failed to report such expenditures as "independent expenditures" as required by the Political Reform Act; and (e) failed to include a disclosure statement identifying the "name of the committee making the independent expenditure" as required by the Political Reform Act. This case has been stayed pending the outcome of the administrative enforcement action referenced above.

b. *California State Association of Counties v. FPPC* (Los Angeles County Superior Court Case No. BS174653)

In this case, the California State Association of Counties and the California School Boards Association are alleging that the FPPC has exceeded its rulemaking authority by adopting Regulations 18420.1 and 18901.1[3] that purport to incorporate the restrictions on modes of communications set forth in the *Stanson* and *Vargas* cases (described above). The plaintiffs argue it is for the courts, not the FPPC, to interpret and apply the standards set forth in the *Stanson* and *Vargas* cases. Additionally, they argue that the dictum in those cases, which has been incorporated into Regulations 18420.1 and 18901.1, which prohibits the use of public funds for television, radio, and electronic communications does not reflect modern times and should not be used by the courts or the FPPC. The FPPC filed a Motion for Judgment on the Pleadings. On March 29, 2019, the court granted the Motion for Judgment on the Pleadings as to standing and ripeness with regards to regulation 18901.1 and gave 30 days leave to amend.

4. Legislation

At its meeting on February 11, 2019, the FPPC directed that letters be sent to the leadership of the Assembly and Senate requesting that they consider legislation amending the Act to authorize the Commission to bring administrative and civil actions against public agencies and public officials for spending public funds on campaign activities.

[3] Regulation 18901.1 provides guidance on the restrictions contained within the Act related to mass mailings sent at public expense under Government Code sections 89001 - 89003.

Assembly Bill No. 1306 (2019–2020 Regular Session) proposes to add section 85300.5 to prohibit any elected state or local officer, including any state or local appointee, employee, or consultant, from using or permitting others to use public resources for campaign activity. The bill would authorize the FPPC to impose an administrative or civil penalty against a person for the misuse of public resources for campaign activity, not to exceed $1,000 for each day on which a violation occurs, plus three times the value of the unlawful use of public resources.

B. ADVICE LETTERS

The following are select advice letters issued by the Commission. Monthly, as part of the FPPC's regular agenda, FPPC staff issues an Advice Letter Report which contains a summary of all advice letters issued by the staff. Full copies of FPPC Advice Letters, including those listed below, are available at: http://www.fppc.ca.gov/the-law/opinions-and-advice-letters/law-advice-search.html.[4]

1. Interests in Real Property

Regulation 18702.2 (Materiality Standard for Property Interests) now provides different standards depending on whether an official's property is located within one of three distances to property that is the subject of a governmental decision: (1) 500 feet; (2) more than 500 feet but less than 1,000 feet; or (3) more than 1,000 feet.[5]

- Pio Roda Advice Letter No. A-19-012
  Councilmember who owns a home located 1,438 feet from project site may take part in decisions related to the project because there is no clear and convincing evidence that decisions related to the project would have a substantial effect on her property.

- Ghizzoni Advice Letter No. A-19-001
  Supervisor who has an interest in property located 4,000 to 6,000 feet from project site may take part in decisions related to the project because there is no clear and convincing evidence that decisions related to the project would have a substantial effect on his property.

- Nebb Advice Letter No. A-19-002
  Mayor who owns property 300 feet from theater may not take part in decisions relating to the potential provision of financial assistance for the reconstruction of the theater because there is no clear and convincing evidence that such decisions will not have a measurable impact on his property. However, he may take part in decisions involving a potential rail

[4] Link current as of April 17, 2019.

[5] Regulation 18702.2 was recently amended (see section C below). The advice letters referenced here only include those applying Regulation 18702.2 as recently amended.

station project located 837 feet from his property because it is unlikely to alter his property's views, privacy, noise levels, or air quality.

- Brewer Advice Letter No. A-19-019
  Councilmember who has a real property interest located within 500 feet from lagoon preservation project may participate in decisions related to the project because, given the geographic separation of the property from the lagoon and the type of lagoon enhancement involved, there is clear and convincing evidence that the decisions will not have any measurable impact on her property.

- Fajardo Advice Letter No. A-19-015
  Mayor who owns property within 500 feet of specific plan area may participate in decisions related to commercial cannabis ordinance because: (a) the ordinance does not pertain to the specific plan area as a whole and is limited to certain districts within the area; (b) although it would impact property located within 615 feet from his property, there is no indication that the ordinance would impact his residence or residential neighborhood differently than the existing permitted types of business uses; and (c) although it would impact property located over 1,000 feet from his property, there is no indication that the decisions will have any effect on his property.

- Fenstermacher Advice Letter No. A-19-020
  Deputy Mayor and two Councilmembers may participate in decisions to supplement two landscape maintenance districts where: (a) one Councilmember lives within 500 feet from the closest potential landscape change; (b) another Councilmember lives more than 500 feet but less than 1,000 feet from the closest potential landscape change: and (c) the Deputy Mayor lives more than 1,000 feet from the closest potential landscape change.

- Eckmeyer Advice Letter No. A-19-018
  Councilmembers who own properties located in, and within 500 feet of, districts that would be affected by a potential general plan amendment may not participate in decisions related to the general plan amendment.

2. Interests in Business Entities (Advice Letters Related to the Cannabis Industry)

Regulation 18702.1 sets forth the materiality standards applicable to an interest in a business entity not explicitly involved in a decision, including a source of income. Regulation 18702(b) provides that a decision's effect on an official's business interest is material "if a prudent person with sufficient information would find it is reasonably foreseeable that the decision's financial effect would contribute to a change in the . . . value of a privately-held business entity." There have been a number of recent advice letters applying this regulation to the cannabis industry.

- Watson Advice Letter No. A-18-150
  Planning Commissioner who is an attorney that provided legal services to a former client in connection with a cannabis distribution business located in another city may participate in considering proposed amendments to the City's zoning ordinance regarding locational and development application requirements for medical cannabis non-storefront (delivery only) retailers in the City.

- Schons Advice Letter No. A-18-260
  Councilmember who is an independent contractor with a firm that provides governmental affairs, land use consulting, lobbying, and public relations serves to clients, including clients engaged in the cannabis industry, may take part in decisions related to ordinances affecting the City's cannabis industry.

- Stroud Advice Letter No. A- 18-259
  Councilmember who owns the only medical cannabis dispensary permitted to operate in the City may not take part in decisions relating to a proposed cannabis ordinance.

- Mollica Advice Letter No. I-18-270
  Planning Commissioner who has an ownership interest in a cannabis retail business may not take part in Planning Commission's consideration of cannabis manufacturing licenses.

3. Government Code Section 1090

a. Consultants

The California Supreme Court recently affirmed that "[i]ndependent contractors come within the scope of section 1090 when they have duties to engage in or advise on public contracting that they are expected to carry out on the government's behalf." (*People v. Superior Court* (*Sahlolbei*) (2017) 3 Cal.5th 230, 245.) This has resulted in a number of advice letters relating to the applicability of section 1090 to design services professionals.[6] It has also led to proposed legislation to create an exception in section 1090 for design services professionals.[7]

[6] For a more comprehensive discussion of this area, see: Conneran, "Sorting Out the Conflicts: Consultants and Alternate Methods of Project Delivery," League of California Cities Annual Conference, September 13, 2018; and Harrison and Prinzing, "Navigating Pitfalls Under Government Code Section 1090 When Contracting Consultants," City Attorneys' Department Spring Conference, May 2, 2018.

[7] Assembly Bill No. 626 (2019–2020 Regular Session) proposes to amend section 1091.5 to create a "non-interest" exception for interests ". . . of an engineer, geologist, architect, land surveyor, or planner in performing preliminary design services, preconstruction services, or assisting with plans, specifications, or project planning services on any portion or phase of a project when proposing to perform services on any subsequent portion or phase of the project."

- Kiernan Advice Letter No. A-18-100
  Design consultant who performed work of a limited, technical nature as a subcontractor to consultant who prepared feasibility study may contract to complete plans, specifications, and related architectural services through construction for the project.

- Stroud Advice Letter No. A-18-185
  City may enter into a design services contract with company for a pool facility where the company had a prior contract with the City to perform a needs assessment study for the same facility.

- Stryker Advice Letter No. A-18-179
  City may contract with engineering company for the design of a road/bridge widening project where the company previously provided information and data associated with the development of environmental reports in connection with the project.

- Stroud Advice Letter No. A-19-004
  City may enter into a contract for engineering design services with consultant who provided preliminary design services for the project under a previous contract with the City. Consultant did not have extensive involvement in the preliminary design phase, or any other phase of the project to provide it with an unfair advantage over other potential contractors in the final design phase and there was no indication that consultant's performance of the initial contract would allow it to accelerate or eliminate steps in its performance of the subsequent contract.

- Stroud Advice Letter No. A-18-276
  City may enter into a contract for engineering design services with consultant who performed the preliminary design services where the engineering design services will simply be a continuation of the design services it already performed.

b. Nonprofit Corporations and Entities

There are three exceptions contained in section 1090 related to nonprofit corporations and entities: (a) a "remote interest" exception for officers or employees of a nonprofit corporation, or an Internal Revenue Code sections 501(c)(3) or 501(c)(5) entity (section 1091(b)(1)); (b) a "non-interest" exception for nonsalaried members of a nonprofit corporation (section 1091.5(a)(7)); and (c) a "non-interest" exception for noncompensated officers of a nonprofit, tax-exempt corporation, which, as one of its primary purposes, supports the functions of the body or board or to which the body or board has a legal obligation to give particular consideration (section 1091.5(a)(8)).

- Walter Advice Letter No. A-18-15
  Mayor who is board member of local Boys & Girls Club may participate in City Council decisions related to the lease of City-owned property to the Club under section 1991.5(a)(8) because the Club "supports the functions of the City by promoting a variety of programs for the City's youth population."

- Schroeter Advice Letter No. A-18-196
  Councilmembers who are members of a nonprofit organization may participate in the decision to create a grant program. However, if a Councilmember becomes an officer of the organization, and the Council considers a grant to the organization, the Councilmember would have to follow the disclosure and recusal requirements of section 1091.

- Avila Advice Letter No. A-18-218
  School Board Member who is a paid President and CEO of a nonprofit corporation may not participate in District's approval of a contract with the nonprofit.

- Nerland Advice Letter No. A-19-014
  Independent contractor for a nonprofit is considered an employee for the purpose of applying the remote interest exception contained in section 1091(b)(1) for officers or employees of a nonprofit corporation or entity.

c. Rule of Necessity

In limited circumstances, the "rule of necessity" allows a contract otherwise violating section 1090 to ensure that essential government functions are performed. (69 Ops.Cal.Atty.Gen. 102, 109 (1986.)

- Schroeter Advice Letter No. A-19-006
  Councilmember who operates a business on municipal airport land owned by City would be financially interested in a grant from the Federal Aviation Administration and may not take part in decisions regarding the grant. However, the "rule of necessity" would allow the City to take part in the contracting process in order to ensure that the airport continues to operate safely.

4. Mass Mailing

Sections 89001 – 89003 prohibit certain newsletters and other mass mailing from being sent out using public funds. With some exceptions, these sections prohibit the individual distribution of more than 200 copies of substantially similar items in a calendar month if the items include the name, office, photograph, or other reference of an elected official.

- Moon Advice Letter No. A-18-173
  City staff may prepare and distribute over 200 copies of a newsletter, which includes a list of candidates for City Council.

- Giba Advice Letter No. A-18-201
  Intra-agency distribution of letter sent to over 200 City staff members was exempt from the mass mailing provisions.

- See Also - Enforcement Actions:

  - In the Matter of Peralta Community College District ($2,000 penalty) (Printed and distributed over 200 copies of a holiday postcard at public expense, featuring a photograph of its elected officials.)

  - In the Matter of Camarillo Health Care District ($2,000 penalty) (Designed, produced, printed and mailed over 200 copies of four different issues of a quarterly magazine that featured photographs and names of several elected officers affiliated with the District.)

  - In the Matter of Madera Unified School District ($2,000 penalty) (Prepared and distributed over 200 copies of an issue of its official newspaper featuring photographs and a message from District's Board.)

5. Public Generally

Section 87103 prohibits an official from taking part in a decision only if the effect of the decision on the official's interest is distinguishable from the effect on the public generally. Regulation 18703 establishes the criteria use to determine if the effect of the decision on the official's interest is distinguishable from the effect on the public generally.

- Nerland Advice Letter No. A-18-192
  Vice Mayor and Councilmember who own homes 100 feet and 400 feet, respectively, from railroad tracks may take part in decisions related to the creation of "quite zones" at up to five railroad crossings because the reduction in train horn noise would affect a large majority, and well more than 25 percent, of the residential parcels within the City.

- Gallagher Advice Letter No. A-18-252
  Councilmembers who own single-family homes and rent rooms in their homes to long-term tenants may take part in decisions related to Price Gouging Ordinance and Anti-Discrimination Ordinance because the ordinances will apply to all rental units in the city, which comprise approximately 47.7 percent of the total residential units within the City.

- Martyn Advice Letter Nos. A-18-167 and A-18-216
  Airport District Director may take part in decisions relating to fuel prices and airport facility rental rates where he rents District facilities on a month-to-month basis if the decisions adjust the rates/prices equally, proportionally, or by the same percentage for all renters and fuel purchasers.

- Loomis Advice Letter No. A-18-210
  Water Commissioner who has ownership interests in apartment building and commercial property may take part in decisions to consider and approve water rate increases for multi-family and commercial properties so long as the rate adjustments are applied equally, proportionally, or by the same percentage to all multi-family and commercial properties subject to the rate.

- Berger Advice Letter No. A-18-247
  Utility District Board Members who have disqualifying financial interest may nevertheless participate in a Proposition 218 public hearing concerning a potential increase to water and wastewater rates because the decision concerns the establishment of taxes or "rates for water, utility, or other broadly provided public services" that will be applied proportionally to all properties.

- Brady Advice Letter No. A-19-017
  "Tenant commissioners" of City's Housing Authority may take part in decisions related to a project to improve and operate City-owned affordable housing properties even though they live in two affordable housing units because the financial effects of the project would be felt by all tenants of the Housing Authority.

- Storton Advice Letter No. A-19-011
  Councilmember who has a financial interest in a downtown business may take part in decisions relating to a downtown festival because the festival will likely affect sales for at least 25 percent of the City's businesses and there is no unique effect on the Councilmember's business.

- Moore Advice Letter No. I-19-044
  Councilmember who owns commercial property within a proposed sewer/assessment district may take part in decisions pertaining to the selection, formation, and governance of the district because the district would cover 90 percent of the commercial property in the Town.

- Coleson Advice Letter No. A-19-016
  Mayor who owns property within a planned unit development district may not take part in decisions related to the district because the district comprises only approximately 9 percent of the Town's parcels.

- Webber Advice Letter No. A-19-010
  Councilmember who works for an apartment association and owns rental property in the City may not participate in decisions relating to a tenant protection ordinance because the decisions would extend certain restrictions to all or a segment of the City's rental market and would therefore have a unique effect on the income of the apartment association. However, the public generally exception would apply to her interest in her rental properties.

6. Appointment

Regulation 18702.5(a) states that the financial effect on an official's personal finances, or those of his or her immediate family, is material if the official or immediate family member will receive a measurable financial benefit or loss from the decision. Regulation 18702.5(b) sets forth a number of exceptions to this rule including: decisions to fill a position on the body of which the official is a member (e.g., vice mayor or mayor); and stipends received for attendance at meetings of any group or body created by law or formed by the official's agency for a special purpose (e.g., a joint powers agency or authority).

- Collins Advice Letter No. A-18-248
  Councilmember who loses an election may not participate in a vote to appoint himself to a vacant seat on the same City Council prior to the end of his tenure.

C. REGULATIONS

1. Amendment to Regulation 18702.2 – Materiality Standard for Property Interests

Since 2014, Regulation 18702.2 provided that:

- where an official's property is located ***within 500 feet*** of property that is the subject of a governmental decision, the official may not participate in the decision unless they have received written advice from the FPPC that the decision will have no measureable impact on the value of the official's property; and

- where an official's property is located ***more than 500 feet*** of property that is the subject of a governmental decision, the official must consider whether the decision:

  . . . would cause a reasonably prudent person, using due care and consideration under the circumstances, to believe that the governmental decision was of such a nature that its reasonably foreseeable effect would influence the market value of the official's property.

Effective March 22, 2019, Regulation 18702.2 (a copy of which is attached) now provides that:

- where an official's property is located ***within 500 feet*** of property that is the subject of a governmental decision, the official may not participate in the decision unless there is clear and convincing evidence that the decision will not have any measurable impact on the official's property;

- where an official's property is located ***more than 500 feet but less than 1,000 feet*** of property that is the subject of a governmental decision, the official may not participate in the decision if the decision would change the property's: (a) development potential; (b) income producing potential; (c) highest and best use; (d) character by substantially altering traffic levels, intensity of use, parking, view, privacy, noise levels, or air quality; of (e) market value; and

- where an official's property is located ***more than 1,000 feet*** of property that is the subject of a governmental decision the financial effect of the decision is presumed not to be material (unless rebutted with clear and convincing evidence the decision would have a substantial effect on the official's property).

2. Amendment to Regulation 18944.1 - Agency Ticket Distribution Policies

The FPPC will soon be considering repealing and readopting Regulation 18944.1 relating to agency provided tickets and passes.

Regulation 18944.1 sets up a procedure for agencies that provide tickets to their officials that, if utilized, will result in the tickets not qualifying as gifts under the Act, where the official may accept the ticket if there is a public purpose achieved through that official's use of the ticket. In particular:

- The use of the ticket must further a governmental or public purpose;

- The agency must adopt a ticket distribution policy that contains provisions set forth in the Regulation;

- The agency must complete a form for each distribution that must be maintained as a public record and subject to inspection and copying; and

- The form for each ticket distribution must be forwarded to the FPPC for posting.

Tickets distributed under the policy, including tickets distributed at the behest of a public official, must be identified on a Form 802 and posted on the agency's website to comply with this regulation. The form must be completed within 45 days of distribution of a ticket or pass.

Where the distribution is made pursuant to the public purpose exception, that purpose must also be described on the form. An agency is free to make its own choice whether or not to adopt a policy conforming to the regulation or to treat the tickets as income or gifts to the official and not apply the regulation.

The FPPC is considering making several structural and substantive changes to Regulation 18944.1 (a copy of the proposed changes is attached). The two most significant substantive changes are as follows:

- The proposed amendments attempt to limit the potential for abuse by requiring that an agency's ticket distribution policy include a provision prohibiting the disproportionate use of tickets or passes by the governing body, the chief administrative officer, or department heads.

- The proposed amendments make clear that, where the public purpose cited for the use of tickets involves the oversight or inspection of facilities, the official must document the public purpose by submitting a written inspection report of findings and recommendations to the official's agency.

3. Adoption of New Regulations 18360.1 and 18360.2 - Streamline Settlement Program

The FPPC's Streamline Settlement Program was established for the Enforcement Division's prosecution of violations with limited public harm. A large percentage of cases before the FPPC are resolved through the existing program. The Enforcement Division has discretion to include or exclude any case from the program based upon mitigating and aggravating circumstances. If mitigating circumstances exist, a case will result in a warning letter rather than a fine. If aggravating circumstances exist, the case is handled through the standard administrative process (i.e., mainline). Penalties in streamline cases start at $100 - $200 and can increase based on the amount of activity not properly reported in the case, and the efforts required to gain compliance and resolve a case. The FPPC adopted two new regulations intended to codify this Program.

New Regulation 18360.1 lists the types of violations eligible for the Program and sets forth general and specific eligibility requirements for the Program.

New Regulation 18360.2 sets forth the penalties in streamline cases under the Program.

4. Possible Future Amendments

The following possible future amendments have been identified in the FPPC's adopted regulation projects and schedule for 2019:

- Advice letter process (Regulation 18329) – revise process for advice letter requests.

- Business interest materiality standard (Regulation 18702.1) – revise the existing regulation for improved clarity and to address interpretation and application issues.

- Source of income materiality standard (Regulation 18702.3) - revise the existing regulation for improved clarity and to address interpretation and application issues.

- Personal financial effect materiality standard (Regulation 18702.5) - revise the existing regulation for improved clarity and to address interpretation and application issues.

D. TIPS ON WRITING ADVICE REQUEST LETTERS TO THE FPPC

1. The Basics

The FPPC's website[8] and Regulations 18329 and 18329.5[9] provide guidance on requesting formal advice letters, including the following:

- You may request formal advice by submitting your inquiry in writing to Advice@fppc.ca.gov or by sending your request to:

  Fair Political Practices Commission
  1102 Q Street, Suite 3000
  Sacramento, CA 95811

- The request must:

  - Be in writing;

  - Provide specific information about the requestor; and

  - Contain sufficient information for the FPPC's staff attorneys to conduct a complete legal analysis.

- A request for advice under section 1090 must be submitted in writing from the contracting public agency. The request must be signed by the public official, agency head or manager, or agency's counsel.

[8] See: http://www.fppc.ca.gov/advice/formal-advice.html (Link current as of April 17, 2019).

[9] Regulation 18329 provides guidance on formal written advice and informal assistance and Regulation 18329.5 provides guidance on the Commission's advice procedure regarding the interpretation of an agency's conflict of interest code.

- In a request for section 1090 advice involving a public agency and a private contractor, the public agency must be provided notice of the request, concur with the facts presented, and agree to the request for advice. The request must come from the public agency or the agency's counsel, and contain an agreed upon set of facts.

- The request should set out the question to be answered as clearly as possible, along with enough description of the background and context of the question to allow a precise legal analysis to be prepared.

- The following requests will be declined:

    - Requests that relate directly or indirectly to past conduct or that may be under review of any enforcement agency. This includes Section 1090 requests where the contract in question has already been made, or where decisions have occurred that (directly or indirectly) affect, even remotely, the contract in question.

    - Requests that do not include complete and accurate facts or in which the facts are in dispute. The FPPC is not a finder or adjudicator of facts when rendering advice (In re Oglesby (1975) 1 FPPC Ops. 71), and any advice the FPPC provides assumes the facts are complete and accurate.

    - In a request for advice involving a public agency and a private contractor, the request will be declined if the public agency did not make the request or has not concurred with the facts.

    - Requests for policy determinations.

    - Requests to interpret other areas of law, including local ordinances, rules, and statutes.

    - Requests for advice posed on behalf of others, or on questions unrelated to the office.

    - The FPPC declines advice requests involving legal issues that are pending in a judicial or administrative proceeding. Issuing an advice letter on a question that is at issue in litigation might be perceived as an inappropriate attempt to influence litigation. When the FPPC becomes aware that a request is the subject of litigation, the preparation of an advice letter will cease and no advice will be provided.

A sample request letter is attached.

2. What FPPC Staff Looks for in Advice Request Letters

The following are practice tips from the FPPC's Legal Division:

- Citations to legal authorities are helpful but a statement of facts that addresses the material issues is more helpful than providing a legal analysis. Review the relevant statutes and regulations to create a relevant statement of facts. For example, if a business interest or real property interest is at issue, provide information indicating whether the official's investment/ interest is worth $2,000 or more.

- Provide website links and/or attach copies of the relevant project/grant program/decision information. When there are relevant staff reports, environmental review documents (including CEQA documents), or other staff or contractor work documents that would provide information relevant to the questions presented, provide those reports and documents or direction on where to access them.

- For issues involving a real property financial interest, provide a map showing the location of the official's property and its distance to the project/decision item if the official's property is not the subject of the decision. Google Maps works well for this. Note any factors relevant to impacts on the parcel under Regulation 18702.2.

- Contact information should include the email of the requestor or authorized representative for ease in contacting for additional information. Timely responses to requests for additional information make for more timely responses on our end.

- Only issues that involve a specific future decision or an intended course of conduct are able to be addressed in formal advice. General questions do not present facts necessary for a formal advice letter. These general questions can be answered by consulting our web site's general guides, Fact Sheets and Manuals. More specific questions about these materials and a general issue can be addressed through our informal assistance by phone or email. If dealing with a novel issue, consider pursuing informal advice prior to pursuing formal written advice, as this may enable better issue spotting and provide insights into the Act's previous application in similar circumstances.

- Requests regarding travel for a public purpose paid for by a 501(c)(3) or foreign government are addressed by a specific Fact Sheet that can be found on the FPPC website, and will only be appropriate for a formal advice letter if the facts raise a specific issue not addressed by the Fact Sheet.

- Influencing a decision and participating in a decision are prohibited when the official has a conflict of interest. Make certain that the official has not been involved in earlier actions prior to "making the decision." We cannot advise where the official has had a role

in the process leading up to the formal decision. When appropriate, include a statement in the request about whether there has been any past conduct by the official at issue relating to the decisions at issue.

- Indicate if there is a pending enforcement case involving the official or agency since it may preclude advice if it involves the same or similar circumstances.

- Provide all relevant informal and formal advice previously sought from us that relates to the latest advice request.

It should be noted that the purpose of the advice function is to inform people on how they can comply with the Act. Beyond providing immunity in certain circumstances, it's not intended as a legal authority in the nature of an Attorney General opinion or a Commission opinion. As such, advice given is often conservative in nature to ensure compliance with the law.

Finally, the Commission will be considering proposed amendments to the advice regulation (Regulation 18329) at its May and June 2019, meetings. As part of that process, FPPC staff intends to add to the information and guidance on the FPPC's website concerning the advice process.

Amend 2 Cal. Code Regs., Section 18702.2 to read:

§ 18702.2. Materiality Standard: Financial Interest in Real Property.

(a) ~~Except as provided in subdivision (c) below, the~~ The reasonably foreseeable financial effect of a governmental decision ~~(listed below in (a)(1) through (a)(12))~~ on a parcel of real property in which an official has a financial interest, other than a leasehold interest, is material whenever the governmental decision:

(1) Involves the adoption of or amendment to a development plan or criteria applying to ~~general (except as provided below) or specific plan, and~~ the parcel ~~is located within the proposed boundaries of the plan~~;

(2) Determines the parcel's zoning or rezoning, ~~(~~other than a zoning decision applicable to all properties designated in that category~~),~~; annexation or de-annexation~~, or~~; inclusion in or exclusion from any city, county, district, or ~~other~~ local government subdivision~~,~~ or other boundaries, other than elective district boundaries ~~as determined by the California Citizen's Redistricting Commission or any other agency where the governmental decision is to determine boundaries for elective purposes~~;

(3) Would impose, repeal, or modify any taxes, fees, or assessments that apply to the parcel;

(4) Authorizes the sale, purchase, or lease of the parcel;

(5) Involves the issuance, denial or revocation of a license, permit or other land use entitlement authorizing a specific use of or improvement to the parcel or any variance that changes the permitted use of, or restrictions placed on, ~~that real~~ the property~~. For purposes of this paragraph, any financial effect resulting from a governmental decision regarding permits or licenses issued to the official's business entity when operating on the official's real property shall~~

~~be conclusively analyzed under Regulation 18702.1, rather than this paragraph, without any separate consideration for any material financial effects on the official's real property as a result of the decision~~;

(6) Involves construction of, or improvements to, streets, water, sewer, storm drainage or similar facilities, and the parcel ~~in which the official has an interest~~ will receive new or improved services that provide a benefit or detriment disproportionate to other properties receiving the services ~~are distinguishable from improvements and services that are provided to or received by other similarly situated properties in the official's jurisdiction or where the official will otherwise receive a disproportionate benefit or detriment by the decision~~;

(7) Involves property located 500 feet or less from the property line of the parcel unless there is clear and convincing evidence that the decision will not have any measurable impact on the official's property; or

(8) Involves property located more than 500 feet but less than 1,000 feet from the property line of the parcel, and the decision would change the parcel's:

~~(7)~~ (A) ~~Would change the development~~ Development potential ~~of the parcel of real property~~;

~~(8)~~ (B) ~~Would change the income~~ Income producing potential ~~of the parcel of real property. However, if the real property contains a business entity, including rental property, and the nature of the business entity remains unchanged, the materiality standards under Regulation 18702.1 applicable to business entities would apply instead~~;

~~(9)~~ (C) ~~Would change the highest~~ Highest and best use ~~of the parcel of real property in which the official has a financial interest~~;

~~(10)~~ (D) ~~Would change the character~~ Character ~~of the parcel of real property~~ by substantially altering traffic levels, ~~or~~ intensity of use, ~~including~~ parking, ~~of property surrounding the official's real property parcel, the~~ view, privacy, noise levels, or air quality~~, including odors, or any other factors that would affect the market value of the real property parcel in which the official has a financial interest~~; or

~~(11) Would consider any decision affecting real property value located within 500 feet of the property line of the official's real property, other than commercial property containing a business entity where the materiality standards are analyzed under Regulation 18702.1. Notwithstanding this prohibition, the Commission may provide written advice allowing an official to participate under these circumstances if the Commission determines that there are sufficient facts to indicate that there will be no reasonably foreseeable measurable impact on the official's property; or~~

~~(12)~~ (E) ~~Would cause a reasonably prudent person, using due care and consideration under the circumstances, to believe that the governmental decision was of such a nature that its reasonably foreseeable effect would influence the market~~ Market value ~~of the official's property~~.

(b) The financial effect of a governmental decision on a parcel of real property in which an official has a financial interest involving property 1,000 feet or more from the property line of the official's property is presumed not to be material. This presumption may be rebutted with clear and convincing evidence the governmental decision would have a substantial effect on the official's property.

~~(b)~~ (c) Leasehold Interests. ~~Except as provided in subdivision (c) below, the~~ The reasonably foreseeable financial effects of a governmental decision on any real property in which

a governmental official has a leasehold interest as the lessee of the property is material only if the ~~whenever~~ governmental decision will:

(1) Change the termination date of the lease;

(2) Increase or decrease the potential rental value of the property;

~~(3) Increase or decrease the rental value of the property, and the official has a right to sublease the property;~~

~~(4)~~ (3) Change the official's actual or legally allowable use of the ~~real~~ property; or

~~(5)~~ (4) Impact the official's use and enjoyment of the ~~real~~ property.

~~(c)~~ (d) Exceptions. The financial effect of a governmental decision on a parcel of real property in which an official has a financial interest is not material if: ~~Exceptions:~~

(1) The decision solely concerns repairs, replacement or maintenance of existing streets, water, sewer, storm drainage or similar facilities.

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

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

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

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

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

~~(d)~~ (e) Definitions. The definitions below apply to this regulation:

(1) A decision "solely concerns the adoption or amendment of a general plan" when the decision, in the manner described in Sections 65301 and 65301.5, grants approval of, substitutes for, or modifies any component of, a general plan, including elements, a statement of development policies, maps, diagrams, and texts, or any other component setting forth objectives, principles, standards, and plan proposals, as described in Sections 65302 and 65303.

(2) "General plan" means "general plan" as used in Sections 65300, et seq.

(3) "Specific plan" or its equivalent means a plan adopted by the jurisdiction to meet the purposes described in Sections 65450, et seq.

(4) Real property in which an official has a financial interest does not include any common area as part of the official's ownership interest in a common interest development as defined in the Davis-Stirling Common Interest Development Act (Civil Code Sections 4000 et seq.)

Note: Authority cited: Section 83112, Government Code. Reference: Sections 87100, 87102.5, 87102.6, 87102.8 and 87103, Government Code.

Adopt 2 Cal. Code Regs., Section 18944.1 to read:

§ 18944.1. Gifts: Agency Provided Tickets or Passes.

(a) Gift Exemption. A ticket or pass provided to an official by his or her agency and distributed and used in accordance with a policy adopted by the agency is not a gift under the Political Reform Act if all of the following criteria are met:

(1) The distribution of the ticket or pass by the agency is made in accordance with a policy adopted by the agency that incorporates all of the provisions of subdivision (b) and is maintained as a public record as required in subdivision (c).

(2) The distribution of the ticket or pass is reported pursuant to subdivision (d).

(3) The ticket or pass is not earmarked by an outside source for use by a specific agency official. (4) The agency determines, in its sole discretion, who uses the ticket or pass.

(b) Agency Ticket/Pass Distribution Policy. Any distribution of a ticket or pass under this regulation to, or at the behest of, an agency official must be made pursuant to a written agency ticket distribution policy, duly adopted by the legislative or governing body of the agency or, if none, the agency head that contains, at a minimum, all of the following:

(1) A provision setting forth the public purposes of the agency for which tickets or passes may be distributed.

(2) A provision requiring that the distribution of any ticket or pass to, or at the behest of, an agency official accomplishes a stated public purpose of the agency.

(3) A provision prohibiting the transfer of any ticket received by an agency official pursuant to the distribution policy except to members of the official's immediate family or no more than one guest solely for their attendance at the event.

(4) A provision prohibiting the disproportionate use of tickets or passes by a member of the governing body, chief administrative officer of the agency, political appointee, or department head.

(c) Public Record. The policy must be maintained as a public record and is subject to inspection and copying under Section 81008. The agency must post the policy on its website within 30 days of adoption or amendment and send to the Commission by e-mail the agency's website link that displays the policy so that the Commission may post the link.

(d) Reporting. Within 45 days of distribution of a ticket or pass, the distribution must be reported on a form provided by the Commission.

(1) Except as provided in subdivision (d)(2), the information must include the following:

(A) The name of the official receiving the ticket or pass;

(B) A description of the event;

(C) The date of the event;

(D) The fair value of the ticket or pass as that term is defined in Regulation 18946, subdivision (d)(1);

(E) The number of tickets or passes provided to each person;

(F) If the ticket or pass is behested, the name of the official who behested the ticket;

(G) If the ticket was transferred to a person meeting the requirements of paragraph (b)(3), the relationship of the transferee;

(H) A description of the public purpose under which the distribution was made; and

(I) A written inspection report of findings and recommendations by the official receiving the ticket or pass if received for the oversight or inspection of facilities.

(2) If the ticket or pass is distributed to a department or other unit of the agency, and not used by a member of the governing body, the chief administrative officer of the agency, political appointee, or department head, the agency may report the name of the department or other unit of the agency receiving the ticket or pass and the number of tickets or passes provided to the department or unit in lieu of reporting the name of the individual employee as otherwise required in subdivision(d)(1).

(3) The forms must be maintained as public records and are subject to inspection and copying under Section 81008(a). The agency must post the form, or a summary of the information on the form, on its website and send to the Commission by e-mail the agency's website link that displays the form so that the Commission may post the website link.

(e) Public Purpose. For purposes of subdivision (b)(2), the agency determines whether the distribution of tickets or passes serves a legitimate public purpose of the agency, consistent with state law. However, a ticket or pass distributed to an official for his or her personal use, other than a member of the governing body, the chief administrative officer of the agency, political appointee, or department head, to support general employee morale, retention, or to reward public service is deemed to serve a public purpose. For purposes of this paragraph, "personal use" is limited to the official, and his or her family, or no more than one guest.

(f) Application. This regulation applies solely to a ticket or pass, as those terms are defined in Regulation 18946, to an event or function provided by an agency to an official of the agency, or at the behest of an official of that agency. The provisions of this regulation apply only to the benefits the official receives from the ticket or pass that are provided to all members of the public with the same class of ticket or pass. This regulation does not apply to the following:

(1) An admission provided to a school, college, or university district official, coach, athletic director, or employee to attend an amateur event performed by students.

(2) An admission identified in Regulation 18942(a)(13) relating to an official performing a ceremonial role.

(g) Ticket or Pass Received as Income. A ticket or pass is not subject to the provisions of this regulation, and not a gift for purposes of the Act, if it is taxable income to the official.

(h) Reimbursement. A ticket or pass is not subject to the provisions of this regulation, and not a gift for purposes of the Act, if the official reimburses the agency for the ticket within 30 days of receipt.

Note: Authority cited: Section 83112, Government Code. Reference: Section 82028, Government Code.

CITY OF SUNNYVALE

OFFICE OF THE CITY ATTORNEY

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April 7, 2016

VIA E-MAIL
Mr. Matt Christy
Commission Counsel
Fair Political Practices Commission
P.O. Box 807, 428 J Street, Suite 620
Sacramento, CA 95812-0807

RE: Conflict of Interest Advice Sought for Planning Commission Members [redacted] and [redacted] Regarding the Butcher's Corner Project

Dear Mr. Christy:

We are writing on behalf of City of Sunnyvale Planning Commission Members [redacted] and [redacted][1] to request formal conflict of interest advice pursuant to Gov. Code §83114.

QUESTION:

May Mr. [redacted] and Ms. [redacted], who are members of the Sunnyvale Planning Commission, participate in and vote on governmental decisions relating to the development of the Butcher's Corner Project at 871 East Fremont Avenue in Sunnyvale?

BACKGROUND INFORMATION:

The Project applicant proposes to construct a mixed-use development on a currently undeveloped 5.1 acre site located at 871 East Fremont Avenue in Sunnyvale, known as "Butcher's Corner". A total of 153 residential units are proposed, including 114 apartment units within two multi-story buildings and 39 two-story townhome units. The Project also includes 6,936 square feet of non-residential (office or retail) use within the first floor of the apartment building fronting El Camino Real.

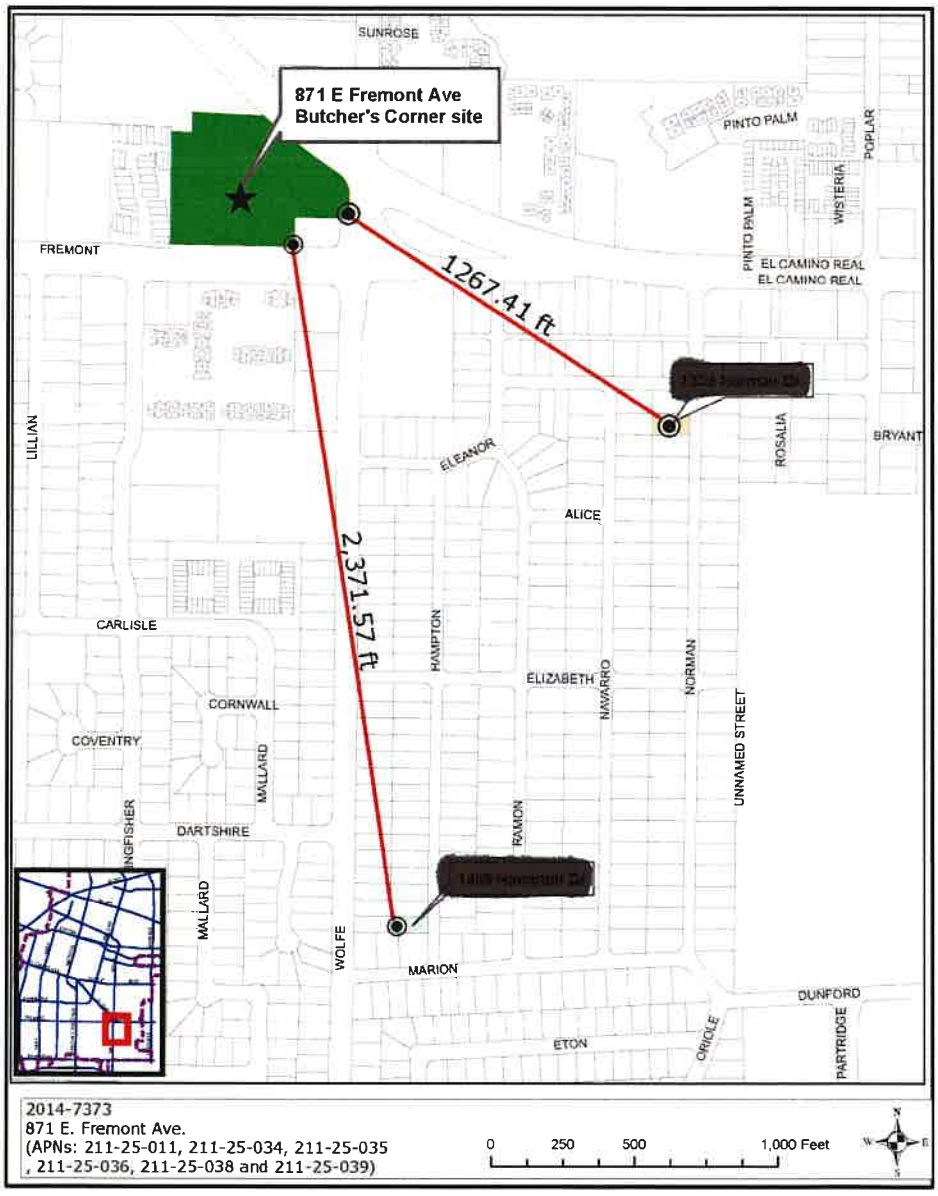
The Project site is an undeveloped parcel of land at the intersection of El Camino Real and Wolfe Road, two of the City's major thoroughfares. The surrounding area is generally characterized by wide streets with high traffic volumes, multifamily residential, commercial retail and medical offices. Nearby land uses include gas stations, small strip malls, and a miniature golf course. The Project site is immediately adjacent to a two-story medical office building and two- and three-story multifamily housing developments. Lower density single-family residential neighborhoods are located west and southeast of the Project site.

[1] Commissioners [redacted] and [redacted] are currently [redacted], respectively of the City of Sunnyvale Planning Commission.

456 W. Olive Avenue • P.O. Box 3707 • Sunnyvale • CA • 94088
TEL: (408) 730-7464 cityatty@sunnyvale.ca.gov FAX: (408) 730-7468

Commissioner [redacted]. Commissioner [redacted] is the owner of a single-family residence at [redacted], approximately 2,372 feet south of the Project. Commissioner [redacted]'s residence is separated from the Project site by three residential blocks and is one block east of Wolfe Road.

Commissioner [redacted]. Commissioner [redacted] is the owner of a single-family residence at [redacted], approximately 1,267 feet southeast of the Project. Her residence is separated from the Project site by approximately two residential blocks.

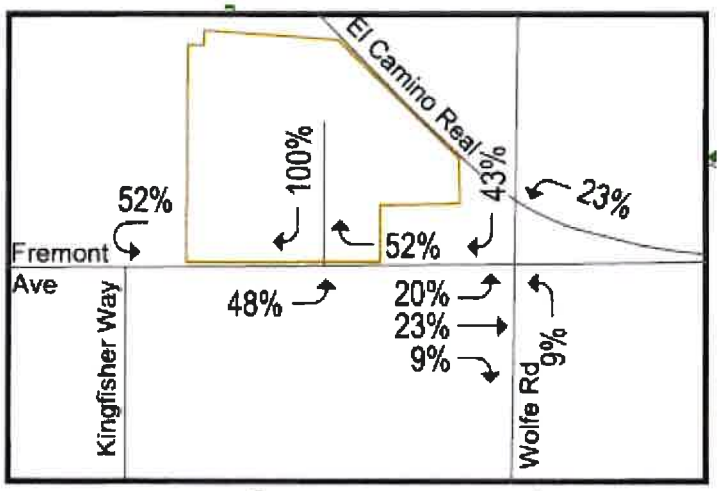


Project Impacts. The following information comes from the Draft Environmental Impact Report (DEIR) for the Butcher's Corner Project, released on April 8, 2016. A copy of the DEIR can be provided if requested. The DEIR is also available for download on the City's website at http://sunnyvale.ca.gov/Departments/CommunityDevelopment/CurrentProjectsandStudies/ButchersCorner.aspx . For convenience, the Executive Summary table and the Traffic and Transportation chapter are included with this letter.

The DEIR identifies significant impacts in the following areas: air quality, biological resources (tree removal and disturbance of nesting birds and bats), cultural resources, and noise. These impacts can be reduced to a less than significant level with appropriate mitigation measures. (DEIR, Executive Summary).

The DEIR identifies a significant and unavoidable traffic impact at the unsignalized intersection of East Fremont Avenue and Kingfisher Way. The average delays at this intersection, which is currently operating at an "F" level during both the morning and evening peak hours, will increase from between 60.3 seconds (morning) and 67.9 seconds (evening) to 92.9 seconds (morning) and 93.7 (evening). (DEIR, page 4.11-14.) The mitigation for this impact would be to add a traffic signal to the intersection. However, a traffic signal could affect through movement of traffic on East Fremont Avenue and cause additional congestion, and is not recommended. (DEIR, page 4.11-21.)

The DEIR's traffic analysis estimates that the Project will generate 1,182 net new trips on a typical weekday. Of the external trips, 79 net trips will occur during the weekday morning peak hour and 108 trips during the evening peak hour. An estimated 48% of the new trips will be on Fremont Avenue, 23% on El Camino Real, and 9% on Wolfe Road south of El Camino Real. (DEIR, page 4.11-15, Figure 4.11-3 "Project Trip Distribution Pattern".



Project Trip Distribution Pattern (Detail)

The Project will slightly worsen traffic operations at certain times at the intersections of El Camino Real, Wolfe Road, and Fremont Avenue, where traffic volumes are already heavy during peak hours. Congestion in the area is expected to worsen due to "background" projects, including the new Apple campus currently under construction on Wolfe Road approximately one mile south of El Camino Real. However, the additional vehicle trips generated by the Project are not expected to substantially increase vehicle queues or delay, and intersections other than Kingfisher and Fremont Ave. will continue to operate at acceptable levels.

DISCUSSION

Section 87100 prohibits a public official from making, participate in making, or using his or her official position to influence a governmental decision in which the official has a financial interest. Under Section 87103, a public official has a financial interest in real property in which he or she has a direct or indirect interest of $2,000 or more. Because Commissioners [redacted] and [redacted] own their homes, they have a financial interest in real property under the Act.

Is the public official making, participating in making or influencing a governmental decision? (2 Cal. Code Regs. § 18704 et seq.)

Commissioners [redacted] and [redacted] are members of the Planning Commission and are therefore public officials who will be making decisions regarding the Butcher's Corner Project.

Is it reasonably foreseeable that the governmental decision will have a material financial effect on the public official's financial interests in real property? (2 Cal. Code Regs. §§ 18701 and 18702.2)

Regulation 18701 provides that in cases where an official's interest is not explicitly involved in a decision, a financial effect is foreseeable if it is a realistic possibility and more than hypothetical or theoretical. Regulation 18702.2(a) provides a list of circumstances under which the reasonably foreseeable financial effect on real property is material. Relevant here, the financial effect will be material if the decision:

> (10) Would change the character of the parcel of real property by substantially altering traffic levels or intensity of use, including parking, of property surrounding the official's real property parcel, the view, privacy, noise levels, or air quality, including odors, or any other factors that would affect the market value of the real property parcel in which the official has a financial interest;
>
> (12) Would cause a reasonably prudent person, using due care and consideration under the circumstances, to believe that the governmental decision was of such a nature that its reasonably foreseeable effect would influence the market value of the official's property.

Both Commissioner [redacted] (2,372 feet south of the Project) and Commissioner [redacted] (1,267 feet southeast of the Project) are separated from the Project by 2-3 blocks of existing residential

neighborhoods. It does not appear that the Project will have any impact on their parking, views, privacy, noise levels or air quality. Although the Project will add to traffic congestion in the general area, the DEIR finds that this impact is less than significant except for one intersection (Kingfisher and Fremont Ave.) which is on the west side of the Project site, further removed from both Commissioners' residences. Although the Project will generate 1,182 net new trips on a typical weekday, there is no evidence that the Commissioners' streets will be affected by additional traffic, although nearby arterial streets (El Camino Real, Fremont and Wolfe) will experience a slight increase. Traffic volumes in the area are already heavy at certain times of day and are expected to worsen due to other projects in the area. The Butcher's Corner project, however, is not expected to significantly add to the congestion according to the DEIR traffic analysis.

Although the Butcher's Corner site is currently undeveloped, the Project will not substantially change the intensity of use in the surrounding area, which is already highly developed and includes single family and multifamily residential neighborhoods as well as the busy commercial and retail corridor on El Camino Real. The eventual development of the Butcher's Corner site is anticipated as part of the City's General Plan.

The following FPPC Advice Letters appear to be helpful to the analysis in this case:

Pleasanton (Lowell, A-15-202): proposal to construct 50 new homes on 195 acres approximately 3,400 feet from the councilmember's residence. The development would result in increased traffic and noise and decreased air quality in the nearby areas, including a 9% traffic increase on the street in close proximity to the councilmember's residence. However, the impacts were not significant enough to cause a reasonably foreseeable effect on the property's market value.
http://www.fppc.ca.gov/content/dam/fppc/documents/advice-letters/1995-2015/2015/15202.pdf

Redondo Beach (Ginsburg, A-15-170): large mixed-used development located 1,500 feet and across the Pacific Coast Hwy from an office building partly owned by the councilmember. The traffic impacts seemed to concern other streets and the councilmember's building was separated from the project by numerous intervening properties.
http://www.fppc.ca.gov/content/dam/fppc/documents/advice-letters/1995-2015/2015/15170.pdf

Pleasanton (Seto, A-15-177): proposal to expand an existing private school from 120 to 298 students and to build 27 single family homes on a former church site approximately 1,900 feet from the councilmember's residence. The FPPC found no conflict because the traffic impacts on intersections near the councilmember's residence would be limited to the beginning and end of the school day.
http://www.fppc.ca.gov/content/dam/fppc/documents/advice-letters/1995-2015/2015/15177.pdf

Mountain View (Quinn, A-15-049): proposed hotel project approximately 1,600 feet from councilmember's residence. It was unlikely that hotel traffic would use this street. Councilmember's residence was separated from the hotel project by 3 large city blocks. The project would not change the intensity of use in the use in the area, which was already highly developed. There were no impacts on the councilmember's residence related to parking, views, privacy, noise, or air quality.
http://www.fppc.ca.gov/content/dam/fppc/documents/advice-letters/1995-2015/2015/15049.pdf

Thank you for your time and attention to this matter. If you need further information, or if I can be of assistance in any way, please do not hesitate to contact me at (408) 730-2705.

Very truly yours,

Rebecca L. Moon
Sr. Assistant City Attorney

cc: Commissioner [redacted]
Commissioner [redacted]

Scooter Wars: Local Approaches to Regulating Shared Mobility Devices

Thursday, May 9, 2019 General Session; 1:30 – 3:15 p.m.

Zachary M. Heinselman, Attorney, Richards, Watson & Gershon

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Notes:

SCOOTER WARS: CHALLENGES AND OPPORTUNITIES IN LOCAL REGULATION OF SHARED MOBILITY DEVICES

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SCOOTER WARS: CHALLENGES AND OPPORTUNITIES IN LOCAL REGULATION OF SHARED MOBILITY DEVICES

By Zachary M. Heinselman, Emily B. Milder and Laurence S. Wiener

Richards, Watson & Gershon

I. Introduction and Shared Mobility Device ("SMD") Landscape Overview

In late 2017, seemingly overnight, electric scooters appeared on the streets and sidewalks of the City of Santa Monica, and soon became ubiquitous throughout several Los Angeles neighborhoods and the Bay Area. The scooters—dockless, accessed via a smartphone app, able to reach speeds of fifteen miles per hour, usually operated on the sidewalk by riders without helmets, and often haphazardly parked or tossed in the public right-of-way—are despised by some and loved by others. Cities, concerned that the scooters pose safety hazards to pedestrians, riders, and drivers, and frustrated by the unsightly scattering of vehicles not in use, have taken various approaches toward regulating these new "shared mobility devices." This paper will explore several of those specific approaches and address the most significant challenges faced by cities in designing and implementing shared mobility device ("SMD") regulation, namely, potential conflicts with the California Vehicle Code, enforcement capability, compliance with the California Environmental Quality Act ("CEQA"), liability for personal injuries, and compliance with the Americans with Disabilities Act ("ADA").

Since the advent of SMDs in California about one and a half years ago, the landscape has evolved from being dominated by two companies (Bird, and, to a lesser extent, Lime) to being crowded with competitors. Some SMD companies are already big, well-funded players in the "disruptive" transportation technology scene, such as Uber, owner of Jump, and Lyft, which launched Lyft Scooters. Others are bankrolled by traditional behemoths; Spin, for example, is owned by Ford. Some companies, most notably Bird, are aggressive: known to place their devices on city streets without seeking permission, let alone offering a warning to the receiving jurisdiction, then apologize (and/or sue) later. In the wake of the disruption wrought by this approach, other companies have sought to distinguish themselves as conscientious citizens sensitive to cities' needs and desires.

What all SMD companies have in common is the type of service they offer to the public: wheeled electric mobility devices that may be accessed via a smartphone app and a credit card, and picked up or dropped off anywhere—no "dock" or stationary storefront necessary. The dockless nature of SMDs is primarily what makes them more convenient and appealing than existing city bicycle programs or traditional rental businesses. SMDs are all powered by electric motors, but may be bicycles, sit-down scooters, or stand-up scooters. However, the particular kind of SMD that is most ubiquitous and vexing to cities is the stand-up, or "kick" scooter.

The level of angst caused by the arrival—and instant popularity—of SMDs is owing to two genuine, conflicting concerns. Most, if not all, California cities struggle to meet the mobility needs of residents, workers, and tourists, and SMDs provide a fun and convenient solution for some. On the other hand, SMDs pose real safety hazards to riders and pedestrians, especially—but not exclusively—to those who are not young or able-bodied. In addition to the legal complexities associated with regulating any new technology, cities will have to grapple with this fundamental tension as they develop SMD policies that best serve their communities.

II. Local Approaches

The section below provides a brief survey of how some cities have responded to the presence of SMDs in their jurisdictions. A number of cities have banned SMDs. Other cities have regulated SMDs with permit systems and by establishing pilot programs. Other cities have taken a more laissez-faire approach and have decided to not independently regulate SMDs, relying instead on state law to control SMDs in their jurisdictions.

A. Santa Monica

Santa Monica has been labelled "Scooter City,"[1] and can be considered ground zero for the interaction between local government regulation and SMD use and innovation. SMDs first appeared in Santa Monica in 2017. The relationship between scooter deployment and regulation started off rocky. In December 2018, the Santa Monica city attorney's office filed a misdemeanor criminal complaint against Bird, alleging that: (1) Bird began operated devices in the city without approval, and that (2) Bird ignored citations asking the company to obtain proper licenses and remove the scooters from sidewalks.[2] Bird pleaded no contest and agreed to pay more than $300,000 in fines and secure proper business licenses.[3]

Subsequently the Santa Monica City Council approved a 16-month pilot plan for SMDs. The pilot program began in September 2018 and runs through December 30, 2019. Companies were chosen for permits based on a selection process is process outlined in Santa Monica Municipal Code Chapter 3.21. These companies were evaluated according to objective criteria outlined in the Code, with review of the shared mobility service providers' experience, operations, ability to launch, education strategies, compliance record, financial viability and

[1] Patrick Sisson, *Scooter City: How Santa Monica, the birthplace of dockless electric scooters, is shaping the multibillion-dollar industry*, CURBED.COM (Dec. 7, 2018, 3:40 PM), https://www.curbed.com/2018/12/7/18130247/santa-monica-uber-lyft-bird-lime-scooter-bike-app. (last visited Mar. 27, 2019).
[2] Melissa Etehad, *Bird scooter firm settles legal fight with Santa Monica*, L.A. TIMES (Dec. 15, 2018, 6:55 PM), https://www.latimes.com/local/lanow/la-me-ln-bird-scooters-20180215-story.html. (last visited Mar. 27, 2019).
[3] *Id.*

safety compliance. A selection committee recommended granting permits to Jump and Lyft.[4] The Director of Planning and Community Development also selected Bird and Lime.[5]

Under the permit program, each provider was allowed to deploy 750 devices, though the number may increase. The SMD Companies paid $20,000 for the right to operate, $130 per device, and $1 per device per day for the privilege of parking on the public sidewalk.[6] With a permit, SMD companies may provide scooters in the City. But, certain areas of the city are subject to geo-speed reduction zones (device speeds are automatically slowed upon entering a designated area) and no ride or deployment zones, such as the Santa Monica Pier, Third Street Promenade, Ocean Front Walk or in municipal parks like Palisades Park.[7]

Device operators are required to secure and maintain insurance coverages, indemnify the city, meet device safety and technology requirements, meet certain maintenance and customer service standards, educate users about safety, share data with the city, and work cooperatively with existing transportation systems.[8]

B. Beverly Hills

By the summer of 2018, Santa Monica's scooter problems had metastasized into other parts of Los Angeles, including Beverly Hills. In response to residents' complaints and evidence that the scooters posed a public health hazard, in late July 2018 the city enacted an urgency ordinance that prohibited SMDs from being placed in, operated on, or offered for use in any of the city's public rights-of-way. The ordinance's definition of an SMD is broad enough to encompass both motorized scooters and bicycles.[9] The ordinance contained a sunset clause providing that it would expire in six months unless the city council took action to renew it. In December 2018, a regular ordinance was enacted to extend the prohibition on SMDs for another year.

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[4] Laura Newberry, *Santa Monica selects Bird and Lime after all for its electric scooter pilot program*, L.A. TIMES (Aug. 30, 2018 7:15 PM), https://www.latimes.com/local/lanow/la-me-ln-santa-monica-scooter-selection-20180830-story.html. (last visited Mar. 27, 2019).

[5] City of Santa Monica Final Administrative Decision, Shared Mobility Device Pilot Program Operator Selection and Device Allocation (Aug. 30, 2018), https://www.smgov.net/uploadedFiles/Departments/PCD/Transportation/Shared%20Mobility%20Device%20Pilot%20Program.pdf. (last visited Mar. 27, 2019).

[6] City of Santa Monica Shared Mobility Device Pilot Program Administrative Regulations (March 5, 2019), https://www.smgov.net/uploadedFiles/Departments/PCD/Transportation/SM-AdminGuidelines_03-05-2019_Final.pdf [hereafter "Santa Monica Administrative Regulations"]. (last visited Mar. 27, 2019).

[7] *Id.*

[8] *Id.*

[9] The ordinance's definition of an SMD includes "any wheeled device, other than an automobile or motorcycle, that is powered by a motor; is accessed via an on-demand portal, whether a smartphone application, membership card, or similar method; is operated by a private entity that owns, manages, and maintains devices for shared use by members of the public; and is available to members of the public in unstaffed, self-service locations, except for those locations which are designated by the City." BEVERLY HILLS MUNICIPAL CODE § 7-6-2.

Beverly Hills thus became the first city in the state to enact a comprehensive ban on SMDs.[10] But the city invited SMD companies to propose a solution to its concerns. The response from SMD companies has varied. Bird objected to the validity of the ordinance on multiple grounds, and continues to challenge each and every scooter impound performed by the city. In the fall of 2018, Bird filed a lawsuit against the city alleging, among other things, that the ordinance is preempted by the Vehicle Code, the city failed to comply with CEQA, and the city's impounding practices are unconstitutional. Meanwhile, other SMD companies have sought to convince Beverly Hills to partner with them on a pilot project to bring regulated SMDs to the city. The lawsuit, as well as the discussions with SMD companies regarding a possible pilot project, are ongoing as of the time of this paper's writing.

C. Goleta

In addition to larger cities and tourist locations, SMDs have proliferated across areas surrounding colleges and universities. In 2018 SMDs from at least two SMD companies were deployed without permits in Goleta, neighboring the University of California, Santa Barbara. The Goleta City Council voted unanimously to pass an urgency ordinance to ban SMDs in Goleta on December 4, 2018.[11] Prior to the meeting, the city received more than 200 public comments on the item, the most ever received on a single topic.[12] Goleta's ban makes it unlawful to "provide, place, offer for use or operate a shared on-demand motorized scooter, or to operate as a shared on-demand motorized scooter operator in any street or public right-of-way, or other public place within the City in which the public has the right of travel."[13] The ban also authorizes the impound of SMDs, with an impound fee set by resolution.

D. San Francisco

San Francisco, like Santa Monica, faced an early wave of SMD deployment. In March 2018, Bird, Lime and Spin unloaded hundreds of scooters across San Francisco. This sparked a wave of concerns, and between April 11 and May 23 the city received nearly 1,900 complaints and impounded more than 500 scooters. In response, the Board of Supervisors unanimously passed an ordinance on April 24, 2018, requiring that any company operating shared, powered scooters in San Francisco have a permit from the San Francisco Municipal Transportation

[10] San Francisco prohibited the parking of shared scooters (not SMDs generally) without a permit from the city in late April 2018, and soon thereafter announced the intention to create a pilot program to permit approved scooter companies to operate in the city. *See* Ben Jose, *SFMTA Offers Two Permits for One-Year Powered Scooter Pilot*, SFMTA Blog (Aug. 30, 2018), https://www.sfmta.com/blog/sfmta-offers-two-permits-one-year-powered-scooter-pilot. (last visited Mar. 22, 2019).

[11] Joshua Molina, *Goleta City Council Votes Unanimously to Ban Motorized Scooters*, NOOZHAWK (Dec. 4, 2018, 11:40 PM), http://www.goletamonarchpress.com/2018/12/motorized-scooters-banned-in-goleta/. (last visited Mar. 27, 2019).The ordinance was codified as Chapter 10.05 of the Goleta Municipal Code.

[12] *Id.*

[13] GOLETA MUNICIPAL CODE § 10.05.030 (2018).

Agency ("SFMTA") to park their scooters on sidewalks or other public spaces. The law took effect on June 4, 2018 and Bird, Lime, and Spin removed their scooters from the city.[14]

The city thereafter established a permitting program and selected Scoot and Skip to participate in a one-year pilot program.[15] Several SMD companies appealed this decision with the SFMTA, but no additional permits were granted for phase one of the program.[16] Lime sought a temporary restraining order to block to program, but was denied.[17]

San Francisco's permit program includes a $25,000 annual permit fee and a $10,000 endowment per permittee to cover city costs associated with property repair and maintenance. The SFMTA has also implemented an initial $5,000 application fee.[18] There is no per-device fee.

Device operators are required to secure and maintain insurance coverages, indemnify the city, meet device safety and technology requirements, meet certain maintenance and customer service standards, educate users about safety, share data with the city, and meet certain equitable service requirements.[19]

E. San Jose

The City of San Jose, months after scooters arrived, passed an ordinance regulating SMDs. To operate in the city, SMD companies must pay an annual permit application fee of $2,500, a $10,000 property repair and maintenance deposit, and $124 per device each year.[20]

The program places various limits and requirements on the devices and SMD companies. For example, downtown speeds are capped at twelve miles per hour.[21] Also, by June 2019, all scooters permitted in the City must have technology that prevents the use the scooters on public sidewalks.[22] There are also equity requirements: twenty percent of an operator's

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[14] Jose, *supra* note 2.

[15] Pilot Powered Scooter Share Permit Program (Aug. 28, 2018), https://www.sfmta.com/sites/default/files/reports-and-documents/2018/08/scooter_policy_directive_08.28.2018.pdf. (last visited Mar. 27, 2019).

[16] Megan Rose Dickey, *Lime loses appeal to operate electric scooters in SF*, TECHCRUNCH (Feb. 13, 2009), https://techcrunch.com/2019/02/13/lime-loses-appeal-to-operate-electric-scooters-in-sf/. (last visited Mar. 27, 2019).

[17] Carolyn Said, *Lime's move to squeeze SF scooter rivals pulped by court*, S.F. CHRONICLE (Oct. 12, 2018, 5:55 PM), https://www.sfchronicle.com/business/article/Lime-s-move-to-squeeze-SF-scooter-rivals-pulped-13303689.php?utm_campaign=twitter-premium&utm_source=CMS%20Sharing%20Button&utm_medium=social. (last visited Mar. 27, 2019).

[18] Jose, *supra* note 2.

[19] *Id.*

[20] San Jose Municipal Code § 11.92.100(B); Emily Deruy, *San Jose imposes new scooter regulations*, MERCURY TIMES (Dec. 20, 2018 6:00 AM), https://www.mercurynews.com/2018/12/19/san-jose-imposes-new-scooter-regulations/. (last visited Mar. 27, 2019).

[21] San Jose Shared Micro Mobility Permit Administrative Regulations, http://www.sanjoseca.gov/DocumentCenter/View/82493. (last visited Mar. 27, 2019).

[22] *Id.*

operation must occur in a "Community of Concern" and operator must establish low-income discount programs for individuals at or below 200% of the federal poverty level.[23]

Device operators are also required to secure and maintain insurance coverages, indemnify the city, meet device safety and technology requirements, meet certain maintenance and customer service standards, educate users about safety, and share data with the city.[24]

F. Santa Cruz

In September 2018, Bird released scooters across Santa Cruz. Bird sent the City an e-mail the day of the drop, but had not previously contacted the city regarding the release of the devices.[25] The city issued a cease and desist order to Bird. City staff impounded about 175 devices, with impounding fees at $181 per device, totaling $32,000.[26]

Santa Cruz imposed an immediate, temporary moratorium on SMD programs on September 25, 2018.[27] The moratorium will last "until the city issues new ordinances governing" SMDs. The moratorium expressly exempts Social Bicycles, a shared bike operator previously authorized by the city. During the moratorium, the city is authorized to remove and impound SMD devices found within the city. Thus far no regulations have been adopted.

G. San Diego

Unlike other city's that rushed to approve regulations on SMDs, San Diego has not yet adopted specific regulations concerning shared mobility devices or established a pilot program for SMDs. The following companies are and have been operating motorized scooters and or e-bikes in San Diego: Lime, Bird, Razor, Wheels, Jump, and Lyft. In May 2018, the San Diego City Council rejected a proposed emergency ban that would have prohibited scooters from the city's boardwalks.[28] Recently, however, the city has taken steps toward regulation. In October 2018, the Mayor proposed regulations, and on February 20, 2019 the City Council's Active Transportation and Infrastructure Committee voted to send a set of regulations on dockless electric scooters and bicycles to the full council.[29] As of the writing of this paper, no regulations have been adopted or implemented.

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[23] *Id.*

[24] *Id.*; SAN JOSE MUNICIPAL CODE CH. 11.92.

[25] SANTA CRUZ ORDINANCE No. 2018-12 (Sep. 25, 2018), https://www.cityofsantacruz.com/home/showdocument?id=73313. (last visited Mar. 27, 2019).

[26] Robyn Sidersky, *Cities to Bird: Pay Up if You Want Your Scooters Back*, VIRGINIAN-PILOT (Nov. 12, 2018), https://www.govtech.com/fs/transportation/Cities-to-Bird-Pay-Up-if-You-Want-Your-Scooters-Back.html. (last visited Mar. 27, 2019).

[27] SANTA CRUZ ORDINANCE No. 2018-12 (Sep. 25, 2018) (codified as Santa Cruz Municipal Code, Chapter 10.70).

[28] *San Diego City Council rejects boardwalk scooter ban*, CWSAN DIEGO.COM (May 22, 2018 5:31 PM), http://www.thecwsandiego.com/story/38252157/san-diego-city-council-weighing-options-on-motorized-scooters-on-boardwalks?removecgbypass&clienttype=smartdevice. (last visited Mar. 27, 2019).

[29] *Id.*

The city's proposed regulations are similar to those in other cities, but do contain some unique conditions.[30] The proposed regulations would implement different speed requirements, based on geofencing[31] requirements. The current speed of SMDs is fifteen miles per hour, but some zones would have reduced speed limits of eight miles per hour, and some zones would feature a further restricted speed limit of two miles per hour.[32] The City also plans to impose certain no park zones. The proposed regulations would establish a six month permit with fees to be established by the city council. The mayor has proposed $253 a permit and up to $150 per device annually.[33] The proposed regulations would also require operators to indemnify the city from liability claims and carry insurance policies, like other cities that have established pilot programs.

Absent local regulations, San Diego police have relied on Vehicle Code provisions to regulate scooter use.[34] The City has been sued by individuals injured by SMDs. The allegations against the City fault the City in part for a failure to adopt regulations, resulting in injuries and ADA violations.[35] Recently San Diego experienced its first fatality resulting from a scooter crash.[36]

H. South Lake Tahoe

In the summer of 2018, Lime introduced scooters to South Lake Tahoe. The devices followed Lime's bikes that were deployed as a part of a pilot program in the city the previous summer. South Lake Tahoe is a much smaller city than most cities where SMDs have been deployed. Additionally, SMDs are only deployed in the city during the summer tourist season, unlike most other cities where devices are available year-round. In April 2019 the City entered into a license agreement with Lime to operate scooters, but not bikes, in the city for one year. The agreement provides for a cap on the scooter fleet at 550 devices and establishes a 5 cent

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[30] City of San Diego Staff Report, Regulation of Shared Dockless Mobility Devices (Feb. 2, 2019), https://onbase.sandiego.gov/OnBaseAgendaOnline/Documents/ViewDocument/Staff%20Report%20for%20%20%20().pdf?meetingId=1488&documentType=Agenda&itemId=33275&publishId=152805&isSection=false. (last visited Mar. 27, 2019).

[31] Geofencing is the practice of using global positioning (GPS) or radio frequency identification (RFID) to define a geographic boundary to create a "virtual barrier."

[32] Joshua Emerson Smith, *San Diego Releases Draft Bike, Scooter Regulations*, SAN DIEGO UNION-TRIBUNE (Feb. 15, 2019), http://www.govtech.com/fs/transportation/San-Diego-Releases-Draft-Bike-Scooter-Regulations.html. (last visited Mar. 27, 2019).

[33] *Id.*

[34] For example, 551 citations issued to people for riding a scooter on the sidewalk in 2018. The city has posted a list of Rules and Regulations on its internet website: https://www.sandiego.gov/bicycling/bicycle-and-scooter-sharing/rules. (last visited Mar. 27, 2019).

[35] Greg Moran, *Disabled man sues scooter maker and San Diego over injuries from boardwalk crash*, SAN DIEGO UNION-TRIBUNE (Mar. 5, 2019 11:40 AM), https://www.latimes.com/local/lanow/la-me-ln-scooter-lawsuit-san-diego-20190305-story.html. (last visited Mar. 27, 2019).

[36] Karen Kucher, *Man dies 2 days after crashing scooter into tree in San Diego's first such fatality*, L.A. TIMES (Mar. 18, 2019 4:45 PM), https://www.latimes.com/local/lanow/la-me-ln-san-diego-scooter-death-20190318-story.html. (last visited Mar. 27, 2019).

per trip fee that will be remitted to the City for enforcement efforts.[37] The agreement also requires a driver's license to unlock the scooters in order to discourage use by individuals under the age of 18, and limits the maximum speed to 15 mph. Further, the agreement promotes the use of geo-fencing in high pedestrian use areas, promotes responsible parking of scooters, requires Lime to remove improperly parked scooters within four hours, and enables the City to remove scooters parked in unsafe locations and recover City costs.

III. Issues in Designing and Implementing Local Regulation

A. Electric Scooters and the California Vehicle Code

1. Preemption Concerns

Section 21 of the California Vehicle Code expressly preempts local regulation in the field of motor vehicle traffic: "[L]ocal authority shall not enact or enforce any ordinance or resolution on the matters covered by this code […] unless expressly authorized by this code." The Vehicle Code regulates motorized scooters[38], therefore cities may not regulate motorized scooters unless a provision of the Vehicle Code expressly grants them the authority to do so. The Vehicle Code does in fact authorize some local regulation of scooters: Section 21230 allows local governments to "prohibit" the operation of scooters on bicycle paths, trails, and bikeways, while Section 21225 allows cities to "regulat[e] the registration of motorized scooters and the parking and operation of motorized scooters on pedestrian or bicycle facilities and local streets and highways, if that regulation is not in conflict with this code."

Because the Vehicle Code uses the term "regulate" rather than "prohibit" in Section 21225, there is an argument that it does not allow cities to entirely prohibit the parking and operation of electric scooters in local streets and highways. Courts have repeatedly held that "the delegation to local authorities of power to make vehicular traffic rules and regulations will be strictly construed—such authority must be expressly (not impliedly) declared by the Legislature."[39] In *Barajas v. City of Anaheim*, 15 Cal. App. 4th 1808, 1815 (1993), the court applied this principle to hold that a local ordinance banning vending from a parked vehicle was preempted by the Vehicle Code, which merely granted local authorities the power to "regulate" vending from parked vehicles: "The Vehicle Code is replete with instances in which the Legislature has given local authorities the power to 'prohibit'[,] 'prohibit or restrict'[,] 'regulat[e] or prohibit'[,] 'license and regulate'[,] or simply 'regulate'[.] Thus, we assume the Legislature knows whatever words it employs to delegate power to local authorities in the

[37] Ryan Hoffman, *City Council approves agreement to allow Lime scooters in South Lake Tahoe,* TAHOE DAILY TRIBUNE (Apr. 17, 2019), https://www.tahoedailytribune.com/news/local/city-council-approves-agreement-to-allow-lime-scooters-in-south-lake-tahoe/. (last visited Apr. 17, 2019); City of South Lake Tahoe Report to the City Council, Lime Scooter License Agreement (Apr. 16, 2019).

[38] *See* Veh. Code §§ 21220 - 21235.

[39] *Barajas v. City of Anaheim*, 15 Cal. App. 4th 1808, 1815 (1993).

Vehicle Code will be accorded their plain meaning and the courts will not imply a broader grant of authority than that expressly given."[40]

However, the Vehicle Code does not include a definition of an SMD (or a category of vehicles readily identified as such), let alone regulate such a category as a whole. A city could therefore persuasively argue that a comprehensive ban on SMDs—which would encompass not just scooters but also bicycles, and only those that are involved in a particular kind of business—constitutes a permissible regulation of scooters, rather than a prohibition. Indeed, a prohibition on SMDs would not include privately owned or leased scooters, or scooters rented as a traditional rental vehicle.

Moreover, the Vehicle Code expressly allows cities to restrict or prohibit "electrically motorized boards" from operating on local streets and sidewalks.[41] An electrically motorized board is defined as "any wheeled device that has a floorboard designed to be stood upon when riding that is not greater than 60 inches deep and 18 inches wide, is designed to transport only one person, and has an electric propulsion system averaging less than 1,000 watts, the maximum speed of which, when powered solely by a propulsion system on a paved level surface, is no more than 20 miles per hour."[42] This definition applies to the scooters currently offered by Bird and other SMD companies. However, confusingly, this definition overlaps with that of a "motorized scooter," defined as "any two-wheeled device that has handlebars, has a floorboard that is designed to be stood upon when riding, and is powered by an electric motor. This device may also have a driver seat that does not interfere with the ability of the rider to stand and ride and may also be designed to be powered by human propulsion."[43] The area of overlap between these two definitions encompasses exactly the type of SMD that is currently causing challenges for California cities. At this time there is no case law to help clarify the situation.

The Vehicle Code as currently written clearly does not contemplate SMDs, leaving cities to reconcile and apply statutes in a new context as best they can. However, the combined authority to regulate motorized scooters and prohibit electrically motorized boards likely gives cities the power to prohibit SMDs on local streets and sidewalks, or institute a permitting scheme that limits which SMD companies are allowed to operate.

2. Impound Authority

Designing valid local regulation is merely the initial challenge faced by a city looking to tackle a current or looming SMD problem; a policy is of little use or effect unless it can be enforced. Cities' clearly have the authority to cite SMD riders for violating the Vehicle Code (for, say, riding a motorized scooter on a sidewalk as prohibited by Section 21235(g)) or for violating a valid local ordinance that prohibits the parking or operation of SMDs on city streets. However,

[40] *Id*. at 1817.
[41] Veh. Code § 21967.
[42] Veh. Code § 313.5.
[43] Veh. Code § 407.5.

writing tickets to individual riders is time consuming and does nothing to incentivize SMD companies to either comply with local law or encourage riders to do so. Moreover, an SMD company can strategically place its devices just outside of a city's legal borders every morning and be in full technical compliance with that city's prohibition of SMDs. As a result, cities may turn to impounding as a useful tool for encouraging SMD companies to respect the spirit as well as the letter of local regulation.

Vehicles may only be impounded pursuant to the Vehicle Code.[44] This point bears emphasizing- a city may not impound an SMD or any other vehicle solely pursuant to a local ordinance, it must rely on specific authorization in the Vehicle Code. The Vehicle Code authorizes "peace officers" as well as any "regularly employed and salaried employee […] engaged in directing traffic or enforcing parking laws and regulations" for a city to impound vehicles located in that city.[45] A police officer or traffic control officer may impound a vehicle in the following situations:

i. When an SMD is placed on a street or sidewalk[46] in a manner that creates a hazard to or obstructs the normal movement of vehicle or pedestrian traffic. (Vehicle Code § 22651(b)).

Depending on the width and condition of the sidewalk, even an SMD that is neatly placed near the side of the sidewalk could potentially be impounded under this provision, if there is not adequate room for a stroller or a wheelchair to maneuver past (see Part D below for a detailed discussion of compliance with disability laws).

ii. When an SMD is illegally parked and there are no license plates or other evidence of registration displayed. (Vehicle Code § 22651(j)).

Note that motorized scooters are exempt from registration and license plate requirements pursuant to Section 21224. In its lawsuit against Beverly Hills, Bird asserts that this provision is therefore inapplicable to its scooters. However, the Vehicle Code section 22651(j) does not distinguish between vehicles that unlawfully fail to display evidence of registration and those that do so lawfully. So, there is an argument that it does indeed apply to scooters. A court has yet to endorse either interpretation.

Additionally, this provision seems to apply whether the SMD is illegally parked according to the Vehicle Code or a local ordinance. Vehicle Code Section 22500 prohibits vehicles from parking

[44] Veh. Code § 22651.
[45] *Id.*
[46] The statute uses the word "highway" rather than "sidewalk," but the Vehicle Code states that a sidewalk is encompassed within the term "highway": "[A] 'Sidewalk' is that portion of a highway, other than the roadway, set apart by curbs, barriers, markings or other delineation for pedestrian travel." Veh. Code § 555. See also *In re Devon C.* (2000) 79 Cal. App. 4th 929, in which the court held that, for purposes of the Vehicle Code, a boy riding his bicycle in the sidewalk was riding in the highway.

on a sidewalk. This is convenient for those cities that have banned SMDs and wish to impound as many found within their jurisdiction as possible, and awkward for those that have instituted franchise systems that allow certain SMDs and prohibit others.

iii. When a police officer has reason to believe that the SMD has been abandoned. (Vehicle Code § 22669).

Unfortunately, there is no definition provided in the Vehicle Code for the term "abandoned," leaving both sides with arguments to support their positions on whether or not this provision would apply to SMDs. Further discouraging a city's use of this provision is the fact that if a traffic control officer—as opposed to a police officer—impounds pursuant to this authority, he or she must first mail or personally deliver a written report to the nearest California Highway Patrol office.[47] This is impractical, as abandoned SMDs are typically picked up to be recharged every evening by individuals hired by SMD companies.

This is not an exhaustive list of all scenarios in which vehicles, including shared mobility devices, may be impounded. These are, however, the main grounds that common sense suggests will apply to shared mobility devices the vast majority of the time. For the full list of circumstances under which vehicles may be impounded see Vehicle Code § 22651.

Finally, cities should be aware that there are constitutional as well as statutory limits to their impounding authority. The impoundment of a vehicle is a seizure under the Fourth Amendment and must therefore meet the constitutional standard of "reasonable."[48] A seizure conducted without a warrant is per se unreasonable, so a warrantless impound must fall under the "community caretaking" exception established by the U.S. Supreme Court.[49] A warrantless impound undertaken solely pursuant to the Vehicle Code that does not also serve a community caretaking function is therefore an unreasonable seizure in violation of the Fourth Amendment.[50] The U.S. Supreme Court has determined that impounding vehicles that violate parking ordinances, impede traffic, or threaten public safety and convenience all serve "community caretaking functions" and are thus reasonable seizures.[51] Courts have additionally held that impounding a vehicle that is at risk of being vandalized or stolen also falls under the community caretaking exception. For example in *People v. Shafrir*, 183 Cal. App. 4th 1238, 1241 (2010), the court held that the impoundment of a legally parked car whose driver had been arrested served a community caretaking function because the car was a "new Mercedes" parked in a "high crime area."

On the other hand, *People v. Williams*, 145 Cal. App. 4th 756 (2006) provides an example of an impound that did not meet the community caretaking standard and was thus held to be

[47] Veh. Code § 22669(c).
[48] *Miranda v. City of Cornelius,* 429 F.3d 858, 862 (9th Cir. 2005).
[49] *Id.*
[50] *Id.* at 864
[51] *S. Dakota v.* Opperman, 428 U.S. 364, 369 (1976).

unreasonable seizure in violation of the Fourth Amendment. In *Williams*, a police officer stopped a driver for not wearing his seatbelt, and arrested him on an outstanding warrant.[52] The officer impounded the driver's vehicle pursuant to Vehicle Code Section 22651(h), which authorizes an officer to impound a vehicle when he or she arrests and takes into custody the driver in control of the vehicle.[53] However, the court found that the impound failed to serve a community caretaking function because the vehicle was parked legally in front of the driver's home and posed no hazard to traffic.[54]

The three statutory justifications for impounding SMDs cited above would thus satisfy the community caretaking standard.

B. Electric Scooters and the California Environmental Quality Act ("CEQA")

Regulations of SMDs must comply with the California Environmental Quality Act ("CEQA"). CEQA is intended to inform governmental decision makers and the public about potentially significant environmental effects before a project is carried out. Because SMDs have been framed as "green" transportation options, regulation of SMDs can lead to arguments regarding the environmental impact of such actions. Thus, cities should carefully consider any environmental consequences of their regulations of SMDs, and whether such regulation may qualify for an exemption from CEQA. Key questions are what environmental impact occur as result of a proposed regulation on SMDs, whether it can be determined if such effects are significant, and what is the appropriate baseline condition.

During preliminary review, a city must determine whether an activity is a "project" under CEQA. There is an argument that regulating SMDs falls outside the definition of "project." CEQA Guidelines Section 15378 (b) provides examples of actions that are not projects. For example, actions "[c]ontinuing administrative and maintenance activities, such as … general policy and procedure making…."[55] or "[o]rganizational or administrative activities of governments that will not result in direct or indirect physical changes in the environment"[56] are not projects. Thus, if a SMD regulations is construed as meeting these definitions, the regulation may not be a "project," and it would not be subject to CEQA. If, however, it is construed as a "project" other exemptions may apply.

While a case can be made that SMD regulations are not projects, it may be a wise to also treat regulations of SMDs as a potential project and consider exemptions. Cities that have approved ordinances regulating SMDs have cited various exemptions to CEQA to avoid undertaking an initial study and potentially further environmental review. Issues regarding some of these exemptions are discussed below. If no exemptions apply, a city will need to determine if it can

[52] *Williams*, *supra*, at 759.
[53] *Id.*
[54] *Id*. at 760.
[55] CEQA Guidelines Section 15378 (b)(2).
[56] CEQA Guidelines Section 15378(b)(5).

be "fairly argued" based on "substantial evidence" that the SMD regulations may have a significant environmental effect. If there is a fair argument that the regulations may have significant impact, an EIR will need to be prepared.

1. The Environmental Effect of the Regulation of SMDs

Environmental impact determinations are particularly important in the face of regulating SMDs, which have been branded—without much evidence in support of that characterization—as environmentally-friendly mobility options. SMD Companies have positioned their devices as first mile/last mile transportation options which make transportation journeys possible without requiring the use of an automobile. These electric, battery-powered scooters create zero emissions. Advocates for their use cite the potential of SMDs to reduce traffic congestion and greenhouse gas emissions by providing alternatives to automobile transportation. Further, the Legislature has found that motorized scooters that produce no emissions do not contribute to air pollution or traffic congestion, two problems that the state finds it is of "paramount importance" to address.[57]

The relationships between SMD environmental benefits and regulation, however, is unclear. Banning SMDs may not create a physical change in the environment, especially in instances where the baseline conditions are those with few or no SMDs. Permitting SMDs could have a physical impact on the environment due to pedestrian conflicts and abandoned scooters. In the former cases, alleged environmental impacts are based on an argument that allowing SMD operation will offset automobile use and resulting impacts from congestion or emissions, and that restricting SMDs will lead to an increase in automobile use, resulting in increased congestion and emissions. Depending on the circumstances, there could be legitimate arguments that the regulation of SMDs could have a significant environmental impact. The Portland, Oregon Bureau of Transportation conducted a survey and found that SMDs replaced some personal driving or ride-hailing trips.[58] But the study also concluded that they replaced walking and biking trips.[59] Thus, there is not a clear causal relationship between limiting or taking SMDs off the road and increases in automobile traffic in all scenarios, and arguments that restricting SMDs will cause negative environmental impacts may be speculative unless

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[57] Veh. Code §21220. "(a) The Legislature finds and declares both of the following: (1) This state has severe traffic congestion and air pollution problems, particularly in its cities, and finding ways to reduce these problems is of paramount importance. (2) Motorized scooters that meet the definition of Section 407.5 produce no emissions and, therefore, do not contribute to increased air pollution or increase traffic congestion.
(b) It is the intent of the Legislature in adding this article to promote the use of alternative low-emission or no-emission transportation."

[58] Portland, Or. Bureau of Transportation, 2018 E-Scooter Findings Report, 6, 20, https://www.portlandoregon.gov/transportation/article/709719. (last visited Mar. 27, 2019). 34 percent of Portland riders and 48 percent of visitors surveyed used an e-scooter instead of driving or using a rideshare service.

[59] 37 percent of Portlanders would have walked and 5 percent would have ridden a personal bicycle instead of using an e-scooter.

supported by data. Any relationship between the regulation and the environmental impact may be dependent upon the unique facts of the jurisdiction.

Cities should be prepared to evaluate the impact of regulating SMDs and should consider how the impacts of the regulations stack up against the relevant environmental standards for determining the impact significance threshold. Cities should consider framing their regulations to fit within a CEQA exemption, such as those discussed below.

2. CEQA Exemptions

Cities that have acted to regulate scooters have cited several exemptions from CEQA. Below, four particular exemptions are discussed. But, some cities have also relied on other exemptions.

i. Common Sense Exemption

CEQA does not apply to projects when the lead agency determines "with certainty that there is no possibility that the activity in question may have a significant effect on the environment."[60] A lead agency's determination that the common sense exemption applies must be supported with factual evidence "demonstrating that the agency considered possible environmental impacts in reaching its decision."[61] This is especially true where opponents of the project have raised arguments regarding possible significant environmental impacts.[62] But, "[d]etermining whether a project qualifies for the common sense exemption need not necessarily be preceded by detailed or extensive factfinding. Evidence appropriate to the CEQA stage in issue is all that is required."[63]

a. Prohibitions on SMDs

It is possible that the argument relating to the existence of environmental impact depends on the level of inundation of SMDs in a city, making the determination of the baseline conditions a potentially important inquiry. For example, in a city where scooters have not yet arrived, the banning of scooters would not change the environmental conditions that existed prior to the regulations. In a city that has been saturated with scooters, however, there is a stronger argument that regulations that take scooters off the road could have an environmental impact by reducing zero-emission transportation options without replacing them, causing travelers to revert back to either walking, biking or making automobile trips to fill the gap. But, it is unclear

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[60] 14 Cal. Code Regs §15061(b)(3); *See Muzzy Ranch Co. v. Solano Cty. Airport Land Use Com.,* 41 Cal. 4th 372, 386 (2007)*, as modified* (Sept. 12, 2007) (explaining application of exemption).

[61] *Davidon Homes v. City of San Jose*, 54 Cal. App. 4th 106, 117 (1997), *as modified on denial of reh'g* (Apr. 29, 1997); *California Farm Bureau Fed'n v. California Wildlife Conservation Bd.,* 143 Cal. App. 4th 173, 195 (2006) (stating that a party challenging what is essentially a claim of the common sense exemption under Guidelines section 15061, subdivision (b)(3), unlike a party asserting an exception to a categorical exemption, need only make a "slight" showing of a reasonable possibility of a significant environmental impact).

[62] *Davidon* Homes, 54 Cal. App. 4th at 117.

[63] M*uzzy Ranch* Co*.,* 41 Cal. 4th at 388.

whether such substitution would cause an increase in automobile use, and the answer likely depends on the circumstances unique to the area. While it is possible that some SMD users would replace their journey by relying on cars, it is also possible that those users would walk or bike. When determining the baseline, however, the current use of SMDs in the city, regardless of whether their operation has been legal, will likely factor into the existing conditions.[64]

Thus, to justify a ban as fitting within this exemption, cities should have some evidence to support that no significant environmental effect will result from prohibiting SMDs on the public right-of-way. Cities seeking to rely on this exemption should build an administrative record showing they considered the potential environmental impacts and demonstrating that there is no possibility of a significant environmental impact. To do so, cities may consider including a discussion of the impact on automobile traffic associated with regulating the use of SMDs. If a city is acting to take scooters off the road/sidewalk, it may consider whether a prospective increase in automobile traffic would surpass the threshold of significance and relevant environmental standards. This may present an intersection with the new CEQA Guidelines section 15064.3. This section establishes vehicle miles traveled ("VMT")[65] as the appropriate measure of transportation impacts, shifting away from the level of service ("LOS") analysis. Under a ban, it would be difficult to quantify alleged traffic shifts to show an impact to the LOS. Additionally, while a permitting system could be argued to slightly improve VMT, a ban would likely not substantially increase VMT, regardless of the level of SMD inundation in the jurisdiction, because of the short nature of SMD trips and the likelihood that some replacement trips would be walking or bicycle trips, not vehicle trips. Overall, cities should also be prepared to address challenges from SMD companies, which will likely incorporate data intended to show that SMDs reduce congestion and emissions by replacing automobile trips.

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[64] California courts have required that baselines be defined as the existing conditions, even where illegal activity has altered the baseline, making illegal conditions, such as the operation of SMDs on sidewalks or operation of SMDs while banned, part of the baseline. *See, e.g.*, *Riverwatch v. County of San Diego*, 76 Cal.App.4th 1428, 1452–1453, (1999) (baseline for a proposed quarry development was the actual condition of the land, even though some existing environmental degradation had resulted from prior illegal mining and clearing activities); *Fat v. County of Sacramento*, 97 Cal.App.4th 1270, 1278–1280 (2002) (baseline for airport expansion was existing airport operations, even though the airport had been operating and had expanded without a required permit for several years); *Eureka Citizens for Responsible Government v. City of Eureka*, 147 Cal.App.4th 357, 370–371 (2007) (baseline for proposed school playground use was the existing playground facility, even though prior construction of the facility may have violated the city's code).
Riverwatch v. County of San Diego, 76 Cal. App. 4th 1428 (1999) (holding that trial court abused its discretion by requiring an EIR account for prior illegal activity by using an early baseline from which impacts could be measured.

[65] "Vehicle miles traveled" refers to the amount and distance of automobile travel attributable to a project. CEQA Guidelines Section 15064.3(a).

b. SMD Permitting Schemes

SMD regulatory permit schemes have also relied on this exemption.[66] Establishing a permit process for SMDs can ensure the companies' operations do not impede the use or safety of streets and sidewalks, but also shows that a city is exploring mobility options that do not rely on cars. SMD companies may be less willing to challenge exemptions from CEQA used in ordinances approving permit programs in which they will participate. Yet, there could be an argument that any cap on SMD use would cause a detrimental environmental effect if it increases car use enough to trigger a significant effect on the environment, again involving a determination of the relevant baseline. However, as noted above, without evidence these claims run the risk of being speculative.

Overall, in assessing whether there is no possibility of an environmental impact from regulating scooters, cities should be prepared to address the impact of the regulation on the number of SMDs, and the resulting transportation impacts. If the city can show that it can be seen with certainty that there is no possibility that the action may have a significant impact, this exemption may be appropriately applied to exempt the regulation from CEQA.

ii. No Expansion of Facilities

The Class 1 categorical exemption from CEQA applies to existing facilities, and includes projects that consist of negligible or no expansion of the "operation, repair, maintenance, permitting, leasing, licensing, or minor alteration of existing public or private structures [or] facilities,"[67] including streets, sidewalks, bicycle and pedestrian trails, and similar facilities.[68]

The regulation of SMDs in cities' public-rights-of way appears to fit within this exemption because it consists of alternate operation (and perhaps permitting) of public streets, sidewalks, and similar facilities, that (arguably) result in a negligible expansion of use akin to adding bicycle facilities, and similar alterations that do not create additional automobile lanes.

a. Prohibitions on SMDs

Banning SMDs does not create an increase or expansion in SMD use of existing facilities, and can be construed as consisting of the operation of existing public facilities such as streets, sidewalks, and bike lanes. But, depending on the baseline condition, there could be an argument that the effect of completely banning SMDs would be to increase road use by automobiles. Negligible expansions of facilities are appropriate, but not those that create

[66] *See, e.g.*, OAKLAND Ordinance NO. 13502, § 3, (Sep. 17, 2018).
[67] CEQA Guidelines § 15301.
[68] *Id.* at § 15301(c). Amended in the new CEQA Guidelines to incorporate the emphasized text: "Existing highways and streets, sidewalks, gutters, bicycle and pedestrian trails, and similar facilities (this includes road grading for the purpose of public safety, *and other alterations such as the addition of bicycle facilities, including but not limited to bicycle parking, bicycle-share facilities and bicycle lanes, transit improvements such as bus lanes, pedestrian crossings, street trees, and other similar alterations that do not create additional automobile lanes).*"

additional automobile lanes. Banning scooters would not add automobile lanes, but it could foreseeably lead to an increase in automobile traffic under the theory that SMDs replace a degree of automobile traffic. However, this concern is likely more appropriately raised to challenge a determination of a finding of no significant environmental impact rather than an existing facilities exemption. Further, absent evidence establishing this connection, this argument could be fatally speculative.

b. SMD Permitting Schemes

Regulating SMDs through a permit system also falls within this exemption. The exemption specifically applies to the "permitting" of facilities that include streets, sidewalks, bike lanes, and bicycle share facilities. Again, the baseline use of the facilities may depend on the level of SMD inundation in a city. But, the cap on permits likely keeps any expansion in the use of facilities within the negligible expansion territory.

Thus, if a city can build a record to show that that its SMD regulations consist of alternate operation of public streets, sidewalks, and similar facilities, that will result in a negligible expansion of use akin to adding bicycle facilities, and similar alterations that do not create additional automobile lanes, this exemption will likely be available.[69]

Lead agencies are not required to prepare studies to support determinations that the categorical exemption applies,[70] but the determination should be supported by evidence. Of course, cities must also be conscious of the exceptions to categorical exemptions, including activities where a reasonable probability exists that there will be a significant environmental effect due to unusual circumstances, or where the impact of successive activities of the same type in the same place are significant.[71]

iii. Action Taken to Prevent or Mitigate an Emergency

If an action is "necessary to prevent or mitigate an emergency" it may also be exempt from CEQA.[72] This may fit nicely with findings for urgency ordinances. The applicability of this provision to a ban on SMDs, however, is likely to be heavily fact dependent. "Emergency" is defined as "a sudden, unexpected occurrence, involving a clear and imminent danger, demanding immediate action to prevent or mitigate a loss of, or damage to, life, health, property, or essential public services."[73] Cities initially faced with an inundation of SMDs could make a claim that bans on SMDs are necessary to prevent the loss of life or damage to health or

[69] Cities should also ensure that exceptions to the categorical exemptions do not apply.
[70] *Apartment Ass'n of Greater Los Angeles v. City of Los Angeles*, 90 Cal. App. 4th 1162, 1172 (2001), *as modified* (Aug. 8, 2001).
[71] CEQA Guidelines § 15300.2(b)&(c).
[72] Cal. Pub. Res. Code § 21080(2).
[73] *Id.* at 21060.3.

property. As discussed below in part III.C.i, the use of SMDs has resulted in fatalities, and their operation has resulted in injuries to individuals and property in jurisdictions across the country where they have been deployed. The wave of injuries has become so prevalent that some public officials have the SMD-related injury trend a "public health disaster in the making."[74] Given this context, it is possible that a jurisdiction could support a finding of an emergency to justify a ban on SMDs.

But, an argument that a city is facing an emergency a substantial time period after SMDs arrive could be strained, unless the city is able to show that the time period was necessary to understand the nature of the emergency.

iv. Project Disapproval

If a project is disapproved or rejected, it is not subject to CEQA.[75] This option could be available to a city if the city is considering a regulatory program, but instead opts not to adopt the program and bans SMDs.

3. CEQA Summary

Overall, the decisions to either ban or permit SMDs could trigger CEQA issues, given arguments regarding the environmental impacts of allowing or banning SMDs. Cities should consider how to frame the activity as a non-project, or to fit into an exemption. In conducting this analysis, the determination of the baseline will be particularly important. Overall, cities should build records to support their determinations.

C. Electric Scooters and Injury Liability

1. Liability Challenges

In addition to the legal risk cities face from SMD Companies challenging their regulation of SMDs, cities may also face legal risk arising from the operation of SMDs in their jurisdiction, including liability arising from injuries caused by dangerous conditions of the public right-of-ways.

The spread of SMDs has resulted in an increase in injuries. Though comprehensive data does not appear to exist at this time, it is clear that the proliferation of SMDs has caused an increase in injuries in cities across the country where SMDs have been released. SMD-related accidents

[74] Joshua Emerson Smith, *San Diego Mayor Floats New Rules for Dockless Scooters*, SAN DIEGO UNION-TRIBUNE (Oct. 19, 2018), http://www.govtech.com/fs/San-Diego-Mayor-Floats-New-Rules-for-Dockless-Scooters.html (referring to a September 2018 statement by public health officials at Scripps Mercy Hospital in San Diego). (last visited Mar. 27, 2019).

[75] Cal. Pub. Res. Code § 21080(3).

have caused several fatalities.[76] The most recent SMD-related fatality occurred in San Diego in March, when a man crashed a SMD he was operating into a tree.[77] Comparing the rise in scooter-related injuries to a diseases outbreak, the Centers for Disease Control, in collaboration with the City of Austin, Texas, has conducted an epidemiological study with the goal of developing and evaluating methods to find and count the number of injuries caused by SMDs.[78]

A prospective SMD accident could result in liability for multiple parties. For example, depending on the circumstances, liability could be attributed to a SMD operator riding without due care, to a negligent third-party such as a driver crashing into a SMD operator, to the SMD company for not complying with safety laws or for providing defective scooters, and potentially to the local government for injuries caused by dangerous conditions of the public property where the SMD was being operated. With so many potentially liable parties, plaintiffs and plaintiffs' attorneys will likely seek to include as many prospective defendants as possible. And, as is often the case, plaintiffs are likely to include defendants viewed as having deeper pockets, like the SMD companies[79] and cities.

Liability for cities could arise under a theory of dangerous conditions on public property. Government Code Section 830 defines "dangerous condition" as "a condition of property that creates a substantial (as distinguished from a minor, trivial or insignificant) risk of injury when such property or adjacent property is used with due care in a manner in which it is reasonably foreseeable that it will be used." Pursuant to Government Code Section 835, a city may be liable for injury caused by a dangerous condition of its property if the plaintiff establishes: (1) that the property was in a dangerous condition at the time of the injury, (2) that the injury was proximately caused by the dangerous condition, and (3) that the dangerous condition created a reasonably foreseeable risk of the kind of injury which was incurred. A plaintiff must also establish either: (4) that a city employee negligently or wrongfully created the dangerous condition; or (5) that the city had actual or constructive notice of the dangerous condition before the incident.

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[76] Ryan Felton, *E-Scooter Ride-Share Industry Leaves Injuries and Angered Cities in its Path*, CONSUMER REPORTS (Feb. 5, 2019), https://www.consumerreports.org/product-safety/e-scooter-ride-share-industry-leaves-injuries-and-angered-cities-in-its-path/. (last visited Mar. 27, 2019).

[77] Kucher, *supra* note 36.

[78] Luz Lazo, *The CDC is studying e-scooter injuries*, WASH. POST (Mar. 19, 2019), https://www.washingtonpost.com/transportation/2019/03/15/cdc-is-studying-e-scooter-injuries/?utm_term=.a4659e99260d. (last visited Mar. 27, 2019).

[79] For example, on October 19, 2018 plaintiffs filed a class action lawsuit against Bird and Lime, as well as the manufacturers of their devices, in Los Angeles Superior Court. *See Danielle Borgia, et al. v. Bird Rides, Inc., et al.*, No. 18STCV01416. (L.A. Cty. Super. Ct. filed Oct. 10, 2018), available at http://src.bna.com/CFM. (last visited Mar. 27, 2019). The plaintiffs assert claims for strict products liability, negligence, negligence per se, gross negligence, breach of implied warranties of fitness for a particular purpose and merchantability, public nuisance, declaratory and injunctive relief, and aiding and abetting assault. These claims arise from injuries plaintiffs suffered from tripping on scooters left in sidewalks, being crashed into by scooter riders, having a car crashed into by a scooter, being blocked from a parking space, and being thrown off a scooter when the device's accelerator malfunctioned.

Under this standard, if all the elements are met a city could be liable for injuries resulting from a SMD accident caused by dangerous physical conditions of a public right-of-way. It is unclear if SMD riders are more susceptible to certain dangers from public property than pedestrians or bicycle, which already use such public facilities. But, the prevalence of SMD traffic may increase exposure for contact with property which could be argued to be dangerous.[80]

Further, it is not only structural defects that can create a dangerous condition. Plaintiffs may also seek to hold cities liable for the conditions of sidewalks because of the city's failure to maintain them in a safe condition in the context of the sidewalks being overrun with SMDs, where it is reasonably foreseeable that this condition would create the risk of injury. For example, San Diego was sued in March by a plaintiff, injured when teenagers on an electric scooter lost control and caused a bicyclist to crash into his wheelchair, alleging that the city is liable for creating a dangerous condition on public property because it does not have regulations in place that would require geofencing, speedometers and signs warning pedestrians that the boardwalk was also used by scooters, whose speed could not be monitored.[81]

The decision of whether to or not to regulate scooters itself should not impose liability on a city. Pursuant to Government Code Section 818.2, "[a] public entity is not liable for an injury caused by adopting or failing to adopt an enactment or by failing to enforce any law."[82] California courts have generally recognized that even where cities may reasonably foresee that some motorists and pedestrians will use public-right-of-ways in a negligent manner to the injury of others it does not make them joint tortfeasors with every motorist or pedestrian who uses the right-of-way to injure another.[83]

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[80] There may also be an argument that design immunity pursuant to Government Code Section 830.6 is available if a city can trace back approval to the improvements at issue and support the reasonableness for the design.

[81] Moran, *supra* note 35.

[82] "This immunity is necessary to protect the essential governmental function of making laws, so that the judiciary does not question the wisdom of every legislative decision through tort litigation." *Wood v. Cty. of San Joaquin*, 111 Cal. App. 4th 960, 972 (2003), *as modified* (Sept. 5, 2003).

[83] In *Campbell v. City of Santa Monica*, 51 Cal. App. 2d 626 (1942), the court held that the city was not liable for injuries sustained by plaintiff, as a result of being struck by a privately owned automobile driven by a member of the public along a pedestrian walkway known as the "Promenade," where the city granted permits that allowed certain motor vehicles to use a pedestrian walkway, which had no barriers to protect pedestrians from the motor vehicles on the walkway. The court stated that a "city is liable only for its own shortcomings. Where a city provides streets or sidewalks, or both, it does so with the expectation that motorists and pedestrians will make a lawful and not an unlawful use of them. The fact that the city may reasonably foresee that some motorists and pedestrians will use them in a negligent manner to the injury of others does not make it a joint tort–feasor with every motorist or pedestrian who uses them to the injury of another. While a city may by ordinance prohibit a misuse or negligent use of its streets and sidewalks, its failure to enforce such an ordinance imposes no liability upon it, in the absence of statute."

But, this "does not excuse the City for violating its duty, to avoid the creation of conditions that are dangerous to its citizens or the public generally."[84] Thus, while a city may not be liable for failing to enact an ordinance regulating scooters, a city may face liability if it appears to affirmatively encourage the use of scooters in public right-of-ways in a dangerous manner[85] or fails to act knowing the use of devices in the public right-of-ways causes dangerous conditions of public property. These are the conditions that plaintiffs will likely allege, regardless of how SMDs are or are not regulated in a city. To reduce liability exposure cities should enforce state laws to keep SMDs off of sidewalks and, as discussed below, out of ADA access areas. Further, the City should consider crafting regulations to restrict the use of SMDs in areas where SMD operation has a history of causing injuries or otherwise protect pedestrians from potentially dangerous conditions.

2. Opportunities to Control Liability

The extent of exposure of a city's liability for injuries caused in part by SMD operation in the city is very fact-specific. However, despite these challenges, banning or regulating SMDs through permit systems provides some opportunities to help cities deal with the SMD problems facing their community. If relying on a ban of SMDs, cities can reduce exposure through minimizing potential incidences of scooter accidents in the jurisdiction. As a result of a ban, there will be less, if not any, SMDs operated in the city, and therefore less potential for SMD accidents.

Regulating through a permit system provides a vehicle, to incorporate protections for a city. First, permit programs may create a source of funding for the City to undertake public improvements to reduce risks associated with flawed conditions of public property. Bird had planned to give cities one dollar per scooter per day to buildout bike lane infrastructure so that SMDs could operate outside sidewalks. However, Bird has since abandoned this plan. But, some cities negotiated this type of fee into their permit agreements with Bird.[86] Additionally, permit requirements can secure funding so that property conditions damaged by the use of SMDs are repaired and potentially dangerous conditions are not created. In San Francisco, for example, SMD permittees are required to provide an endowment specifically dedicated to

[84] *Quelvog v. City of Long Beach*, 6 Cal. App. 3d 584, 591 (Ct. App. 1970) (holding that complaint alleging that city not only failed to enforce state law prohibiting operation of motor vehicles upon public sidewalks, but affirmatively encouraged such operation of motor vehicles by creating and maintaining easy means of access to sidewalks, and by informing operators of electrically-powered 'autoettes' and similar motorized vehicles that they could use sidewalks without interference by police sufficiently alleged cause of action against city on theory of creating and maintaining dangerous condition).

[85] *See id.*

[86] Angie Schmitt, *Bird Quietly Ends a Much-Hyped Bike Lane Subsidy*, STREETSBLOG USA (Jan 10, 2019), https://usa.streetsblog.org/2019/01/10/bird-quietly-ends-a-much-hyped-bike-lane-subsidy/. (last visited Mar. 27, 2019).

repair and maintenance and are required to reimburse costs associated with repair and maintenance of public property.[87]

Second, through regulation, cities can control some degree of liability by requiring that SMD companies assent to indemnification agreements. Such agreements can be crafted to address the city's liability concerns. For example, Santa Monica has a codified limitation on municipal liability.[88] In the indemnification agreement required of operators, operators must agree to indemnify, defend, and hold harmless the city for claims arising from the city's permitting process and from injuries connected with any "use, misuse, placement or mis-placement of any of the Operator's device or equipment by any person, except …[that injury] caused by the sole willful misconduct of the City."[89] The San Francisco's permit program also requires permittees to indemnify the city releasing the city from liability for injuries other than those caused by "gross negligence or willful misconduct of the city."[90] In the Los Angeles pilot program, the indemnification clause also specifically required indemnification for alleged violations of the ADA.[91]

Scooter companies, however, have pushed back on what they see as expansive indemnity language. For example, in Oakland, the draft indemnification provision included in the terms and conditions to operate SMDs in the city contained a provision that released the city "from liability for injuries 'arising out of, or relating to the design, construction, maintenance, repair, replacement, oversight, management, or supervision of any physical, environmental, or dangerous conditions' of public streets."[92] Representatives of scooter companies sent a letter to the city attorney, and other officials challenging the language, noting that "[m]any cities have adopted reasonable indemnification provisions which do not seek to include the city's own negligence and does not explicitly carve out the city's responsibility to riders to maintain the city's right of way and infrastructure."[93]

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[87] SFMTA Powered Scooter Share Permit Terms and Conditions (Oct. 12, 2018), https://www.sfmta.com/sites/default/files/reports-and-documents/2018/10/scooter_program_terms_conditions_and_guidline_10.12.18_0.pdf [hereinafter "SFMTA Powered Scooter Share Permit Terms and Conditions"]. (last visited Mar. 27, 2019).

[88] SANTA MONICA MUNICIPAL CODE § 3.21.070 ("Limitations on City liability").

[89] Santa Monica Administrative Regulations (Exhibit B "Indemnification and Insurance Agreement").

[90] SFMTA Powered Scooter Share Permit Terms and Conditions.

[91] City of Los Angeles Department of Transportation Dockless On-Demand Personal Mobility Conditional Use Permit Rules and Guidelines (Oct. 1, 2018), https://ladot.lacity.org/sites/g/files/wph266/f/LADOTDocklessCP.pdf. (last visited Mar. 27, 2019).

[92] Rachel Swan, *Scooter companies tussling with Oakland over who pays for injuries*, S.F. CHRONICAL (Feb. 20, 2019) (9:04 pm), https://www.sfchronicle.com/bayarea/article/Scooter-companies-tussling-with-Oakland-over-who-13632424.php. (last visited Mar. 27, 2019); City of Oakland Dockless Scooter Share Program: Terms and Conditions and Permit Application (Draft 3.0 December 11, 2018), https://www.oaklandca.gov/documents/oak-dot-scooter-sharing-terms-and-conditions-december-2018. (last visited Mar. 27, 2019).

[93] *Id.*

Third, regulations may also require the companies to maintain insurance policies. Santa Monica's code requires that permittees maintain insurance as determined necessary by the Risk Manager, naming the City as an additional insured.[94] The administrative regulations set the minimum requirements and require each operator to procure and maintain commercial general liability insurance with limits of no less than $5 million per occurrence and no aggregate annual limit, as well as Workers' Compensation insurance as with Statutory Limits and Employers' Liability Insurance with limits of no less than $1,000,000 per accident for bodily injury or disease. San Francisco also imposes insurance requirements on scooter permittees which include that companies maintain the following insurance coverages: Workers' Compensation, Commercial General Liability, Commercial Automobile Liability, Professional Liability, and Cyber and Privacy insurance.[95] San Diego's proposed regulations would require each operator to procure and maintain commercial general liability insurance with limits of $2 million per occurrence and a $4 million aggregate, as well as a $4 million umbrella policy.[96]

Fourth, through regulation cities can require other safety requirements of SMD operators as a condition of their operation in the city. This could include public education programs regarding safe riding and applicable laws ranging from where SMDs can be operated to how they should not be left in ADA access areas. Santa Monica, for example, requires certain maintenance obligations of SMD companies. But, Bird has been sued, by a former mechanic for Bird, for allegedly violating the safety requirements of their operation agreement with the City of Santa Monica.[97]

Overall, the operation of SMDs within a jurisdiction exposes that jurisdiction liability based on a number of different theories. Thus, cities should consider their own circumstances and assess their potential liability when considering how to address SMDs. If the goal is to reduce the prevalence of SMDs and limit liability in the jurisdiction, a ban may be the best route. However, liability can also be addressed through a regulatory permit scheme and imposition of requirements on SMD companies so that they shoulder the risks associated with or caused by their use of public rights-of-way. Finally, jurisdictions that do not regulate may still be subject to liability with less opportunity mitigate liability risks and shift the liabilities to the SMD companies where they arguably belong.

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[94] SANTA MONICA MUNICIPAL CODE § 3.21.070(b).

[95] SFMTA Powered Scooter Share Program Permit Application (May 23, 2018), https://www.sfmta.com/sites/default/files/reports-and-documents/2018/05/powered_scooter_share_program_permit_application.pdf. (last visited Mar. 27, 2019).

[96] City of San Diego Staff Report, Regulation of Shared Dockless Mobility Devices (Feb. 2, 2019), https://onbase.sandiego.gov/OnBaseAgendaOnline/Documents/ViewDocument/Staff%20Report%20for%20-%20%20().pdf?meetingId=1488&documentType=Agenda&itemId=33275&publishId=152805&isSection=false. (last visited Mar. 27, 2019).

[97] Madeleine Pauker, New *lawsuit claims deficiencies in scooter safety*, SANTA MONICA DAILY PRESS (Feb. 07, 2019 5:03 PM), https://www.smdp.com/new-lawsuit-claims-deficiencies-in-scooter-safety/172675. (last visited Mar. 27, 2019).

D. Electric Scooters and ADA Compliance

The proliferation of scooters on public-right-of-ways also has the potential to conflict with a city's obligations under the Americans with Disabilities Act (ADA) and other laws which prohibit discrimination against disabled persons.[98] The ADA prohibits discrimination and ensures equal opportunity for persons with disabilities.[99] Under the ADA, disabled persons may not be "excluded from participation in or be denied the benefits of the services, programs or activities of a public entity, or be subjected to discrimination by any such entity."[100] A city must ensure that its services, programs, or activities, when viewed in their entirety, are readily accessible to and useable by individuals with disabilities.[101] A city must take affirmative steps to make reasonable modifications to their policies, practices or procedures when necessary to avoid discrimination on the basis of disability.[102] The Ninth Circuit has held that facilities within the public right of way, such as public sidewalks, are a service, program, or activity of the city within the meaning of Title II of the ADA.[103] Thus, cities must ensure that their public right-of-ways, when viewed in their entirety, are readily accessible to and useable by individuals with disabilities and must take affirmative steps to avoid discrimination on the basis of disability as it relates to accessible right-of-ways. Compliance with these requirements requires addressing the waves of SMDs, whether whizzing down sidewalks or left unattended in sidewalks and obstructing ADA-required access.

Allegations of ADA violations have been leveled against some cities that ban SMD operation as well as some that do not regulate SMDs. For example, in January 2019, San Diego was sued for alleged violations of Title II of the ADA as well as other laws requiring open access of the sidewalks and prohibiting discrimination against the disabled.[104] The suit alleges "[t]he City of San Diego has failed to adequately maintain the system of sidewalks, crosswalks, curb ramps, transit stops, pedestrian crossings and other walkways, by allowing dockless scooters used primarily for recreational purposes to proliferate unchecked throughout San Diego and to block safe and equal access for people with disabilities who live in or visit the City. Defendant City of San Diego has thereby denied Plaintiffs the benefits of the City's services, programs, and activities based on their disabilities."[105] The plaintiff's further assert that the city has "intentionally or recklessly overlooked the egregious actions of the Scooter defendants and their severe negative impact on disability access" through their dockless business model by

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[98] 42 USC §12131 *et seq.* See *also* The Rehabilitation Act (29 U.S.C. §794, et seq.), and California Government Code sections 4450, 11135, 54 et seq., 51 et seq. (Unruh Civil Rights Act).
[99] 42 U.S.C. §§ 12101 et seq.
[100] 42 U.S.C. § 12132; 28 C.F.R. § 35.149.
[101] 28 C.F.R. § 35.150(a).
[102] 28 C.F.R. § 35.130(b)(7).
[103] *Barden v City of Sacramento*, 292 F3d 1073, 1076 (9th Cir 2002).
[104] *Montoya et al v. Bird Rides Inc. et al.*, No. 3:19-cv-00054-JM-BGS (S.D. Cal. filed Jan. 9, 2019), https://www.classaction.org/media/montoya-et-al-v-city-of-san-diego-et-al.pdf. (last visited Mar. 27, 2019). The plaintiffs allege that the city violated Title II of the Americans With Disabilities Act, The Rehabilitation Act, and California Government Code sections 4450, 11135, 54 et seq., 51 et seq.
[105] *Id.* at 9.

failing to enforce San Diego Municipal Code provisions which prohibit objects to be placed in the public right of way.[106] As noted above, San Diego does not have specific SMD regulations at this time. The complaint specifically references this in the ADA cause of action, alleging that the city "failed and continues to fail to adopt, implement, or enforce ordinance or other regulations necessary to ensure that the system of sidewalks, crosswalks, transit stops, curb ramps, pedestrian crossings and other walkways are kept free of the Scooter obstructions."[107]

However, even cities that do regulate or ban SMDs may face plaintiffs asserting ADA violations. For example, in October 2018 an individual plaintiff filed a class action suit against Bird as well as the cities of Beverly Hills (which has banned SMDs), Santa Monica (which has regulated SMDs through a permitting system), and Los Angeles (which has regulated SMDs through conditional use permits and a pilot permitting system), asserting ADA violations in relation to denial of access to the sidewalk.[108]

It is unclear how these ADA cases will be resolved, but cities should be mindful of their ADA obligations when deciding how to regulate scooters in their jurisdictions. In particular, cities should act to keep scooters off of sidewalks and should keep scooters from being parked or abandoned in the ADA access portions of the public right-of-way. In the end, however, whether a city is able to maintain accessible sidewalk systems as required by the ADA comes down to how the devices are actually used and the city's efforts in enforcing regulations that keep the sidewalks clear of obstruction, which is yet another example of the way in which these operations impose costs on cities to mitigate liability risks that arguably should be factored into the SMD companies' costs of doing business.

IV. Conclusion

SMDs offer innovative mobility options that may serve an important role in the transportation planning of both individuals and cities. Despite these benefits, SMDs have their critics and present cities with legitimate concerns for the safety and welfare of their residents and visitors. As such, cities are placed in a precarious position of deciding whether and how to regulate SMDs in their jurisdictions. As addressed above, cities must be mindful when making these decisions of exposure to liability either both from regulating, or from failing to regulate SMDs enough (or at all). On one hand, efforts to regulate may be challenged by SMD companies who likely will argue that the ability of local jurisdictions to regulate is limited by the Vehicle Code or on other grounds. Yet, there may be authority for cities to prohibit SMDs on local streets and sidewalks, or to institute a permitting scheme that limits which SMD companies are allowed to operate, and regulates the manner and conditions of any such operations. On the other hand, individuals may challenge what they see as insufficient regulation where the operation of SMDs cause dangerous conditions, restrict access to the city's public right-of-ways, or (allegedly)

[106] *Id.* at 10.
[107] *Id.* at 19.
[108] *Labowitz v. Bird et al*, No. 2:18-cv-09329 (C.D. Cal. filed Oct. 31, 2018), available at https://www.courthousenews.com/wp-content/uploads/2018/11/Scooters.pdf. (last visited Mar. 27, 2019).

caused individual injury or harm. In these instances, cities should consider craft their regulations to insulate the city from liability associated with the dangers of SMD operation, and shift the risk to the SMD companies where it arguably should reside.

In addition to the issues addressed in this paper, the regulation of SMDs also presents several other interesting issues and opportunities that cities should consider, such as those relating to the data captured and shared in connection with the operation of SMDs and to issues of equity in access.

It remains to be seen whether the courts or the Legislature will clarify the role of local governments in regulating SMDs. In the meantime, as with other shared economy and disruptive businesses like short term rentals (Airbnb, VRBO, etc.) and parking squatters "selling" public parking (Monkey Parking,[109] etc.), local governments will continue to find themselves on the forefront in dealing with these issues arising from SMDs and balancing the provision of mobility opportunities and the safety of their residents and visitors.

[109] *See* Marcus Wohlsen, App That Lets Users Sell Public *Parking Spots is Told to Shut Down*, WIRED (June 23, 3014 3:37 PM), https://www.wired.com/2014/06/app-that-lets-users-sell-public-parking-spots-is-ordered-to-shut-down/. (last visited Mar. 27, 2019).

Shots Fired! How to Respond to an Officer Involved Shooting

Thursday, May 9, 2019 General Session; 1:30 – 3:15 p.m.

J. Scott Tiedemann, Managing Partner, Liebert Cassidy Whitmore
Jeb Brown, Assistant County Counsel, Riverside County Counsel's Office

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Notes:_____

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Shots Fired!

How to Respond to an Officer Involved Shooting

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LCW LIEBERT CASSIDY WHITMORE

1. INTRODUCTION

In the event of an officer involved shooting (OIS) that involves a city police officer, there will most likely be two separate investigations: a criminal investigation and an administrative investigation. A third investigation may also be conducted for the specific purpose of assessing civil liability exposure. A city attorney is less likely to have any significant involvement in the criminal investigation; criminal investigators will conduct the investigation of the underlying crime(s), if any, and the shooting itself. They will report their findings to prosecutors. A city attorney is most likely to give advice in connection with an administrative investigation into whether the shooting complied with the employing agency's policies and any investigation that focuses on civil liability issues. This paper is designed to provide a city attorney with an overview of the administrative and, to a lesser degree, the liability investigation process and the applicable authorities.

2. INITIAL CHECKLIST

The response to an OIS can seem chaotic. It may help for a city attorney to have an initial checklist of the various issues to be considered in the aftermath of an OIS. The following checklist is intended to provide a broad overview of issues that will warrant attention in the hours and first few days following an OIS.

- Before an incident occurs, an agency should consider adopting a protocol that will help to answer in advance some of the questions that are raised below, including but not limited to who will respond to the scene, who is responsible to handle specific issues and when things will happen.
- After the incident occurs, then the following issues will need to be considered.
- Decide whether City Attorney personnel will respond to the scene, be available by phone, etc.
- Circumstances of Incident known at time. *Note: the facts and circumstances will likely change substantially based upon continued investigation.*
    - Status of involved officer(s);
    - Status of suspect(s) and any special considerations that may draw public scrutiny;
    - Status of civilians/bystanders;
    - Static Event v. Ongoing Investigation?
- Notification to City Manager/City Council

- Who makes notification? If notification is made by the City Attorney, then the communications may be privileged.

- How is notice to be given? *Note: Care must be given to avoid Brown Act violations. E.g. emails and phone calls between council members can evolve into serial meetings.*

- When should notification be given? Presuming it will not interfere with the investigation, then providing notice as soon as practical will help ensure executives and elected officials are prepared to address inquires.

- Public Relations

  - Contact Public Information Officer or equivalent;

  - Who will prepare a press release?

  - Who will provide updates to the media and respond to media requests?

- Debriefing of Incident

  - Who will conduct and attend debrief?

  - When? 24 / 48 hours.

  - Will the city attorney or other legal counsel attend? Is the debrief privileged?

- Collection of Evidence

  - Criminal Evidence v. Civil Evidence to Defend Case

  - Statement of Involved Officer

    - Will the officer provide a voluntary statement to criminal investigators?

    - Or, will the officer only provide a compelled statement to administrative investigators?

- Initiation of Defense of Civil Litigation

  - Who is going to represent city / officers

  - When retained?

  - Conflict Issues?

3. APPLICATION OF THE POBR TO THE ADMINISTRATIVE INVESTIGATION

It is important for a city attorney to know that the criminal investigation will be subject to criminal laws and procedures, but the administrative investigation is subject to the Public Safety Officers Procedural Bill of Rights Act ("POBR"), enacted by the California Legislature in 1976 as a "labor relations statute."[1] It "provides a catalog of basic rights and protections that must be afforded all peace officers by the public entities which employ them" and applies to the majority of peace officers employed by the State of California, its counties, cities, and other local agencies.[2]

Government Code section 3303(i)[3] of the POBR provides that the POBR does not apply to investigations that are "concerned solely and directly with alleged criminal activities." For example, in *Van Winkle v. County of Ventura*,[4] a sheriff's department uncovered evidence that a deputy had embezzled firearms from the department. The department's major crimes bureau (MCB) ─ which had authority to conduct criminal investigations, but not to recommend discipline ─ conducted a criminal investigation into an allegation that the deputy received weapons required to be destroyed and subsequently kept the weapons without booking them for destruction. MCB conducted a sting operation, during which the deputy made several incriminating statements. The MCB arrested the deputy. At the start of the post-arrest interrogation of the deputy, a MCB detective told the deputy, "this is a criminal matter, it's not [an] administrative matter so I can't order you to speak." The deputy then waived his Miranda rights and admitted that he took home one of the guns turned over for destruction. The department later terminated the deputy's employment. The deputy argued that the department violated the POBR by obtaining statements from him during the criminal investigation without providing him with various POBR rights. The California Court of Appeal upheld the termination decision, finding that the POBR provisions do not apply to officers that are subjected to criminal investigations conducted by their employers.

However, another court has held that an outside agency must afford officers the rights proscribed in section 3303 if its criminal investigation is one which is "inextricably intertwined" with the employer's administrative investigation. In *California Correctional Peace Officer's Assoc. v. State of California*, the Department of Justice (DOJ) began a criminal investigation regarding claims of abuse of inmates by correctional officers at Corcoran State Prison. The correctional officers were interviewed by DOJ investigators and were not afforded the rights provided by the POBR. The California Department of Corrections (CDC) argued that since it was the DOJ conducting the investigation and not CDC staff, the provisions of the POBR did not apply. This argument was based on the fact that Section 3303 provides that the POBR applies "[w]hen any public safety officer is under investigation and subjected to interrogation by his or her commanding officer, or any other member of the employing public safety department, that could lead to punitive action…" In finding that the POBR did apply to the investigation by the DOJ, the Court stated that "…the DOJ's involvement does not serve to immunize the CDC from the provisions of section 3303. The CDC and DOJ must be considered to have been acting together in this investigation. The CDC did not merely order the correctional officers to cooperate with the DOJ investigation, but delivered interviewees to DOJ investigators, and threatened them with arrest and/or discipline if they asserted their rights during interrogation by DOJ agents." The Court then went on to hold that in order for the criminal investigation exemption to apply, a criminal investigation must be one "conducted primarily by [an] outside agenc[y] without significant active involvement or assistance by the employer."[5]

4. THE SUBJECT OFFICER'S STATUS WHILE UNDER INVESTIGATION

An involved officer may be assigned to administrative leave with pay pending the outcome of the investigation or a possible fitness for duty examination. The POBR only prohibits an agency from loaning or temporarily reassigning a police officer to a location or duty assignment if a police officer in the department would not normally be sent to that location or would not normally be given that duty assignment under similar circumstances.[6]

Leave is typically with pay. Most city police officers have constitutionally protected property interests in their positions and are entitled to both pre-removal and post-removal due process. Some agencies have rules that permit employees who face criminal charges to be placed on unpaid status pending the outcome of a criminal case. In rare circumstances, when an employee has been indicted or is otherwise charged by prosecutors with a serious criminal offense, an agency may consider placing the employee on unpaid leave while the investigation is pending.[7] Nevertheless, under Section 3304(b) and constitutional due process principals, an employee who is placed on unpaid status based on pending criminal charges will be entitled to at least a post-deprivation appeal.

In *Assoc. of Los Angeles Deputy Sheriffs v. County of Los Angeles*, four deputy sheriffs charged with felonies were suspended without pay while the charges were pending. The County returned them to paid status after the charges were dropped or they were acquitted. The deputies requested appeal hearings to receive backpay for the time they were suspended. Two of the deputies retired before they received their hearings. Two of the deputies received hearings and the hearing officers recommended that the deputies receive backpay.

The Civil Service Commission upheld the suspensions based on an alleged County policy of upholding suspensions based upon a showing of felony charges only, and not commission of the actual charges. The deputies filed 42 U.S.C .Section 1983 claims against the County, the County Supervisors, the Civil Service Commissioners, and the Sheriff alleging violation of their procedural due process rights. The District Court dismissed the complaint, finding that the deputies could not state a *Monell* claim and that the individual defendants were entitled to qualified immunity.

The Ninth Circuit held that although the Civil Service Commission lacked jurisdiction under the County charter to hear the retired deputies' appeals, the County was still required to provide them with post-suspension hearings. Consequently, the retired deputies stated plausible due process claims. The Court further held that the deputies who received hearings stated plausible due process claims based on their allegation that the County should have proved actual misconduct during their post suspension hearings, and not just that they were charged with felonies. The Court did not decide whether post-suspension hearings based only on the filing of felony charges are unconstitutional, but remanded the case for further factfinding.

5. SELECTING AN INVESTIGATOR

In advance of any officer involved shooting, a police department should establish protocols for who will conduct the administrative investigation into the shooting. The protocol should afford

the chief of police discretion to choose an internal or an external investigator depending on the circumstances. In many California counties, a protocol has been established for criminal review of officer involved shootings by the district attorney's investigators. Agencies should be equally prepared for the administrative investigation.

The administrative investigator will be responsible for:

- Conducting the investigation
- Rendering factual findings
- Writing a report

Conducting an investigation is a significant responsibility. If discipline results, an officer may challenge the fairness or accuracy of the investigation, making the investigation itself subject to scrutiny in a hearing or judicial proceeding. If discipline is imposed against an officer, he or she will have access to the records of the investigation. These materials may also be discoverable in any subsequent litigation. It is therefore crucial that the agency choose an appropriate individual who is capable of conducting a prompt, fair, and thorough investigation.
To fulfill his/her responsibility for acting promptly and fairly, the investigator must be provided the necessary resources, training and access to information and potential witnesses.

In general, it is preferable to have the investigation conducted by someone who outranks the subjects and witnesses and who has established credibility within the department. That said, a lower ranking investigator can be vested with authority by a supervisor to require employees who are otherwise above him/her in the chain of command to participate in an administrative interview.

Administrative investigations should always be conducted in a professional and courteous manner. Nevertheless, any proceeding which can result in the imposition of discipline may become adversarial and confrontational. The most effective investigator is not viewed as an advocate for the complainant, the alleged wrongdoer, or the agency. Neutrality and objectivity enhance the credibility of the investigator and the investigation. Investigators who demonstrate impartiality and integrity will be more effective in conducting investigations.

The investigator should also be someone who is patient, thorough, and assertive. Many investigations involve interviewing people who are reluctant to provide information. The investigator must be capable of pursuing lines of questioning with individuals who are reluctant or deceptive during an interview — while remaining unbiased and maintaining a non-accusatory, positive rapport with interviewees.

Perhaps the most important quality of an investigator is impartiality. To conduct a fair investigation and to minimize conflict of interest claims, the investigator must not be biased in any manner toward the people involved in the investigation. Additionally, the investigator must not have any biases toward the nature of the allegations being investigated. If there is any doubt as to the investigator's ability to remain impartial throughout the course of the investigation, another investigator should be assigned.

The investigator must have the ability to compile and analyze the data from the investigation in a concise and organized manner. A well-written report will include credibility assessments and will support conclusions (if allowed to be made) with specific factual evidence. The investigator must understand the difference between making factual findings and inappropriate conclusions of law.

6. General Format for Conducting an Administrative Investigation

Each administrative investigation must be conducted according to its own unique facts and circumstances. For example, witness availability may impact the order of witness interviews or the gathering of other evidence. The following approach will generally be used in conducting most administrative investigations.

- Decide whether to prohibit the subject employee and employee[8] witnesses from discussing the shooting with any other employees other than their representatives. Investigations must be processed as confidentially as possible. The subject employee and witnesses may be ordered not to discuss the subject matter of the investigation with anyone other than their legal representatives.[9] Moreover, identities should not be disclosed, except to the extent necessary to continue the investigation. Statements made by witnesses should not be disclosed to other employees, unless it is necessary to elicit specific, relevant, and necessary information from the employee. An employer should be careful to lift the restriction on discussing the investigation when confidentiality is no longer required.
- One appellate court held that an agency's "anti-huddling" policy, which precluded officers from meeting in a group with other officers and a lawyer before the initial interrogation, did not create an unreasonable limit on the right to representation.[10] More recently, the Public Employment Relations Board, which typically does not have jurisdiction over city police officers, has nonetheless instructed that gag orders issued to employees must be justified on a case by case basis for reasons such as the need to protect witnesses, the danger of destruction of evidence, or the risk of fabrication of testimony;
- Interview all witnesses (including individuals who may have seen nothing but who could have seen misconduct had it been occurring); generally, non-suspect employee witnesses will be interviewed first in order to allow a concluding interview with the suspect employee to be the most comprehensive, yet circumstances do exist where the subject employee should be interviewed first in order to obtain unrehearsed answers and testimony that is not tainted by the subject having been advised of the investigation by individuals previously interviewed. Note that under *Santa Ana Police Officers Association v. City of Santa Ana*,[11] discussed more below, conducting more than one interrogation of a subject officer may result in having to disclose investigation records to the subject officer before the officer is interviewed a second or subsequent time;
- Collect physical evidence (videotapes, documents, etc.);

- Audio record all interviews;
- Transcribe witness interviews for department's use in interrogating the subject employee. Note that the interview of a subject employee is commonly referred to as an interrogation, which sounds adversarial, but is consistent with the statutory language in Section 3303;
- Interrogate subject employee;
- Conduct necessary follow-up interviews and investigation;
- Prepare a report which includes synopses, transcripts, evidentiary documents, findings of fact and statement of rules, orders and/or statutes violated.

7. INTERROGATION OF THE SUBJECT EMPLOYEE

In almost all instances, an administrative investigation culminates with the interrogation of the public safety employee who is suspected of wrongdoing. Section 3303 establishes the conditions under which such interrogations might occur. Violating these statutes may lead to suppression of valuable evidence in a disciplinary appeal proceeding. Some of the more significant aspects of Section 3303 are discussed below.

A. WHEN IS CONTACT WITH AN EMPLOYEE CONSIDERED AN "INTERROGATION"?

By its own terms, the rights afforded to public safety employee under Section 3303 only applies when an employee is "under investigation" and subjected to "interrogation." The initial contact with an officer following a shooting may not rise to the level of an interrogation. Asking an officer basic safety questions in the immediate aftermath of a shooting, including about the officer's status, i.e. are they injured; are there any subjects and what is their status; how many shots were fired in what direction, etc., is most likely not going to be considered an interrogation that triggers the officer's rights under the POBR. Section 3303(i) states that the POBR does "not apply to any interrogation of a public safety officer in the normal course of duty, counseling, instruction, or informal verbal admonishment by, or other routine or unplanned contact with, a supervisor or any other public safety officer."

What type of contact with an employee is considered an "interrogation" under Section 3303?

The line at which contact with an employee becomes an "interrogation" for which Section 3303 rights attach is often blurry. For example, in *City of Los Angeles v. Superior Court* ("*Labio*"),[12] Officer Labio was on duty during the late evening/early morning hours. While he was on duty, a fatal traffic accident occurred on his beat. Labio did not respond to the call.

After the incident was resolved, Labio's watch commander and another supervisor went into a local donut shop. The owner of the donut shop told the watch commander that he saw a male Filipino officer drive past the fatal accident scene when it first occurred without stopping to render aid. The watch commander went back to the station and checked the deployment log. When he did, he discovered that Labio was the only officer on duty at the time who matched the

donut shop owner's description. The watch commander also discovered that Labio did not have permission to drive a City vehicle on the night in question.

Upon discovering this information, the watch commander called Labio into his office and questioned him about his whereabouts and his use of a City vehicle during his shift. Prior to questioning Labio, the watch commander never advised Labio he was under investigation or that he had rights under the POBR. After his interview with Labio, the watch commander filed a personnel complaint with the department's internal affairs bureau.

Labio was later interviewed by the department's internal affairs investigators. During this interview, the investigator used statements Labio had previously provided to the watch commander in their questioning. Labio's attorney objected to the use of those statements claiming they could not be used because the watch commander never advised Labio of his rights under the POBR. Labio was eventually terminated for failing to stop and render aid, for using a City vehicle without authorization, and for making false and misleading statements to the watch commander. Labio appealed his dismissal, and during the appeal he moved to suppress the statements made to the watch commander on the grounds he was never advised he was under investigation (a violation of Section 3303(c).)

Both the trial court and the Court of Appeal agreed with Labio. The Court of Appeal held that the watch commander's contact was not "routine" questioning within the meaning of Section 3303(i), and it rejected the department's assertion that Section 3303 rights only apply when an officer is interrogated in the internal affairs setting. Instead, the Court held that since the watch commander suspected Labio had engaged in misconduct at the time he interviewed him, Labio was entitled to all the protections afforded to officers during interrogations. Since the watch commander failed to advise Labio that he was suspected of misconduct before he interviewed him, the Court suppressed all of Labio's statements to the watch commander except for purposes of impeachment.

Similarly, in *Paterson v. City of Los Angeles*,[13] a supervisor suspected that an officer was abusing sick leave after the officer called into work sick. The supervisor sent a police sergeant to the officer's house to see if he was home. When the officer was not home, the sergeant called him on his cell phone and tape recorded the conversation. The sergeant asked the officer where he was and the officer said that he was at home sleeping. The sergeant subsequently called her supervisor and said, "Guess what…he's not at home. I have it all on tape." The officer was later charged with making a false and misleading statement to a supervisor. The California Court of Appeal found that the supervisor conducted an investigation as defined by the POBR and the POBR's protections applied.

Contrast *Labio* and *Paterson* with *Steinert v. City of Covina*.[14] In *Steinert*, the Department of Justice ("DOJ") performed a routine audit of the City of Covina's use of the CLETS system. As a result of the audit, the DOJ reported to the City that one of its officers, Steinert, had performed a records search on an individual named Robert Tirado. Officer Steinert designated the Tirado search as "TRNG," signifying it was used for training purposes. Both the DOJ and the City's policies prohibited the use of actual criminal records for training purposes.

A support services manager examined the Department's records the day that Steinert ran the Tirado search, and discovered that Steinert had taken a vandalism report for a citizen (Roff). The vandalism report did not specifically mention Tirado's name, but a link between the location on the report and Tirado's rap sheet indicated there was a possible connection between the victim and Tirado. The support services manager provided the possible link to Steinert's supervisor, Sgt. Curley. Since Steinert had legal justification to run Tirado's name, Sgt. Curley believed Steinert made a simple "user error" when she ran the search, *i.e.,* Sgt. Curley believed Steinert mis-designated the search as a "TRNG" search rather than entering the crime report number associated with the vandalism report.

With this belief in mind, Sgt. Curley called Steinert into his office and counseled/trained her on the proper way to designate a CLETS search. As she was leaving, Sgt. Curley asked Steinert whether she had disclosed any of Tirado's confidential information to the victim (Roff). Steinert replied that she had not.

During a routine audit of crime reports, the victims of crimes were contacted to see whether they were satisfied with the Department's customer service. One of the victims contacted was Roff. During this contact, Roff reported that Steinert had disclosed Tirado's confidential rap sheet to her. When this information came to light, Sgt. Curley initiated an internal affairs investigation for possible dishonesty. Steinert was terminated as a result of the investigation.

Steinert filed a petition for writ petition seeking to exclude statements she made to Sgt. Curley during the CLETS counseling session, *i.e.,* her denial that she disclosed Tirado's rap sheet to Roff. Steinert argued that since she could have been disciplined for the mis-designation of the CLETS search, Sgt. Curley should have afforded her the protections specified in Section 3303, *i.e.,* she should have been advised of the nature of the charges against her, given the right to a representative, etc. The City (and Sgt. Curley) argued that since the intent behind the meeting was solely to counsel and train Steinert on the proper way to designate a CLETS search, rather than to investigate or discipline her, the contact between Sgt. Curley and Steinert was outside the scope of Section 3303. Stated another way, the City argued that the meeting was one which was simply "in the normal course of duty, counseling, instruction, or informal verbal admonishment by, or other routine or unplanned contact with, a supervisor."

The Court of Appeal agreed with the City. The Court weighed the evidence and found that Sgt. Curley's testimony that he only intended to train and counsel Steinert on the proper way to designate a CLETS search was credible. The Court also found that Sgt. Curley was credible when he denied that he suspected that Steinert had committed misconduct during the counseling meeting. The *Steinert* Court distinguished the *Labio* case on this basis.

The *Labio* and *Steinert* cases demonstrate that the line between an "interrogation" and routine counseling is ambiguous. If a supervisor has a reasonable suspicion that an officer has engaged in misconduct, the supervisor should assure he/she complies with Section 3303 before questioning the employee about his/her suspicions.

B. PRE-INTERROGATION DISCOVERY RIGHTS

An officer who is the subject of an administrative investigation regarding an OIS may request to be provided with information known to the investigators prior to being interrogated. In some cases, providing the officer with information in advance is in the best interests of the investigation. In other cases, the investigators may determine that providing the officer with information in advance will undermine the investigation. One particularly controversial issue is whether the involved officer should be shown any video recordings of the OIS before being interrogated. Some experts feel strongly that the involved officer should be shown videos in order to refresh the officer's recollection and to give the officer the best opportunity to provide a cogent explanation of what happened. Other experts believe that showing the video to the officer in advance can undermine the officer's credibility and even lead an officer to form beliefs about the facts and circumstances around the OIS that they did not have at the time of the incident. As a matter of law, at least with regard to the initial interrogation of the subject officer, the investigators have discretion whether to provide information in advance.

In 1990, the California Supreme Court held in *Pasadena Police Officers Association v. City of Pasadena*[15] that the POBR does not compel an employing public safety department to provide pre-interrogation discovery rights to a peace officer who is the subject of an internal affairs investigation. If the interview is recorded and the officer is subsequently interrogated as part of the same investigation, however, he/she is entitled to receive a copy of the first recording before the second interrogation.[16]

The Court of Appeal in 2017 expanded the subject's rights to discovery prior to a second or further interrogation in *Santa Ana Police Officers Association v. City of Santa Ana*.[17] This opinion held, for the first time, that the officer's right to receive "the tape" prior to a further investigation includes the right to receive the complaints, the investigator's notes, and the interviews of *other* witnesses. The safest course of action is to provide an officer with the recording of his or her prior interview(s) and as well as complaints and reports prior to conducting a second interrogation. However, if you are concerned that doing so could undermine the effectiveness or integrity of an ongoing investigation, then you may consider:

- Only conduct one interview near the completion of the investigation. The law still does not entitle an officer to discovery prior to his or her first interrogation. If a second or latter interrogation is not conducted, then the *Santa Ana* decision is not implicated.
- Do not transcribe witness interviews or draft any reports until you are certain that there is no need to conduct any further interrogation of the subject employee. That way there are no stenographer notes or reports to have to provide.
- Consider declaring the reports and complaints confidential and do not place them in the officer's personnel file pending completion of the investigation, including any follow-up interrogations. Section 3303(g) provides: "[t]he public safety officer shall be entitled to a transcribed copy of any notes made by a stenographer or to any reports or complaints made by investigators or other persons, except those which are deemed by the investigating agency to be confidential. No notes or reports that are deemed to be confidential may be entered in the officer's personnel file." [Emphasis added.] Note that no case has ever interpreted this

provision in the specific context of an officer's potential right to discovery prior to a second or latter interrogation.

C. TIMING OF THE INTERROGATION

Section 3303(a) provides that an interrogation must be conducted "at a reasonable hour, preferably at a time when the public safety officer is on duty, or during the normal waking hours for the public safety officer, unless the seriousness of the investigation requires otherwise." Again, there can be differences of opinion regarding the best time to interrogate an involved officer regarding an OIS. Many experts believe that an officer should be afforded time to decompress before being interrogated. Some other experts believe that the sooner the better so that the officer does not forget critical details and is not influenced by outside information that may cloud their recollection.

In 2014, the Court of Appeal in *Quezada v. City of Los Angeles* held that the seriousness of an investigation into the drunken, random firing of firearms by off-duty officers mandated that the Department conduct its investigation at the earliest opportunity while the officers' memories were still the freshest.[18] The incident occurred slightly after 2:00 a.m. and the officers were kept awake until approximately 2:30 p.m. the next day before interrogation. The fact that the officers were awake for many hours before being interrogated was because the incident occurred after the officers had been on duty for many hours and not because of the Department.

Section 3303(d) provides that the interrogating session "shall be for a reasonable period taking into consideration the gravity and complexity of the issues." The Act also require that the subject employee be given the opportunity to attend to his or her own personal physical necessities.[19] In *Quezada*, the Court held that section 3303(d) was not violated where the officers were occasionally denied access to food and water, where the officers did have access to food, water, and restrooms during the process.[20]

If an interrogation continues for an unreasonable amount of time, the subject employee later claims that fatigue caused a variety of responses that he/she now deems are inaccurate. Periodic inquiries into an employer's ability to continue with a lengthy interrogation should be made in order to protect the validity of the record.

D. THE RIGHT TO REPRESENTATION

1. *"Subject" versus "Witness" Employees*

Section 3303(i) states that, "[u]pon filing of a formal written statement of charges, or whenever an interrogation focuses on matters that are likely to result in punitive action against any public safety officer, that officer, at his or her request, shall have the right to be represented by a representative of his or her choice who may be present at all times during the interrogation."

Section 3303(i) also states that, "[t]he representative shall not be a person subject to the same investigation," and "[t]he representative shall not be required to disclose, nor be the subject of

punitive action for refusing to disclose, any information received from the officer under investigation for noncriminal matters."

Under Section 3303, it is clear that an officer who is the subject of an investigation of an OIS has a right to be represented during his or her interrogation. But it is not uncommon for public safety employees who are being treated as investigation *witnesses* to demand a representative during said interview. In many instances, this demand has no legal basis and can be denied. Nevertheless, it should be kept in mind that circumstances do exist where an individual, who is seemingly a witness, can momentarily become a person who may or is likely to be punished. Thus, care should be exercised in determining whether or not to grant to a witness's demand for a representative. We recommend that an agency err on the side of caution in allowing representatives when demanded. But a firm line should be drawn where such demands are nothing more than obstructive tactics and where there is no reasonable claim that the witness may become a disciplinary subject.

2. *Who May Serve as the Employee's "Representative?"*

Section 3303(i) states that an officer has the right to a "representative of his or her choice" subject only to the qualification that the chosen representative "shall not be a person subject to the same investigation." This does not mean that an investigator must wait indefinitely or repeatedly postpone an interrogation of a suspect employee when the employee's chosen representative is unavailable. In *Upland Police Officers Assn. v. City of Upland* ("*Kac*"),[21] the Court of Appeal held that, under the POBR, the right to a representative of an officer's choice is limited by a requirement of reasonableness, and it does not require rescheduling of an interrogation or a hearing every time a chosen representative is unavailable. The *Kac* Court held that it was unreasonable for the officer to insist on one attorney from one law firm be his representative when the Department had already continued the interrogation once at this attorney's request, the attorney then called to cancel the continued interrogation at the eleventh hour, and there were other attorneys in the chosen representative's law firm that could have represented the officer.

In 2014, the Court of Appeal followed *Kac* in deciding *Quezada v. City of Los Angeles* ("*Quezada*").[22] In *Quezada*, the police officers to be interrogated had, under the influence of alcohol, randomly fired their firearms. The officers requested to be represented by a particular attorney and that attorney was contacted; however, it was reported at 8:00 a.m. that the attorney would not be available until late that evening. To provide the officers an opportunity to find another attorney, the department waited until approximately 2:30 p.m. before interrogating the officers. The Court held that the deputies were not entitled to wait until the particular attorney was available, and that the seriousness of the circumstances prompting the investigation be conducted at the earliest opportunity. In addition, the officers made little to no effort to obtain alternative counsel.

E. WHO MAY BE PRESENT DURING THE INTERROGATION ON BEHALF OF THE DEPARTMENT?

Section 3303(b) provides for no more than two interrogators asking questions and provision of notice prior to the interrogation of the rank, name, and command of the officer in charge of the interrogation and identity of all others to be present during the interrogation. The POBR does not clearly delineate whether or not non-peace officers can act as interrogators. Based on our experience, non-sworn personnel, particularly attorneys, do frequently become involved acting as interrogators. In highly sensitive proceedings, such practice may be the most productive manner in which to proceed. At a minimum, legal counsel could be present and provide a sworn interrogator with advice during the proceedings.

F. WHAT MUST AN EMPLOYEE BE TOLD ABOUT THE NATURE OF THE INVESTIGATION PRIOR TO INTERROGATION?

Section 3303(c) provides that the employing department shall inform the officer under investigation of the nature of the investigation prior to any interrogation. Thus, a department typically should consider informing the officer of the following prior to any interrogation: (1) the dates(s) of action(s) under investigation; (2) a brief description of allegation of misconduct; and (3) statute(s) and/or administrative rules or orders that may have been violated. In the case of an OIS, of course, the nature of the investigation is likely to be clear to everyone involved. But there may still be nuances to the investigation and careful consideration should be given to the description of the nature of the investigation.

In *Hinrichs v. County of Orange*,[23] a deputy claimed that the Department violated her rights under section 3303 because it failed to inform her of the nature of its investigation prior to her initial interrogation. However, the court found that prior to asking any questions, the supervisor informed the deputy that he smelled alcohol on her breath, and only then did he ask if she had been drinking. The prefatory statement and initial question should have adequately put the deputy on notice that she was being investigated for use of alcohol, and the failure to otherwise expressly say so was harmless.

In *Ellins v. City of Sierra Madre*,[24] the California Court of Appeal provided some clarification as to how much prior notice is necessary to satisfy Section 3303(c). The Court rejected the officer's argument that the statute required a minimum of one to five days' advance notice, and held that the notice given must be "with enough time for the officer to meaningfully consult with any representative he elects to have present. The time necessary to do so may depend upon whether the officer has already retained a representative (or instead needs time to secure one) and upon the nature of the allegations; their complexity; and, if they are unrelated, their number." Further, the Court held, "an employing department with reason to believe that providing this information might risk the safety of interested parties or the integrity of evidence in the officer's control may delay the notice until the time scheduled for interrogation as long as it thereafter grants sufficient time for consultation."

In *Ellins*, the City initially gave the employee more general notice of the nature of the investigation – that Ellins was being investigated for an alleged abuse of his peace officer powers – and then on the day of the interrogation, provided a more specific verbal and written

interrogation admonition prior to any questions being asked, and also granted the employee's request for time to confer with his representative. The employee chose not to use all the time the City permitted, but instead refused to submit to the interrogation. The Court found that, under these circumstances, the notice provided was sufficient and the City did not violate the statute.

G. RECORDING OF INTERROGATION

Section 3303(g) allows for the interrogation to be recorded by one or both parties. We recommend that *every* interrogation, whether of a "subject" or "witness" employee, be tape recorded. Section 3303(g) gives a public safety employee the right of access to the tape if any further proceedings are contemplated or prior to any further interrogation at a subsequent time.

H. OFFENSIVE LANGUAGE/THREATS

Following an OIS, particularly if the circumstances are attracting public scrutiny, emotions can run high. It can be important to remind supervisors and investigators that Section 3303(e) provides that the public safety employee under interrogation shall not be subjected to offensive language or threatened with punitive action. Likewise, a promise of reward shall not be made as an inducement to answering any question.[25] But the officer can specifically be advised that his/her refusal to respond to questions or submit to the interrogation may result in punitive action up to and including dismissal for insubordination in refusing a direct order to participate in the interrogation.

I. ADVISEMENT OF CONSTITUTIONAL RIGHTS PRIOR TO INTERROGATION

Section 3303(h) provides that if, prior to or during the interrogation of a peace officer, it is deemed that he or she *may be charged with a criminal offense*, the employee shall be immediately informed of his or her constitutional rights. In *Lybarger v. City of Los Angeles*,[26] a case interpreting the POBR, the California Supreme Court held that this means that the employee should be advised of his or her *Miranda*[27] rights, i.e. the right to remain silent, the right to presence and assistance of counsel, and the admonition that any statements may be used against the employee in a court of law. Of course, many administrative investigations have potential criminal implications, e.g. misuse of the station fuel pump could be petty or grand theft as well as administrative misconduct. Thus, at the outset of an investigation, careful consideration should be paid to whether criminal charges are possible.

In *Spielbauer v. County of Santa Clara*,[28] the California Supreme Court held that a public employer may compel an employee to answer questions in an administrative investigation regarding the employee's job performance without first obtaining a formal grant of immunity from criminal use of the employee's statements, as long as the employer does not force the employee to waive the employee's constitutional protection against criminal use of those statements. Based on this decision, an employer can require a public employee, under threat of discipline, to answer any job related questions as long as the employer does not require the employee to surrender his or her right against the use of any such statements in a subsequent criminal proceeding. While the Court did not specifically hold that a *Lybarger* admonition must

be provided to non-peace officer public employees in that situation, the County of Santa Clara did provide a *Lybarger* admonition to Spielbauer, who was a deputy public defender and not a peace officer. The Court made clear that a public employer may compel answers in an administrative investigation if it first provides a *Lybarger* admonition to a public employee and does not otherwise force the employee to waive his or her constitutional rights.

8. TIME LIMITATIONS FOR COMPLETION OF INVESTIGATION AND NOTIFICATION TO PUBLIC SAFETY EMPLOYEE OF PROPOSED DISCIPLINARY ACTION

A. THE GENERAL RULE: THE POBR HAS A ONE YEAR STATUTE OF LIMITATIONS

Subject to certain exceptions, Section 3304(d) states that no punitive action or denial of promotion on grounds other than merit may be taken for misconduct if the investigation of the allegation of misconduct is not completed within *one year*. Under the POBR, the one-year statute of limitations is triggered by the date "of the public agency's discovery by a person authorized to initiate an investigation of the allegation.…"

A public safety employer must not only complete its investigation within one year of the discovery of possible misconduct, but the employer must serve the employee with notice of its proposed disciplinary action within that one year. A 2009 amendment to the POBR requires that the notice of proposed disciplinary action articulate the proposed discipline, but specifies that the public agency is not required to impose the discipline within that one-year period. Because the POBR statute of limitations is a complete defense to what would otherwise be a legitimate disciplinary action, agencies are advised to serve the subject employee with the notice of proposed disciplinary action, articulating the specific discipline proposed, as soon as reasonably possible.

Under the POBR, the issue of when an agency has "discovered" that an officer has engaged in misconduct has been the subject of litigation. In *Jackson v. City of Los Angeles*,[29] for example, Officer Jackson told his partner, Officer Shaw, that he had a plan to kill several of his colleagues with an assault rifle. Believing Officer Jackson might go through with his plan, Officer Shaw told a supervising sergeant about Jackson's plan on March 25, 1999. Officer Shaw also told a fellow officer about Jackson's plan the next day, and that officer, in turn, notified his supervisor (Sgt. Sciarrillo) on March 26 or 27, 1999.

On April 12, 1999, Sgt. Sciarrillo advised a sergeant in the department's internal affairs group about what he had been told about Jackson's plan. An internal affairs investigation ensued. On March 31, 2000, less than one year after the investigation was initiated, the chief of police issued an administrative complaint against Officer Jackson. After a Board of Rights hearing, the Chief of Police terminated Jackson effective November 14, 2000.

Officer Jackson filed an action under the POBR alleging he could not be terminated because the investigation was not completed within one year of the department's discovery of the plot. The trial court denied Officer Jackson the relief he requested, and he appealed.

The California Court of Appeal reversed and held that Officer Jackson could not be disciplined based on the one year statute of limitations in Section 3304(d). The *Jackson* Court held that the date that Sgt. Sciarrillo was told about the plot, March 26 or 27, 1999, was the date the statute of limitations began to run because Sgt. Sciarrillo was authorized to initiate an investigation under the department's rules. Since the department was five or six days late in issuing the administrative complaint (March 31, 2000), the Court overturned Officer Jackson's termination. This case demonstrates the severe problems the statute of limitations can cause an agency that needs to impose discipline.

Further, the Court of Appeal in *Pedro v. City of Los Angeles*,[30] held that the statute of limitations begins to run upon the discovery of the misconduct, even if the agency does not know the identity of the officer who committed the misconduct. In *Pedro*, a citizen sent a letter to the Chief of Police stating his suspicions that an officer driving an unmarked police car was conducting personal business while on duty on November 9 and 30, 2009. The letter was received on December 3, forwarded for investigation on December 10, and assigned to a lieutenant on December 16, 2009. The officer was charged with misconduct on December 16, 2010. The Court held that ignorance of the identity of the accused officer does not delay commencement of the limitations period, and that the limitations period began to run when a person authorized to initiate an investigation first became aware of an allegation of misconduct.

Further still, the Court of Appeal in *Earl v. State Personnel Board*,[31] held that the employee must be given ***actual***, rather than constructive notice of the discipline within one year of the discovery of the misconduct. The agency sent the officer notice of its intent to discipline, by certified mail, exactly one year after the date of discovery of the misconduct. The notice therefore was not delivered until after one year from the date of discovery. The Court of Appeal held that because the statute is silent as to the manner of service, personal service or an equivalent method imparting actual knowledge is required. The Court did, however, note that this was not a case in which the employee willfully evaded service, leaving open the possibility that the one-year statute may be extended to allow an agency to accomplish service where the employee willfully evades.

B. THE EXCEPTIONS

Exceptions to the one year statute of limitations include when:

- The act, omission or other allegation of misconduct is also the subject of a criminal investigation or criminal prosecution. In such case, the one year period to complete an administrative investigation does not start running until the criminal investigation or criminal prosecution is completed. So long as this investigation is "pending," it need not be "actual and active."[32] This is true whether the criminal investigation is external or conducted internally by the employing agency.[33]

- The employee agrees to waive the one year statute of limitations *in writing*.[34]
- The administrative investigation is a *multi-jurisdictional investigation* that requires a reasonable extension for coordination of the involved agencies.[35]
- The employee is under investigation is incapacitated or otherwise unavailable.[36]
- The administrative investigation involves a matter in civil litigation where the officer is named as a party defendant.[37] In such case, the one year completion time period shall be tolled while the civil action is pending.
- The administrative investigation involves a matter in criminal litigation where the complainant is a criminal defendant.[38] In such a case, the one year administrative investigation completion time limit will be tolled during the period of that defendant's criminal investigation and prosecution.
- The situation where the administrative investigation involves an allegation of workers' compensation fraud on the part of the officer, whether the investigation is internal or external.[39]
- If the administrative investigation involves multiple employees, and is such that a "reasonable" extension is required.[40] The mere fact that an administrative investigation has focused upon multiple employees, alone, will likely be insufficient to extend the investigation completion deadline. A department seeking the benefit of this exception must also demonstrate that the multi-employee investigation requires a reasonable extension, and a department should prepare this justification in writing before the one year statute of limitations period expires.

Section 3304(g) also states that the one-year time period may be reopened against a public safety employee if significant new evidence has been discovered that is likely to affect the outcome of the investigation *and* either of the following conditions exist:
(1) The evidence could not reasonably have been discovered in the normal course of investigation without resorting to extraordinary measures by the agency; or

(2) The evidence resulted from the public safety employee's predisciplinary response or procedure.[41]

In addition to these statutory exceptions, in the POBR context, the California Court of Appeal has also noted that where an officer was terminated and later reinstated, the POBR statute of limitations did not run while he was not employed as a peace officer. Consequently, for practical purposes, the statute of limitations was tolled while he was not employed as a peace officer.[42]

9. OFFICERS' RIGHTS TO INVESTIGATION MATERIALS

Section 3303(g) states, in part, "If a tape recording is made of the interrogation, the public safety [employee] shall have access to the tape if any further proceedings are contemplated or prior to any further interrogation at a subsequent time. The public safety [employee] shall be entitled to a transcribed copy of any notes made by a stenographer or to any reports or complaints made by

investigators or other persons, except those which are deemed by the investigating agency to be confidential. No notes or reports that are deemed to be confidential may be entered in the [employee's] personnel file.…"

Penal Code section 135.5 provides that "Any person who knowingly alters, tampers with, conceals, or destroys relevant evidence in any disciplinary proceeding against a public safety officer, for the purpose of harming that public safety officer, is guilty of a misdemeanor."

As noted above, the California Supreme Court has held that an officer has no right to *pre-interrogation* discovery under the POBR.[43] But, after an investigation has been concluded, Section 3303(g) gives an officer the right to view some of the non-confidential portions of the investigation materials.

In *San Diego Police Officers Association v. City of San Diego*,[44] the department's practice was to provide a subject officer with only the investigators' final written report and a copy of the complaint that initiated the particular investigation, and only at the conclusion of the investigation. The union representing the city's officers filed a petition for writ of mandate asserting that Section 3303(g) required the department, at the conclusion of an internal affairs investigation, to provide not only the final report and complaint, but also the investigators' raw notes and any tape-recorded interviews of witnesses. Both the trial court and the Fourth District Court of Appeal, Division One, agreed with the union's interpretation of Section 3033(g). However, the court did note that an investigator's raw notes may be destroyed.

Three years after *San Diego Police Officers Association* was decided, another Court of Appeal reached a markedly different conclusion. In *Gilbert v. City of Sunnyvale*,[45] an officer who had been terminated filed a petition for writ of mandate alleging his former employer violated Section 3303(g) when it did not provide him with all the documents and videotapes referenced in the investigator's report. Those materials were withheld by the department because they were not relied upon in reaching the decision to terminate and because their release would compromise an on-going criminal investigation being conducted by an outside agency. The Sixth District Court of Appeal expressly disagreed with the *San Diego Police Officers Association* Court and held the other court's expansive interpretation of the phrase "reports or complaints" in Section 3303(g) was not consistent with the Legislative intent of the statute.

Thus, as it now stands, there are conflicting opinions concerning the scope of materials that must be provided to officers under Section 3303(g). Until there is further clarification from the courts, we recommend that agencies follow the more recent *Gilbert* decision (unless a particular agency is within the geographic area covered by the Fourth District Court of Appeal, Division One) and take a limited view of Section 3303(g).

10. THE PUBLIC'S RIGHT TO RECORDS OF OIS INVESTIGATIONS

Once confidential, the records of an OIS investigation are now open for public inspection as a result of Senate Bill 1421, which took effect January 1, 2019. The California Public Records Act ("CPRA"), Section 6250 et seq., was enacted in 1968 on the notion that "access to information concerning the conduct of the people's business is a fundamental and necessary right of every

person in this state." (Gov. Code, § 6250.) Generally, under the CPRA all public records are open for inspection and copying, except those categories of records specifically designated as "exempt" from disclosure, such as records of investigations by local public safety agencies. (Gov. Code, §§ 6253, subd. (b), 6254.) Penal Code sections 832.7 and 832.8 make the personnel records of peace officers and/or custodial officers confidential, and also prevent such records from being disclosed in any criminal, civil or administrative proceeding, except through a procedure commonly called a "Pitchess motion," pursuant to Evidence Code sections 1043 and 1046.

Nonetheless, even before recent statutory amendments discussed below, the names of officers involved in a shooting were determined to be subject to public disclosure. *Long Beach Police Officers Ass'n v. City of Long Beach*, concerned a PRA request for the names of the officers involved in a fatal shooting, along with the names of Long Beach police officers involved in other shootings over the preceding five years. The police officers association sought to enjoin the City from complying with the request. In support of its position, the association expressed safety concerns about releasing the names of the shooting officers, referring to an incident in which an anonymous blog post contained a threat to a shooting officer's family and to another incident in which an officer involved in a shooting was reassigned to another area following death threats. The City, aligning itself with the association, asserted that its policy was not to release the names of officers involved in an officer-involved shooting because those officers become the subject of an administrative and/or criminal investigation, and the investigation materials become part of the officers' personnel records. The City asserted that upon completion of the investigation process, the officers names were kept confidential unless a motion was filed pursuant to *Pitchess*, or they were sought through discovery in a civil or criminal case.

The trial court denied the request for an injunction because the officers' names were not subject to any PRA exemption and consequently had to be disclosed. The California Court of Appeal affirmed.

The California Supreme Court affirmed the judgment of the Court of Appeal, upholding the trial court's denial of the Union's requested injunctive relief.[46] The Supreme Court declined to read Penal Code section 832.8 broadly and determined that, in general, only records generated in connection with officer appraisal or discipline are protected by Section 832.8, not records that could possibly be considered for officer appraisal or discipline. The Supreme Court held that, although the Penal Code makes complaints or investigations of complaints confidential, the newspaper's request here was not for complaints against officers. As to the privacy arguments, the Supreme Court determined that the public interest in peace officer conduct is significant and, in the circumstances presented in this case, outweighs an officer's privacy interest in maintaining the confidentiality of his or her name. To prevent disclosure in a case such as this one, there would need to be evidence that disclosing a particular officer's identity would jeopardize that officer's safety or efficacy.

The Supreme Court's opinion specifically noted that a public safety department may still prevent disclosure of the names of officers involved in shootings if they make a particularized evidentiary showing that disclosing a particular officer's name would compromise that officer's safety or the safety of the officer's family. Generalized assertions regarding the risks officers face following a shooting are insufficient.

On September 30, 2018, former-Governor Edmund G. Brown, Jr. signed Senate Bill 1421 and Assembly Bill 748, which dramatically increase the public's access to certain peace officer personnel records relating to police misconduct and serious uses of force, in response to CPRA requests.

Effective January 1, SB 1421 amended Penal Code Section 832.7 to generally require disclosure of records and information relating to the following types of incidents in response to a request under the CPRA:

(1) Records relating to the report, investigation, or findings of an incident involving the discharge of a firearm at a person by a peace officer or custodial officer.
(2) Records relating to the report, investigation or findings of an incident in which the use of force by a peace officer or custodial officer against a person results in death or great bodily injury.
(3) Records relating to an incident in which a sustained finding was made by any law enforcement agency or oversight agency that a peace officer or custodial officer engaged in a statutorily defined sexual assault involving a member of the public.
(4) Records relating to an incident in which a sustained finding of dishonesty by a peace officer or custodial officer directly relating to the reporting, investigation, or prosecution of a crime, or directly relating to the reporting of, or investigation of misconduct by, another peace officer or custodial officer.

Effective July 1, 2019, AB 748 similarly requires agencies to produce video and audio recordings of "critical incidents," defined as an incident involving the discharge of a firearm at a person by a peace officer or custodial officer, or an incident in which the use of force by a peace officer or custodial officer against a person resulted in death or great bodily injury, in response to CPRA requests.

The law does not require immediate disclosure and permits records to be withheld for various reasons described with some particularity in the statute. A city attorney should carefully review the timing mechanisms in the statute before authorizing release.

11. REMEDIES FOR POBR VIOLATIONS

The Superior Court has initial jurisdiction over alleged POBR claims.[47] A court may order injunctive or other extraordinary relief to remedy the violation and prevent similar future violations.[48] If a court finds that a public safety department has maliciously violated the POBR, the public safety department can be liable for a civil penalty of up to $25,000 for each violation.[49] A public safety department may also be liable for any actual damages a public safety employee has suffered as a result of a POBR violation.

If a court finds that a public safety employee has filed a bad faith or frivolous action or filed a claim for an improper purpose, the court may order sanctions against the employee and/or the employee's attorney. Sanctions may include reasonable expenses including attorney's fees incurred by the public safety department.

[1] Gov. Code, § 3300, *et seq*.; *California Correctional Peace Officers Assn. v. State of California* (2000) 82 Cal.App.4th 294 [98 Cal.Rptr.2d 302].

[2] *California Correctional Peace Officers Assn. v. State of California* (2000) 82 Cal.App.4th 294 [98 Cal.Rptr.2d 302].

[3] Unless other stated, statutory references are to the California Government Code.

[4] *Van Winkle v. County of Ventura* (2007) 158 Cal.App.4th 492 [69 Cal.Rptr.3d 809].

[5] *California Correctional Peace Officers Assn. v. State of California* (2000) 82 Cal.App.4th 294 [98 Cal.Rptr.2d 302].

[6] Gov. Code, § 3303, subd. (j); *Crupi v. City of Los Angeles* (1990) 219 Cal.App.3d 1111 [268 Cal.Rptr. 875], rehg. den. & opn. mod. (May 18, 1990).

[7] See, *Gilbert v. Homar* (1997) 520 U.S. 924 [117 S.Ct. 1807].

[8] *Perez v. Los Angeles Community College District* (2014) PERB Dec. No. 2404.

[9] *Los Angeles Police Protective League v. Gates* (1984) 579 F.Supp. 36.

[10] *Association for Los Angeles Deputy Sheriffs (ALADS) v. County of Los Angeles* (2008) 166 Cal.App.4th 1625, 83 Cal.Rptr.3d 494.

[11] *Santa Ana Police Officers Association v. City of Santa Ana* (2017) 13 Cal.App.5th 317.

[12] *City of Los Angeles v. Superior Court* (1997) 57 Cal.App.4th 1506 [67 Cal.Rptr.2d 775], review den. (Dec. 17, 1997).

[13] *Paterson v. City of Los Angeles* (2009) 174 Cal.App.4th 1393 [95 Cal.Rptr.3d 333].

[14] *Steinert v. City of Covina* (2006) 146 Cal.App.4th 458 [53 Cal.Rptr.3d 1].

[15] *Pasadena Police Officers Assn. v. City of Pasadena* (1990) 51 Cal.3d 564 [273 Cal.Rptr. 584].

[16] Gov. Code, § 3303, subd. (g). (Proposed legislation).

[17] *Santa Ana Police Officers Association v. City of Santa Ana* (2017) 13 Cal.App.5th 317.

[18] *Quezada v. City of Los Angeles* (2014) 222 Cal. App. 4th 993 [166 Cal. Rptr. 3d 479].

[19] Gov. Code, §§ 3303, subd. (d).

[20] *Quezada v. City of Los Angeles* (2014) 222 Cal. App. 4th 993 [166 Cal. Rptr. 3d 479].

[21] *Upland Police Officers Assn. v. City of Upland* (2003) 111 Cal.App.4th 1294 [4 Cal.Rptr.3d 629], review den. (Dec. 17, 2003).

[22] *Quezada v. City of Los Angeles* (2014) 222 Cal. App. 4th 993 [166 Cal. Rptr. 3d 479].

[23] *Hinrichs v. County of Orange* (2004) 125 Cal.App.4th 921 [23 Cal.Rptr.3d 186].

[24] Case No. B261968 (CITATION UNAVAILABLE).

[25] Gov. Code, §§ 3303, subd. (e).

[26] *Lybarger v. City of Los Angeles* (1985) 40 Cal.3d 822, 829 [221 Cal.Rptr. 529, 332].

[27] *Miranda v. Arizona* (1966) 384 U.S. 436 [86 S.Ct. 1602], superseded by statute, called into doubt.

[28] *Spielbauer v. County of Santa Clara* (2009) 45 Cal.4th 704 [88 Cal.Rptr.3d 590], cert. den. (2009) 557 U.S. 921 [129 S.Ct. 2841].

[29] *Jackson v. City of Los Angeles* (2003) 111 Cal.App.4th 899 [4 Cal.Rptr.3d 325], review den. (Nov. 25, 2003).

[30] *Pedro v. City of Los Angeles* (2014) 229 Cal.App.4th 87 [176 Cal.Rptr.3d 777].

[31] *Earl v. State Personnel Board*.

[32] Gov. Code, §§ 3304, subd. (d)(1); *Richardson v. City and County of San Francisco* (2013) 214 Cal.App.4th 671 [154 Cal.Rptr.3d 145].

[33] *Dep't of Corrections and Rehab. v. State Personnel Bd.* (Iqbal) (2016) 247 Cal.App.4th 700 [202 Cal.Rptr.3d 732].

[34] Gov. Code, §§ 3304, subd. (d)(2).

[35] Gov. Code, §§ 3304, subd. (d)(3).

[36] Gov. Code, §§ 3304, subd. (d)(5).

[37] Gov. Code, §§ 3304, subd. (d)(6).

[38] Gov. Code, §§ 3304, subd. (d)(7).

[39] Gov. Code, §§ 3304, subd. (d)(8); *California Dept. of Corrections and Rehabilitation v. State Personnel Board* (2013) 215 Cal.App.4th 1101 [155 Cal.Rptr.3d 838].

[40] Gov. Code, § 3304, subd. (d)(4).

[41] Gov. Code, §§ 3303, subd. (g).

[42] *Melkonians v. Los Angeles County Civil Service Com'n* (2009) 174 Cal.App.4th 1159 [95 Cal.Rptr.3d 415], review den. (Aug. 26, 2009).

[43] *Pasadena Police Officers Assn. v. City of Pasadena* (1990) 51 Cal.3d 564 [273 Cal.Rptr. 584].

[44] *San Diego Police Officers Assn. v. City of San Diego* (2002) 98 Cal.App.4th 779 [120 Cal.Rptr.2d 609], review den. (Sept. 25, 2002).

[45] *Gilbert v. City of Sunnyvale* (2005) 130 Cal.App.4th 1264 [31 Cal.Rptr.3d 297].

[46] *Long Beach Police Officers Assn. v. City of Long Beach* (2014) 59 Cal. 4th 59.

[47] Gov. Code, §§ 3309.5, subd. (b).

[48] Gov. Code, §§ 3309.5, subd. (c)(1).

[49] Gov. Code, §§ 3309.5, subd. (d).

Closed Session Training Program
(Open Government Behind Closed Doors)

Thursday, May 9, 2019 General Session; 3:15 – 4:30 p.m.

Christi Hogin, City Attorney, Lomita, Malibu & Palos Verdes Estates, Interim City Attorney, Pomona, Of Counsel, Best Best & Krieger
Michael Jenkins, City Attorney, Goleta, Hermosa Beach, Rolling Hills and West Hollywood, Of Counsel, Best Best & Krieger

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OPEN MEETINGS BEHIND CLOSED DOORS (*plus 10 bonus pro tips*)

Dysfunction Junction City Council Irregular Meeting City Attorneys' Department League of California Cities May 2019

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BEST BEST & KRIEGER LLP
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OPEN MEETINGS BEHIND CLOSED DOORS
(plus 10 bonus pro tips)

As city attorneys we can play an important role in building and reinforcing the bonds of trust between local government and its citizenry. Our job is to promote the rule of law and to foster a culture of compliance. When we perform well, we can increase the confidence in local government and provide reassurance that the government is functioning within the confines of the law (as far as we know). One place where this source of reassurance is most useful is in closed session.

The Brown Act is a perfect host to American representative democracy. As is bluntly stated in the Act's express legislative intent, power is delegated to institutions and elected officials — delegated along with a healthy dose of skepticism:

> In enacting this chapter, the Legislature finds and declares that the public commissions, boards and councils and the other public agencies in this State exist to aid in the conduct of the people's business. It is the intent of the law that their actions be taken openly and that their deliberations be conducted openly.
>
> The people of this State do not yield their sovereignty to the agencies which serve them. The people, in delegating authority, do not give their public servants the right to decide what is good for the people to know and what is not good for them to know. The people insist on remaining informed so that they may retain control over the instruments they have created.

Government Code § 54950.

Leaning strongly in favor of open and public meetings, the Legislature — to which the Brown Act does not apply — still recognized that there are a narrow set of circumstances under which a public meeting is actually not in the best interests of the public. These are the matters where the members of a Brown Act body must represent the public interests outside of the public view — a circumstance not in natural harmony with the intent of the statute. Indeed, closed sessions are an exception to the state's strong policy that local governments' "actions be taken openly and that their deliberations be conducted openly." See Gov't Code §54962. Exceptions that permit closed sessions must be narrowly construed. See Cal. Const. art. 1 § 3 (a statute "…shall be broadly construed if it furthers the people's right of access, and narrowly construed if it limits the right of access.").

The best way to approach whether an item should be considered in closed session is to consider how the public would benefit from a closed session. Would it disadvantage the city (read: public/taxpayers) in litigation for opposing counsel to be privy to the city attorney's assessment of the case? Would the city be able to garner the best price for property if the seller's

representative attended the council's meeting with its negotiator when developing an offer? Would the city be able to recruit and retain top management employees if their performance reviews were held in public? Each of the circumstances under which the Brown Act authorizes a closed session supports the underlying policy that favors open meetings, except when it's to the specific detriment of the public.

Detriment to the public interest is not itself a basis for closed session. Instead, a Brown Act body may meet in closed session under the narrow exceptions — to the extent that discussion in open session would be detrimental to the public interest. For example, the general desire to avoid being sued over a controversial ordinance does not justify a closed session. Negotiation of a professional services agreement is not an express basis for a closed session and therefore discussions, including instruction to negotiators, must be done in open session. If discussion exceeds the scope of the exception that permits a closed session, the council is having an illegal meeting. While each councilmember is responsible for compliance with the law, as counsel to the city, whenever present in closed session, it is also the city attorney's job to keep the conversation in bounds.

The specific statutory exemption that authorizes the closed session must be stated on the agenda. Gov't Code §54954.2. The Brown Act provides closed session descriptions for each permitted exception and states "[n]o legislative body or elected official shall be in violation of Section 54954.2 or 54956 if the closed session items were described in substantial compliance with this section." Gov't Code § 54954.5; see *Castaic Lake Water Agency v. Newhall County Water Dist.* (2015) 238 Cal.App.4th 1196, 1205. These form descriptions provide "safe harbor."

All closed session meetings start in open session. There are two items of business that must take place in open session before holding a closed session: disclosure and public comment. The Brown Act requires that, before recessing to closed session, the city must publicly disclose the items to be discussed in closed session. This public announcement may be made by reference to the items by number or letter as they are listed on the agenda. Gov't Code §54957.7; see also Gov't Code §54956.9. The Brown Act also requires that each meeting provide an opportunity for public comment on agenda items before (or during) the Council's consideration of the item. Gov't Code §54954.3. The closed session agenda is no exception.

No minutes of closed session are required by the Brown Act (but it is obviously a good idea for someone to know exactly what happened in closed session). Some documentation of closed session action takes place in the public session. After the closed session, a written or oral report is required of certain actions. Gov't Code §54957.1.

Ten *Pro Tips* for closed sessions:

1. Closed session is a choice.

The Brown Act authorizes closed sessions under narrowly defined circumstances but it does not require them. For example, if a developer has sued a city to challenge a land use decision, the city council may discuss settlement of the pending litigation in closed session. Specifically, "based on advice of legal counsel" when the city council determines "discussion in

open session concerning those matters would prejudice the position of the local agency in the litigation." However, because the proposed development may impact neighbors who are not a party to the lawsuit, the city council may be better served by a public discussion of any proposed settlement. Before advising that a matter should be discussed in closed session, the city attorney should make a conscientious assessment of the particular facts of the matter.

2. The public interest is the reason for closed session.

In determining whether to advise that a matter be held in closed session, only the best interests of the public should drive the advice.

A closed session cannot be used to advise the council of the legal vulnerabilities of an ordinance because someone *might* sue over it. The city attorney may convey confidential legal advice in writing, but cannot convene a closed session to convey the advice. See *Roberts v. City of Palmdale* (1993) 5 Cal.4th 363.

A closed session cannot be used for "team building" among the councilmembers or between the council and the staff, even if no "city business" will be discussed. The public is entitled to observe the manner in which the council conducts itself as well as the deliberations on substance. In other words, developing mechanisms to get along with one another is "city business."

3. Safe harbor descriptions require specific information

Government Code §54956.9(g) requires the city to announce the subparagraph under paragraph (d) that authorizes a closed session for litigation matters. If the basis of the closed session is to discuss a lawsuit that has been filed, the name of the case must be on the agenda (or announced publicly) unless to do so would jeopardize the city's ability to effect service or to conclude settlement negotiations to its advantage.

If the council is meeting to discuss initiation of litigation or exposure to litigation, additional information beyond the safe harbor language [Gov't Code §54954.5] may be required on the agenda (or announced publicly) to satisfy the Brown Act. The agenda should influence reference to the "facts and circumstances," as defined by the Brown Act, that authorize the closed session. Usually this will be a reference to a letter threatening litigation, description of a claim that has been filed with the city, or a brief description of the "accident, disaster, incident, or transactional occurrence that might result in litigation" against the city. Gov't Code §54956.9 (e)(2)-(5). This additional information is not required where it would reveal facts to otherwise unaware plaintiffs subjecting the city to potential liability or reveal the identity of a victim or alleged employee perpetrator of unlawful sexual conduct.

4. A performance evaluation is not a council goal setting session

The Brown Act allows the city council to conduct a performance evaluation of its direct appointees, usually that will include at least the city manager and the city attorney. Gov't Code §54957. The purpose of the exception is to protect the employees' privacy (and prevent any lawsuits against the city for violating any privacy rights), create an environment for candid

feedback in furtherance of a well-functioning city hall, and to to attract and retain good employees by handling performance evaluations in a professional and effective manner.

Sometimes city councils are tempted to use the privacy of the employee evaluation to address new goals of the city or dynamics among the councilmembers unrelated to the manager's performance. The attempt to introduce topics of broader city policy or council functioning is generally made with an obviously-too-broad scope of the manager's responsibility. This can take the form of deciding to set goals for the manager like "identify sites for new city hall" or "initiate business license amendments that will regulate commercial cannabis businesses." If the council has already in its public sessions decided to build a new city hall or regulate commercial cannabis businesses, then the evaluation may be focused on setting timelines or expectations for status updates. But if these topics have not been discussed in public, the city manager's performance evaluation is not the place for the council to deliberate about whether to start committing resources to exploring property for a new city hall or whether to regulate commercial cannabis businesses. Another possible detour from the permissible scope of the discussion is where the council's real interest is in discussing their criticisms of the police chief or other department head hired by the manager. While the effectiveness of the manager's supervision and staff development is certainly fair ground for a performance evaluation, detailed discussion of the performance of others is usually beyond the scope of the manager's performance.

Using an evaluation form (the League has several samples) is one way to assist the council in focusing on appropriate factors and limiting the scope of the discussion to comply with the Brown Act. More importantly, a city attorney should not sit quietly while a council veers off-topic. When present in closed session, whatever else the city attorney may be there for, the public should be able to count on the city attorney to speak up if the council discussion exceeds the scope of the permissible closed session.

Note that the Brown Act specifically prohibits discussion of employee compensation, except in context of labor negotiations. No closed session convened for a performance evaluation of a city manager may include a discussion between the manager and the council about compensation in closed session.

5. An agenda is no place for misdirection

The Brown Act agenda requirement is the way that the city communicates to the public in advance what will be on the agenda so the members of the public may make informed decisions about whether to attend the public portion of the council meeting. The public's right to attend and especially the public's ability to participate in local agency meetings is protected by the California Constitution and the Brown Act. Obviously, the agenda must include any item of business that the council will discuss in closed session. Some agencies list all pending litigation items on every agenda so that they *may* discuss them, even if they don't intend to (have any need to) at the time the agenda is posted. While certainly a practice to the convenience of the agency and arguably compliant with the letter of the law, the practice imposes a disadvantage to the public in that one could not discern from the agenda what matters will be discussed. That fact alone makes the practice suspect, but also consider that items listed routinely that do not meet the

standard ("based on advice of legal counsel" "discussion in open session concerning those matters would prejudice the position of the local agency in the litigation") are not proper subject matters for closed session, even if litigation has been filed.

The better practice (by far) is to list the closed session items that the council has a statutory basis and need to discuss in closed session on the agenda. If the council runs short on time or doesn't take up an item posted for whatever reason, when making the closed session announcement simply state that. Here is an example:

> "The council met in closed session and tonight discussed the first item listed on the closed session agenda, performance evaluation of the city manager, but did not have time to discuss the second item listed on the closed session agenda, the litigation matter. The litigation matter will be placed on next meeting's agenda for council consideration at that time."

6. Agency negotiator has to be designated in public session

Here is a sometimes overlooked passage of the Brown Act: with respect to labor negotiations, "...prior to the closed session, the legislative body of the local agency shall hold an open and public session in which it identifies its designated representatives." This is *in addition* to the requirement that the agency's designated representative be listed on the agenda (safe harbor language).

7. Real estate decisions often require an open session discussion

The only aspect of a real estate transaction authorized for closed session is "price and terms of payment." Gov't Code §54956.8. The use of the property and site design are matters for the public session. Any topic involving the purpose of the transaction is for public session; closed session is limited to price and terms of payment to avoid disadvantage given the city (read taxpayer) in the monetary negotiation. See *Shapiro v. San Diego City Council* (2002) 96 Cal.App.4th 904.

8. Legislative findings based on legal advice should satisfy the statute

Under Section 54956.9(d), "based on legal advice," the council may convene a closed session to discuss litigation "when discussion in open session concerning those matters would prejudice the position of the local agency in the litigation." As discussed above, the city attorney must be deliberate in assessing the need for a closed session. However, once that determination is made by the legislative body, judicial review should be limited to whether the appropriate findings were made on appropriate facts. To wit, if the city attorney advised a closed session and the litigation qualifies under the appropriate test, a court should uphold the conclusion without second-guessing the legislative decision. Because a litigant in Malibu is aggressively pursuing his legal theory that the council must establish in the open session the evidentiary basis for, among other things, the city attorney's advice that discussion of a particular litigation matter in open session <u>would</u> prejudice the city in the litigation, I feel duty bound to mention this issue.

9. Reportable is the floor

The Brown Act provides a list of specific actions that must be reported in public. The report includes both the action taken and how each councilmember voted. And there are plenty of points of discussion, direction to negotiators, requests for information, and intermediary decisions that should not be reported in order to maintain the integrity of the closed session matter. That said, there are plenty of circumstances where more information than required will not adversely impact the council's handling of a closed session matter but will aid in reinforcing public confidence. For example, if the city manager is up for a raise made controversial because of budget restraints or performance complaints, at the end of a closed session involving a conference with the labor negotiator, it may be prudent to explain the rules. Here is an example:

> "As announced at the outset of this meeting, the city council met in closed session tonight to confer with its labor negotiator involving the terms of the city manager's contract, including salary. I want to mention for the public's benefit that the city manager is not permitted in the closed session during those discussions and was not in the closed session for that item. No reportable action was taken in the closed session on that item. Again for the public's benefit, let me add that, in order to take action, the matter will be on an open session agenda and the public will be afforded an opportunity to comment."

Using closed session announcements to restate the rules of closed session will convey to the skeptical resident that there are rules, that you know the rules, and that someone (city attorney!) is looking out for the public.

10. Confidentiality

Some councils leak and others do not. Unauthorized disclosure of confidential information obtained in a closed session is a violation of the Brown Act and the Act contains remedies (injunctions, referral to grand jury) and exceptions (whistleblowing). Gov't Code §54963. The Brown Act's provisions are meant to deter all leaks and address a specific leak. For city attorneys, the thornier issue is managing a leaky ship. Often councilmembers have a "kitchen cabinet" (an informal group of confidants with whom ideas are vetted) and sometimes it is difficult to convince such councilmembers that the confidentiality rules really extend to their trusted allies. Sometimes the manager or head of HR has close relationships with other employees or commissioners and they gossip in a way they would describe as discrete and inconsequential. Some councils are sharply divided and members may be on the active hunt for things that would embarrass their colleagues, whether in open session, outside a meeting, or in closed session. In those and the myriad of permutations of these situations, the city attorney should think through practices that best serve her client, *the city itself*.

Does it make sense to distribute closed session materials by email? In advance at all? Should closed session materials be collected at the end of the closed session? Are Councilmembers using electronic devises in closed session and is the city attorney able to address that matter? Is the matter something that could just as well be discussed in open session (and eliminate the issue altogether)?

The confidentiality of closed session is important. An excellent way to preserve it is to favor open session over closed and restate at the outset — in public or just for the council's benefit in closed session — the limited purpose for the closed session and the reason that the exception to the law is permitted.

The session will be a practical application of the Brown Act's rules on closed session. You will find these *pro tips* handy. And now you are ready to provide legal counsel to the Dysfunction Junction City Council. Here is today's meeting agenda:

AGENDA
IRREGULAR MEETING
CITY COUNCIL
CITY OF DYSFUNCTION JUNCTION
MAY 9, 2019 1:00AM
COUNCIL CHAMBERS, CITY HALL
666 MAGA ROAD

To the members of the City Council of the City of Dysfunction Junction:

NOTICE IS HEREBY GIVEN that the Mayor has called a Special Meeting of the City Council of the City of Dysfunction Junction to be held at City Hall, 666 Maga Road, Dysfunction Junction, California, at 1:00 p.m. on Thursday, May 9, 2019, for the purpose of convening a closed session.

1. CALL TO ORDER (Mayor)

2. ROLL CALL

3. PUBLIC COMMENT ON CLOSED SESSION ITEMS

4. CLOSED SESSION AGENDA

A. EMPLOYEE PERFORMANCE EVALUATION
Title: City Manager

B. PUBLIC EMPLOYEE DISCIPLINE/DISMISSAL/RELEASE

C. CONFERENCE WITH LABOR NEGOTIATORS
Agency designated representative: City Attorney or her designee
Employee organization: all of them

D. CONFERENCE WITH REAL PROPERTY NEGOTIATORS
Property: APN No. 33-426-010
Agency negotiator: Dudley Doright, Mounties Realty
Negotiating parties: Snidely Whiplash
Under Negotiation: Price & Terms of Payment

E. CONFERENCE WITH LEGAL COUNCIL — EXISTING LITIGATION
Pursuant to Government Code 54956.9(d)(1)
Disgruntled Residents of Dysfunction Junction v. City of Dysfunction Junction
LACSC Case No. BS2018

F. CONFERENCE WITH LEGAL COUNCIL — ANTICIPATED LITIGATION
Number of cases: one

5. RECONVENE IN OPEN SESSION

6. CLOSED SESSION ANNOUNCEMENT

7. ADJOURNMENT

Municipal Tort and Civil Rights Litigation Update

Friday, May 10, 2019 General Session; 9:00 – 10:15 a.m.

Timothy T. Coates, Managing Partner, Greines, Martin, Stein & Richland

DISCLAIMER: *These materials are not offered as or intended to be legal advice. Readers should seek the advice of an attorney when confronted with legal issues. Attorneys should perform an independent evaluation of the issues raised in these materials.*

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Notes:

MUNICIPAL TORT AND CIVIL RIGHTS LITIGATION UPDATE

FOR

THE LEAGUE OF CALIFORNIA CITIES

CITY ATTORNEYS' SPRING CONFERENCE

May 10, 2019

Presented By: Timothy T. Coates
Managing Partner
Greines, Martin, Stein & Richland LLP
Los Angeles California

I. CIVIL RIGHTS – EXCESSIVE FINES.

A. *Timbs v. Indiana*, __U.S.__, 139 S.Ct. 682 (2019)

● Excessive Fines Clause of Eighth Amendment Applies To Civil Forfeiture Actions In State Court.

Timbs v. Indiana, __U.S.__, 139 S.Ct. 682 (2019) arose from a civil forfeiture proceeding whereby local law enforcement officials attempted to seize Mr. Timb's $42,000 Land Rover following his conviction for a drug trafficking offense that carried a maximum fine of $10,000. A state trial court rejected the civil forfeiture claim, finding that since the vehicle was worth more than four times the amount of any fine, forfeiture would result in an excessive fine in violation of the Eighth Amendment. An Indiana intermediate appellate court affirmed, but the Indiana Supreme Court reversed, finding that the excessive fines clause of the Eighth Amendment applied only to the federal government and not to the states.

The Supreme Court reversed. The Court held that the excessive fines clause was "fundamental to our scheme of ordered liberty," "deeply rooted in the nation's history and tradition" and hence fully incorporated and applicable to the states via the Fourteenth Amendment. It noted that in *Austin v. U.S.*, 509 U.S. 602 (1993) it had held that civil *in rem* proceedings could violate the excessive fines clause when the forfeiture is at least partially punitive in nature. The Court declined to revisit *Austin*, because the issue had not been raised below.

Timbs is an extremely important case for local public entities. It clarifies that the Eighth Amendment applies to fines levied by local government. It is likely to be the touchstone for further efforts to challenge fines for traffic and parking violations in circumstances where indigency prevents an individual from paying the fine. In addition, it provides support for challenges to administrative fines and abatement actions where the fines may significantly exceed the cost of cleanup.

II. LAW ENFORCEMENT LIABILITY

A. *City of Escondido v. Emmons*, __U.S.__, 139 S.Ct. 500 (2019)

● Courts Must Identify Highly Analogous Case Law In Order To Overcome Qualified Immunity In Use Of Force Cases.

In *City of Escondido v. Emmons*, __U.S.__, 139 S.Ct. 500 (2019), Officer Craig responded to a domestic disturbance call at a residence, with Sergeant Toth later arriving with other officers as back up. Craig knocked on the door and asked that they be allowed to enter to perform a welfare check. Instead, a man, Mr. Emmons, came outside and brushed past Craig, refusing the officer's command not to close the door. Officer Craig stopped Emmons and took him to the ground using minimal force, i.e. without striking him or displaying a weapon. Emmons was subsequently charged with interfering with a police officer.

Emmons sued Toth and Craig, along with the city and various other officers, asserting the officers had used excessive force in violation of the Fourth Amendment. The district court granted summary judgment to the officers. It concluded Toth could not

be liable for excessive force, because video evidence indicated he did not use force at all. The court found that Craig was entitled to qualified immunity, because the law was not clearly established as to whether use of minimal force under those circumstances would violate the Fourth Amendment.

The Ninth Circuit reversed in an unpublished memorandum disposition, stating that there was a genuine issue of material fact as to whether the force was excessive, and that "the right to be free of excessive force was clearly established at the time of the events in question." The Supreme Court reversed the Ninth Circuit in a per curiam opinion. The Supreme Court noted that the Ninth Circuit had no explanation as to why it had reversed summary judgment as to Toth, given that there was no evidence that he had used any force at all. It found that Officer Craig could be entitled to qualified immunity, given that the Ninth Circuit cited no existing case law involving analogous facts that would have put the officer on notice that his conduct would violate the Constitution. The Court again underscored the point that in analyzing qualified immunity, appellate courts must not define the right at issue at too high a level of generality.

Emmons is an important case for several reasons. First, it is the most recent in a uniform line of cases from the Supreme Court chiding the lower appellate courts, and particularly the Ninth Circuit, for defining clearly established law at a high a level of generality. Second, it is significant that the Supreme Court reversed an unpublished memorandum disposition, making it clear that the Court will monitor lower courts for egregious departure from Supreme Court precedent, even if done in an unpublished

opinion. Third, the case is a reminder to the lower courts that each defendant is entitled to separate consideration in terms of evaluating liability under section 1983. The Court emphasized that it was "puzzling" that the Ninth Circuit had reversed summary judgment as to Toth, given that there was no evidence that he was involved in the use of force. Finally, the case is another illustration of the increasing value of video evidence as support for a motion for summary judgment. The video evidence showed that the force used was minimal, that Emmons displayed no pain or significant discomfort, and that Toth was not involved in the incident. In the absence of such video evidence, the plaintiff may have had much more leeway to contest the officers' accounts of the events in question.

B. *Emmons v. City of Escondido,* __F.3d __, 2019 WL 1810765 (9th Cir. 2019)

● Officer Entitled to Qualified Immunity For Use Of Minimal Force To Subdue Suspect.

Having been admonished by the Supreme Court for defining clearly established law at too high a level of generality, on remand the Ninth Circuit exhaustively examined its case law concerning use of force against a mildly resisting suspect, and concluded no case would have put Officer Craig on notice that use of minimal force against Emmons would violate the Fourth Amendment. The Ninth Circuit's opinion on remand contains very helpful language on the need to identify specific case law in the use of force context in order to overcome qualified immunity.

C. *Jessop v. City of Fresno,* 918 F.3d 1031 (9th Cir. 2019)

- **Qualified Immunity For Theft Of Property Seized With A Valid Warrant.**

Does the Constitution prohibit police officers from stealing property seized with a valid warrant? The answer is apparently unclear, at least according to the Ninth Circuit. In *Jessop v. City of Fresno*, 918 F.3d 1031 (9th Cir. 2019) plaintiffs alleged that police officers stole $225,000 in rare coins and cash that had been seized pursuant to a valid warrant. They filed suit, asserting claims under the Fourth and Fourteenth Amendments. The district court granted the police officers' motion for summary judgment based on qualified immunity.

The Ninth Circuit affirmed. The court held that the officers were entitled to qualified immunity for the Fourth Amendment claim, because the law was not clearly established whether the Fourth Amendment governed retention of property after an initial seizure. Citing an existing circuit split on the issue, the Ninth Circuit therefore found that since the law was not clearly established, the officers were entitled to qualified immunity.

The court also held the officers were entitled to qualified immunity on plaintiff's Fourteenth Amendment claim for violation of substantive due process. The court noted the absence of clearly established law recognizing a substantive due process claim based on theft of property pursuant to a valid warrant. It observed that there was only a single circuit court decision on the issue, and that court had held that there was no Fourteenth Amendment substantive due process claim.

Jessop is a very helpful case for public entities in underscoring the need for a plaintiff to identify specific case law governing the particular factual situation confronted by officers in order to avoid application of qualified immunity. However, while *Jessop* is certainly correct in its interpretation of the legal niceties concerning the Fourth Amendment claim, despite the circuit court opinion suggesting that the Fourteenth Amendment does not encompass theft by law enforcement officers, it seems somewhat extraordinary to conclude that the Constitution does not prohibit theft by police officers under color of authority. Given the current broad-based attack on qualified immunity by legal scholars and advocates representing both liberals and conservatives, *Jessop* may well provide further fuel for the movement to drastically scale back qualified immunity.

D. *Advance Building & Fabrication, Inc. v. California Highway Patrol*, 918 F.3d 654 (9th Cir. 2019)

- **No Qualified Immunity For Administrative Inspection Conducted During Execution Of A Warrant As Part Of A Criminal Investigation.**

Administrative inspections are among the most frequent activities undertaken by public employees, and given their informal nature and typical relationship to civil proceedings, it is easy to ignore the Fourth Amendment implications of such searches. In *Advance Building & Fabrication, Inc. v. California Highway Patrol*, 918 F.3d 654 (9th Cir. 2019) an employee of the State Board of Equalization stopped by the plaintiff's factory, mistaking it for another business. Harsh words were exchanged, and the state

employee later informed his superiors that he had been physically assaulted by the plaintiff. The California Highway Patrol was notified and CHP officers obtained a search warrant for the business in order to examine videotapes that might have captured the incident. The plaintiff alleged that during execution of the warrant, the state employee accompanied the officers and began going through file cabinets of personal records.

The plaintiff sued the officers, as well as the state employee, alleging violation of the Fourth Amendment based upon the unlawful search of his files. The trial court denied the state employee's motion for summary judgment based on qualified immunity and the Ninth Circuit affirmed. The court rejected the state employee's assertion that state regulations authorized him to review plaintiff's files, noting that the statutes in question did not permit forcible entry in order to effectuate such a review. Nor could the administrative search of the records be justified by the concurrent execution of the warrant, because the warrant for the criminal investigation was narrowly tailored to seek only video evidence concerning the underlying incident. Moreover, it was clearly established that Fourth Amendment liability may be imposed upon a public employee present at a search where his/her presence was not related to the objectives of the intrusion.

Advance Building underscores the importance of viewing administrative searches through the prism of the Fourth Amendment. That an ordinance, statute or regulation may give a public employee the right to inspect documents, building sites or the like, does not

necessarily authorize that the inspection may be undertaken in a particular manner, i.e. without notice, with a forcible entry or some other serious invasion of privacy rights.

E. *Whalen v. McMullen*, 907 F.3d 1139 (9th Cir. 2018)

- **Fourth Amendment Bars Warrantless Administrative Search Carried Out for purposes Of Criminal Investigation.**

Whalen v. McMullen, 907 F.3d 1139 (9th Cir. 2018) provides another reminder to be alert to potential Fourth Amendment issues arising from administrative searches. There, a police detective was conducting an investigation into possible Social Security fraud by the plaintiff. The detective was part of the unit that verified entitlement to Social Security disability benefits for both civil administrative proceedings, and possible referrals for criminal prosecution. In order to verify the plaintiff's entitlement to benefits based on disability and the existence of possible fraud, the detective gained entry to her home by asserting he was investigating a case of identity theft. After observing her physical condition and surreptitiously videotaping the encounter, the detective submitted a report indicating that plaintiff did not seem to be disabled so as to be entitled to benefits. (For example, her wheelchair was being used as a blanket holder). Her benefits were later terminated, but she was not criminally prosecuted.

Plaintiff sued the detective, arguing that his warrantless entry into her home by means of a ruse violated the Fourth Amendment. The district court granted the detective's motion for summary judgment based on qualified immunity and plaintiff appealed. In affirming summary judgment for the detective, the Ninth Circuit emphasized that the

warrantless search violated the Fourth Amendment. The court rejected the contention that this was a purely administrative search that was justified by the "special needs" doctrine, as the detective was not merely investigating for purposes of the civil administrative proceeding, but for purposes of a possible criminal prosecution as well. Thus, even if this could be characterized as an administrative search, nonetheless it was conducted in order to serve general law enforcement purposes and hence was subject to the Fourth Amendment warrant requirement. However, because the law was not clearly established, the detective was entitled to qualified immunity.

Whalen again underscores the importance of not blurring the distinction between searches conducted for purely administrative purposes, which may be subject to the "special needs" exception, and those conducted under circumstances where there may be a possibility of criminal prosecution, thus creating greater potential for Fourth Amendment issues.

F. *Hines v. Youseff*, 914 F.3d 1218 (9th Cir. 2019)

- **Law Enforcement Officials Entitled To Qualified Immunity Based On Absence Of Clearly Established Factual Basis For Liability.**

Valley Fever is an illness caused by fungal spores, and highly prevalent in the Central Valley of California. Although most individuals who contract the disease have relatively minor symptoms, some patients experience severe complications and death. In *Hines v. Youseff*, 914 F.3d 1218 (9th Cir. 2019) African-American prisoners in Central Valley prisons sued state prison officials for violation of the Eighth Amendment,

asserting that exposing them to the hazards of Valley Fever constituted cruel and unusual punishment, given the statistical proclivity of African-Americans to suffer particularly severe complications from the disease. They also asserted that prison officials violated the Equal Protection clause of the Fourteenth Amendment, because given the disparate impact the disease had an African-Americans, it was discriminatory to keep them in the same conditions as non-African-American prisoners. The district court granted summary judgment to the defendant officials based on qualified immunity, and the plaintiffs appealed.

In affirming summary judgment for defendants, the Ninth Circuit held that the defendants were entitled to qualified immunity on both claims, given that the higher susceptibility of African-American prisoners to severe complications of the disease was not clearly established at the time of the events in question. At most there was some minor statistical indication of a higher susceptibility to complications, but the failure of prison officials to act on this information did not rise to the level of an Eighth Amendment violation, nor violate equal protection by subjecting African-American prisoners to greater peril than non-African-American prisoners.

The key point to take from *Hines*, is that entitlement to qualified immunity does not always turn on the question of a clearly established law, but on a clearly established factual basis for liability. Public officials and employees often act on less than ideal information, and it is important to bear in mind that qualified immunity applies both as to reasonable mistakes of law and reasonable mistakes of fact.

G. *Horton v. City of Santa Maria*, 915 F.3d 592 (9th Cir. 2019)

● Officer Entitled To Qualified Immunity For Failure To Prevent Prisoner Suicide.

In *Horton v. City of Santa Maria*, 915 F.3d 592 (9th Cir. 2019), the plaintiff was arrested after slashing the tires of his girlfriend's car. Although agitated, plaintiff denied any suicidal ideation, and after his mother refused to bail him out, requested that one of the officers, Brice, call his mother just to let her know what was going on. Brice then spoke with plaintiff's mother, who informed him that several weeks earlier the plaintiff had been briefly put on a 5150 hold for possible suicide, but that physicians had determined he was not a danger to himself, and had released him. Unbeknownst to Brice, as he was speaking with plaintiff's mother, plaintiff was attempting to hang himself in his holding cell. Plaintiff was found and revived, but suffered severe injuries.

Plaintiff sued Brice, the City, and other officers, asserting that they violated the Fourteenth Amendment by failing to provide for his serious medical needs in that they had not properly evaluated and monitored him for possible suicide. Plaintiff also asserted that there had been a failure to summon medical care under Government Code section 845.6. Brice moved for summary judgment based on qualified immunity and the absence of any basis to find him liable for failure to summon medical care under state law. The district court denied the motion and Brice appealed.

The Ninth Circuit affirmed in part and reversed in part. The court held that Brice was entitled to summary judgment on the federal claim based on qualified immunity,

because no clearly established law would have suggested that Brice could be held liable under these circumstances. Particularly significant was the fact that the Ninth Circuit standard for evaluating Fourteenth Amendment claims based upon failure to provide medical services to pre-trial detainees had changed since the incident had occurred. At the time of the incident, the Ninth Circuit only allowed liability to be imposed on an officer for failing to provide for a pre-trial detainee's serious medical needs where the officer subjectively believed that care was necessary. In *Castro v. County of Los Angeles*, 833 F.3d 1060 (9th. Cir. 2016) (en banc) the Ninth Circuit had changed the standard, rejecting any requirement of subjective intent, and holding that an officer could be liable where there was a substantial risk of serious harm to a prisoner that could have been eliminated through reasonable and available measures. Since Brice's conduct had to be evaluated under the law as it existed at the time of the incident, he was plainly entitled to qualified immunity.

However, the court affirmed the denial of summary judgment based upon an alleged failure to summon medical care under Government Code section 845.6. It also held that it lacked jurisdiction to review the denial of the City's motion for summary judgment for liability under *Monell v. Department of Social Services*, 436 U.S. 658 (1978) because it was not directly related to the issues that were subject to review in the context of the denial of qualified immunity to Officer Brice. In so holding however, the court emphasized that on remand any *Monell* claim against the City could be premised on

application of the *Castro* standard in assessing whether a constitutional violation had occurred.

Although *Horton* is helpful to public entities in that it reaffirms application of qualified immunity, nonetheless the opinion contains troubling dicta concerning application of the *Castro* standard to *Monell* claims, even where the underlying conduct occurred prior to *Castro*. In addition, the decision's interpretation of California law concerning failure to summon medical care under Government code section 845.6, erodes the protections of that immunity, a point made in a very strong dissent. As the dissent noted, the *Horton* majority's interpretation of California law is squarely at odds with governing California case authority, and unless and until the California Supreme Court directly addresses the issue, public entities will be subjected to greater potential liability for section 845.6 claims in federal court, than in state court.

H. *Ioane v. Hodges,* 903 F.3d 929 (9th Cir. 2018)

- **Officer Not Entitled To Qualified Immunity For Monitoring Bathroom Use During Execution Of A Warrant.**

Ioane v. Hodges, 903 F.3d 929 (9th Cir. 2018) arose from execution of a search warrant for documents by IRS agents. During the search, a female occupant of the home asked to use the restroom. A female agent agreed, but even though the female occupant had not been detained, and indeed had been told she was free to leave, the agent would not let her use the restroom unless the agent was allowed to observe her in the restroom. She did so, and after completing the search, the agents left.

The plaintiff sued the IRS agent for violation of the Fourth Amendment, asserting that the female agent had unreasonably intruded on her privacy by insisting on monitoring her bathroom use. The agent moved for summary judgment based on qualified immunity, arguing that the law was not clearly established with respect to whether same-sex monitoring of bathroom use during the course of a search violated the Fourth Amendment. The district court denied the motion, and the agent appealed.

In affirming the denial of summary judgment, the Ninth Circuit rejected the agent's contention that it was required to cite a case with "identical facts" in order to render the law clearly established for purposes of denying qualified immunity. The court observed that it had repeatedly held in the context of jail searches, that observation of an unclothed individual was a significant intrusion on personal privacy. The Ninth Circuit emphasized that the plaintiff was not under arrest, nor even detained, and that there was no justification at all for monitoring her bathroom use. Given the absence of any justification for the intrusion, as well as case law putting the defendant on notice of the severe intrusion on personal privacy resulting from such observation, the court concluded that the officer was not entitled to qualified immunity.

Ioane is somewhat concerning, given its departure from recent Supreme Court authority directing the lower courts to identify cases that are closely factually analogous to the circumstances confronting an officer before denying qualified immunity, particularly in the context of Fourth Amendment claims. It is anticipated that plaintiffs

will frequently cite *Ioane* in an effort to avoid rigorous application of the Supreme Court's dictates concerning application of qualified immunity.

I. *Sandoval v. County of Sonoma,* 912 F.3d 509 (9th Cir. 2018)

● Impoundment Of Vehicle Of Unlicensed Driver Under Vehicle Code Section 14602.6 Subject To Fourth Amendment.

Vehicle Code section 14602.6 empowers police officers to impound the vehicle of an unlicensed driver for up to 30 days, subject to an administrative hearing for the owner to reclaim the vehicle. In *Sandoval v. County of Sonoma,* 912 F.3d 509 (9th Cir. 2018), plaintiffs sued a city and a county, arguing that the seizure of vehicles pursuant to the statute was subject to the Fourth Amendment, and that an automatic 30 day hold was unconstitutional, in that it was applied without regard to whether it was reasonable under the particular circumstances. The district court granted summary judgment to the plaintiffs, and the public entities appealed.

The Ninth Circuit affirmed the judgment, noting that after the district court's ruling, it had issued its opinion in *Brewster v. Beck,* 859 F.3d 1194 (9th Cir. 2017), which had held that seizures under section14602.6 were subject to the Fourth Amendment. It rejected defendants' argument that the seizures were warranted as an administrative penalty, that they could be justified by the "community caretaking" exception, or that they were reasonable in light of the severity of the offense in question.

The Ninth Circuit also affirmed the dismissal of plaintiffs' claim under the Bane Act, Civil Code section 52.1, noting that under current law plaintiffs were required to show that the defendants had a specific intent to violate their rights, but that given the uncertainty of the law as applied to Vehicle Code section 14602.6, plaintiffs could not show that defendants had any specific intent to violate their rights. The court also affirmed the district court's denial of class certification, noting that the individualized nature of Fourth Amendment determinations rendered such claims inappropriate for adjudication on a class wide basis.

Sandoval reaffirms *Brewster*'s holding that seizures under the Vehicle Code section14602.6 must comply with Fourth Amendment standards, meaning that retention beyond the initial seizure must be justified by particularized circumstances. Given the potential for liability, public entities should be wary of impounding vehicles for any of significant period of time under section 14602.6. On the other hand, *Sandoval* provides strong authority for opposing Fourth Amendment class-action claims, given the court's recognition that the unique factual circumstances underlying such claims generally makes them poor candidates for class adjudication. In addition, the court's further clarification of the standards governing Bane Act claims will be helpful to public entities, particularly its conclusion that where the law is not clearly established, the plaintiff will be unable to demonstrate the specific intent necessary to support such a claim.

J. *Taylor v. County of Pima*, 913 F.3d 930 (9th Cir. 2019)

● ***Heck v. Humphrey*, 512 U.S. 477 (1994) Bars Any Civil Rights Claim Where Any Part Of Plaintiff's Injury Is Attributable To A Valid Conviction.**

In *Taylor v. County of Pima*, 913 F.3d 930 (9th Cir 2019), the plaintiff was convicted in 1972 of 28 counts of felony murder arising from arson of a hotel. In 2012, the plaintiff filed a state court post-conviction petition citing newly discovered evidence indicating that the fire was not caused by arson. The government disputed the new theory, but nonetheless agreed to vacate the plaintiff's prior conviction, in exchange for plaintiff pleading nolo contendere to the same counts and being sentenced to time served. Plaintiff agreed and was released, and then filed suit against the County, asserting he had been wrongfully convicted as a result of unconstitutional policies and customs concerning prosecution of African-Americans. The defendant successfully moved to dismiss, arguing, among other grounds, that the plaintiff could not obtain damages for wrongful conviction, because of his subsequent nolo contendere plea.

The Ninth Circuit heard the appeal after granting certification under 28 U.S.C. section 1292 (b). The court noted that in *Heck v. Humphrey*, 512 U.S. 477 (1994) the Supreme Court had held that where success on a civil rights claim would call into question the validity of a criminal conviction, the suit could not proceed unless or until the conviction was successfully vacated either on direct review, or by habeas corpus. The Ninth Circuit concluded that here, *Heck* barred any claim for damages arising from time served as a result of plaintiff's initial wrongful conviction, because success on his civil

rights claim would call into question the validity of the sentence, and undermine the validity of the plea deal. Although his initial conviction had been vacated, the time served was part of his subsequent plea agreement, which remained a valid conviction.

Taylor is helpful in reaffirming the strict application of *Heck*, and is especially noteworthy given the increasing reluctance of courts to apply *Heck* in all but the most straightforward cases.

III. ABSTENTION

A. *Herrera v. City of Palmdale*, 918 F.3d 1037 (9th Cir. 2019)

- ***Younger* Abstention Justifies Stay Of Federal Civil Rights Action Pending Disposition Of State Court Nuisance Abatement Action, But Fourth Amendment Search And Seizure Claims May Proceed.**

Herrera v. City of Palmdale, 918 F.3d 1037 (9th Cir. 2019) arose from a state court nuisance abatement action directed at plaintiffs' motel. Just before the state action was filed, plaintiffs filed suit in federal court, seeking injunctive and declaratory relief to the effect that the local enforcement actions violated due process, were discriminatory and improper, and seeking damages for various Fourth Amendment search and seizure violations. The defendants moved to dismiss the action, or for the court to stay the federal case based on abstention under *Younger v. Harris*, 401 U.S. 37 (1971). The district court agreed to stay the federal action, and plaintiffs appealed.

The Ninth Circuit affirmed application of *Younger* abstention to the claims for declaratory and injunctive relief. Although *Younger* itself concerned abstention from interfering in an ongoing state court criminal proceeding, the Ninth Circuit noted that the Supreme Court had expanded its reach to state court administrative enforcement proceedings that were akin to a criminal prosecution. It held that the nuisance abatement proceeding at issue here fell squarely within *Younger* and hence abstention was warranted in order to allow the state court action to proceed, and to possibly adjudicate federal claims that plaintiffs were attempting to raise in federal court.

However, the court held that the lower court had erred in abstaining as to the Fourth Amendment damages claims, because the search and seizure issues that plaintiffs were raising were not likely to be adjudicated in the state court nuisance abatement proceeding.

Herrera is a very useful case, as it clarifies application of *Younger* abstention to one of the most commonly prosecuted actions by local entities – nuisance abatement proceedings. The decision should prevent plaintiffs from attempting to circumvent, or delay state court enforcement proceedings by filing suit in federal court.

IV. FIRST AMENDMENT – REGULATION OF SPEECH IN A NONPUBLIC FORUM.

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

● Regulation Of Speech In Nonpublic Forum Must Be Viewpoint Neutral, Sufficiently Definite To Foreclose Arbitrary Enforcement, And Advance A Valid Regulatory Purpose.

American Freedom Defense Initiative v. King County, 904 F.3d 1126 (9th Cir. 2018) arose from a challenge to a local ordinance regulating advertising that could be displayed on government owned buses. Plaintiff sought to display an anti-terrorism ad depicting several individuals of Middle Eastern descent. The County refused to accept the ad, asserting it violated provisions of the local ordinance banning false statements, disparaging material, and content that may disrupt the transit system. Plaintiff submitted a revised, factually accurate ad, which the County again declined, asserting that it was disparaging and might disrupt the transit system. Plaintiff filed suit challenging the regulation under the First Amendment, and the district court granted summary judgment to the County.

The Ninth Circuit affirmed in part and reversed in part. The court noted that the bus advertising space was a nonpublic forum. Accordingly, strict scrutiny does not apply, but any regulation must be reasonable, viewpoint neutral and sufficiently specific to avoid arbitrary enforcement. The court upheld the prohibition on false advertising, as well as the prohibition on material likely to disrupt the transit system. However, the court held that the prohibition on "disparaging" racial and ethnic groups was viewpoint-based and hence ran afoul of the First Amendment. It also found that the County had improperly applied the prohibition on displays likely to disrupt the transportation system,

given that although it had rejected plaintiffs ad, it had previously allowed buses to display substantially similar content, with no impact on the operation of the transit system.

American Freedom underscores the importance of examining any regulation of speech with particular care, mindful of the need to precisely define prohibited conduct and avoid viewpoint discrimination. It is also a reminder of the need to enforce regulations in uniform fashion and to be able to provide concrete reasons justifying application of the regulation.

V. MUNICIPAL TORT LIABILITY

A. *Arista v. County of Riverside*, 20 Cal.App.5th 1051 (2018)

- **Assumption Of Duty To Undertake Rescue With Due Care.**

In *Arista v. County of Riverside*, 20 Cal.App.5th 1051 (2018) a wife and children sued the County for negligence, wrongful death and violation of civil rights arising out of the failure of County personnel to rescue their husband and father. Plaintiffs alleged the decedent had left home in the morning for a bike ride in the mountains, noting he would be back in the early afternoon. When he did not return by late afternoon, the wife became worried, and eventually spoke with him on a cell phone, learning that he had fallen from his bicycle, was disoriented, and somewhere near Santiago peak. She called the local police, who then contacted the Sheriff's Department. According to plaintiffs, a lieutenant from the Sheriff's Department who had no search and rescue experience assured them that the Sheriff's Department would handle the situation, and prevented them from undertaking an effort to effect a rescue on their own. Plaintiffs also alleged that search

and rescue personnel were available who could have found the missing victim, but that the lieutenant failed to alert them, and in fact believed that that victim was not missing, but simply having an affair. When the search was finally started the next morning, the victim was found dead. Plaintiffs contended that had the search promptly started the night before, the victim would have been found and survived.

The County successfully demurred to the operative complaint, arguing that it had no duty to undertake a rescue effort, and that in any event it was immune from liability under state law under Health & Safety Code section 1799.107. The County also argued that plaintiffs failed to allege facts sufficient to show that the County had a policy, custom or practice of deliberate indifference in conducting search and rescue operations and hence the federal civil rights claim must be dismissed as well. Plaintiffs appealed.

The Court of Appeal reversed as to the state law claims, holding that plaintiffs had properly pleaded causes of action for negligence and wrongful death. The court held that by representing that County personnel would undertake rescue efforts, County employees had created a special relationship between the County and the plaintiffs, which in turn spawned a duty to conduct the search and rescue operation in a reasonable manner. The court emphasized that the assurances of County personnel had prevented the plaintiffs from undertaking their own search, which might have resulted in the victim being found and rescued. The court noted that Health & Safety Code section 1799.107 did not immunize a public entity from liability for gross negligence in providing emergency

services, and that plaintiffs' allegations were sufficient to support a gross negligence claim here.

Arista is a very troubling case. The opinion contains very loose language concerning the low threshold for creating a special relationship based upon undertaking search and rescue operations. It has effectively created a tort of "negligent failure to rescue," which could greatly expand the potential liability of public entities when rendering not simply search and rescue services, but emergency services in general.

B. Steinle v. City & County of San Francisco, 919 F.3d 1154 (9th Cir. 2019)

●Sheriff's Issuance Of Memo Directing Employees Not To Provide Prisoner Release Information To ICE Is A Discretionary Act Shielded By The Immunity Of Government Code Section 820.2.

In *Steinle v. City & County of San Francisco*, 919 F.3d 1154 (9th Cir. 2019) the plaintiffs' adult child was murdered by an undocumented alien who had previously been in County custody for an offense, but had been released without notifying federal ICE agents, pursuant to a memo issued by the Sheriff limiting local cooperation with ICE agents. Plaintiffs sued the Sheriff and the County, asserting various state tort claims. The district court granted a motion to dismiss without leave to amend, finding that issuance of the memo was a discretionary act and therefore shielded from liability under Government Code section 820.2.

The Ninth Circuit affirmed. The court emphasized that the immunity of section 820.2 turns on whether the underlying act is merely operational, or instead reflects a basic policy decision. The court found that the Sheriff's decision to issue a memo limiting departmental cooperation with ICE in line with Sanctuary City regulations, constituted a basic policy decision of the sort protected by section 820.2.

Steinle is a helpful case in two respects. First, it again emphasizes the broad application of section 820.2 to policy decisions by government officials, and clarifies the distinction between operational decisions and policy making. Second, it frees local public entities from liability concerns under state law for decisions regarding the extent to which local governments will cooperate with federal immigration officers.

Cannabis Conundrum—How to Extinguish Illegal Marijuana Businesses

Friday, May 10, 2019 General Session; 9:00 – 10:15 a.m.

David J. Ruderman, City Attorney, Lakeport, Colantuono, Highsmith & Whatley PC

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Notes:

THE CANNABIS CONUNDRUM

How to Extinguish Illegal Marijuana Businesses

Prepared By:
David J. Ruderman
Colantuono, Highsmith & Whatley, PC
May 2019

INTRODUCTION

Marijuana's legal status has changed markedly since California voters approved Proposition 215[1] in 1996 to provide medical marijuana users limited immunity from criminal prosecution. With the Legislature's adoption of the Medical Marijuana Program Act in 2003,[2] some risk-taking entrepreneurs sought to open medical marijuana dispensaries that engaged in storefront retail operations. The change in our state's marijuana laws has only accelerated since voters approved Proposition 64 in 2016,[3] which decriminalized adult recreational use of marijuana. Combined with 2017's Medicinal and Adult-Use Cannabis Regulation and Safety Act,[4] state law now imposes a dual licensing scheme that regulates and taxes marijuana businesses in an attempt to extinguish the black market in marijuana sales while "ensuring a regulatory structure that prevents access to minors, protects public safety, public health and the environment, as well as maintaining local control."[5]

Despite the new regulatory regime governing marijuana from cultivation through sale, the problem of illegal marijuana — now referred to by its Latin "cannabis" — dispensaries persists. In cities that ban cannabis businesses and in those that allow them, illegal cannabis retail operations continue to vex local officials. These businesses seek to profit by avoiding the cost of regulatory compliance and threatening the voters' intent under Proposition 64. Further, illegal cannabis businesses undermine a city's land use authority and police power and strain a city's budget.

This paper outlines a city's options for enforcing its cannabis business regulations or ban given the recent changes to state and local law. Cities have the following enforcement tools:

(1) administrative citations;

(2) civil injunctions either with (a) contempt proceedings to enforce violations or (b) criminal enforcement for violations;

(3) abatement warrants;

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[1] Proposition 215 is known as the Compassionate Use Act of 1996 and added section 11362.5 to the Health and Safety Code. (Prop. 215, § 1, approved Nov. 5, 1996.)
[2] Stats. 2003, ch. 875 (S.B. 420).
[3] Proposition 64 is known as the Control, Regulate and Tax Adult Use of Marijuana Act ("the Adult Use of Marijuana Act" or "AUMA"). (Prop. 64, § 1, approved Nov. 8, 2016.)
[4] Stats. 2017, ch. 27 (S.B. 94).
[5] *Id.* at § 1, subd. (g).

(4) criminal enforcement;

(5) unlawful detainer actions brought by landowners;

(6) state regulatory enforcement; and

(7) some combination of 1 through 6.

The effectiveness of these approaches varies, but our experience shows that pursuing just one option is normally ineffective in closing illegal cannabis businesses. Instead, a combination of different approaches is most effective.

LEGAL FRAMEWORK

A. State Law

Under the Medicinal and Adult-Use Cannabis Regulation and Safety Act ("MAUCRSA"), the Legislature created a comprehensive system to control and regulate the cultivation, distribution, transportation, storage, manufacturing, processing, and sale of medical and adult-use cannabis. Commercial cannabis activity is now permitted within the state subject to approval by the local jurisdiction. Commercial cannabis activity is defined as "cultivation, possession, manufacture, distribution, processing, storing, laboratory testing, packaging, labeling, transportation, delivery or sale of cannabis and cannabis products."[6]

MAUCRSA imposes civil penalties for unlicensed commercial cannabis activity "of up to three times the amount of the license fee for each violation, and the court may order the destruction of cannabis associated with that violation in accordance with Section 11479 of the Health and Safety Code."[7] This can be a substantial sum. License fees depend on the type of cannabis business and expected gross revenue.[8] Thus, a Type 10 retailer license fee is currently $7,500 for gross revenue between $750,000 and $1 million. The civil penalty would accordingly be $22,500 for each day a person operates an unlicensed retail facility. Notably, "[e]ach day of operation shall constitute a separate violation of this section."[9]

If a city attorney obtains civil penalties under MAUCRSA, "the penalty collected shall first be used to reimburse the city attorney or city prosecutor for the costs of bringing

[6] Bus. & Prof. Code, § 26001, subd. (k).
[7] Bus. & Prof. Code, § 26038, subd. (a).
[8] Cal. Code Regs., tit. 16, § 5014, subd. (c).
[9] Bus. & Prof. Code, § 26038, subd. (a).

the action for civil penalties, with the remainder, if any, to be deposited into the General Fund."[10]

The possession of cannabis for sale outside a licensed cannabis business remains a misdemeanor under Health and Safety Code sections 11359 and 11360, "except as otherwise provided by law." Giving away, transporting or offering to transport over 28.5 grams of cannabis is also a misdemeanor under Health and Safety Code section 11360.

MAUCRSA does not abrogate the defense a primary caregiver has when providing marijuana to a qualified medical marijuana patient.[11] Until January 2019, defendants could also assert a medical use defense to the collective or cooperative cultivation of medical cannabis. Thus, in a recent ruling, the First Appellate District reversed a conviction for the sale of marijuana where the defendant operated a medical marijuana dispensary in Livermore, which bans dispensaries. The defendant contended the trial court erred by denying him the ability to assert a medical marijuana defense. The court overturned his conviction, holding that the trial judge's ruling that barred him from raising a medical marijuana defense violated his constitutional right to present a defense.[12] However, the Health and Safety Code section that provided this defense was repealed effective January 9, 2019.[13]

B. Local Law

The California Supreme Court in *City of Riverside v. Inland Empire Patients Health and Wellness Center, Inc.* (2013) 56 Cal.4th 729 recognized cities' land use authority under our Constitution to regulate and even ban medical marijuana businesses under the Compassionate Use Act and the Medical Marijuana Program Act.[14] Proposition 64 and MAUCRSA also reflect this fundamental principle that a local jurisdiction has constitutional authority over land use within its boundaries. Thus, Proposition 64 provides:

> This division shall not be interpreted to supersede or limit the authority of a local jurisdiction to adopt and enforce local ordinances to regulate businesses licensed under this division, including, but not limited to, local zoning and land use requirement … or to completely prohibit the

[10] Bus. & Prof. Code, § 26038, subd. (b).
[11] Health & Saf. Code, § 11362.765.
[12] *People v. Ahmed* (2018) 25 Cal.App.5th 136.
[13] Health & Saf. Code, § 11362.775, subd. (e); see also Bureau of Cannabis Control, Notice Regarding the Repeal of Health and Safety Code Section 11362.775, <https://www.bcc.ca.gov/about_us/documents/18-005_repeal_hscode.pdf> (as of Mar. 23, 2019).
[14] Cal. Const., art. XI, § 5 (charter cities) & § 7 (general law cities).

establishment or operation of one or more types of businesses licensed under this division within the local jurisdiction.[15]

MAUCRSA similarly added a subsection acknowledging cities' constitutional authority: "This division, or any regulations promulgated thereunder, shall not be deemed to limit the authority or remedies of a city, county, or city and county under any provision of law, including, but not limited to, Section 7 of Article XI of the California Constitution."[16] The statutory framework not only acknowledges cities' authority to regulate, it specifically requires the local jurisdiction's approval to operate lawfully under state law, i.e., it mandates the dual-licensing regime for commercial cannabis activity.[17]

MAUCRSA requires cities to provide their ordinance relating to commercial cannabis activity to the Bureau of Cannabis Control so it may ensure the license applicant may operate consistent with local law.[18] As a result, cities no longer rely on permissive zoning alone to prohibit cannabis businesses, as they long did with medical marijuana dispensaries.[19]

Whether a city bans all commercial cannabis activity or allows some or all of the license types available under state law, a city will find enforcement easier if its ordinance includes certain provisions. First, the ordinance should declare that any operation in violation of its regulations is a public nuisance subject to abatement. Second, the city's code should provide that it may abate such nuisances through any lawful means, and that no one remedy is exclusive. Nuisances may normally be abated through an administrative procedure provided by the municipal code, and through civil actions allowing for injunctive relief. Third, the ordinance should impose civil penalties for a violation as well as the cost of abatement including attorneys' fees. Finally, it should designate violations as misdemeanors subject to criminal action and the city's general penalty provisions.

Cities that allow some commercial cannabis activity require not only compliance with the zoning code, but also require business licenses to prevent a commercial cannabis use from potentially running with the land. Other cities also include their own public health permit.

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[15] Bus. & Prof. Code, § 26200, subd. (a)(1).

[16] Bus. & Prof. Code, § 26200, subd. (f); see also Health & Saf. Code, § 11362.83 (regulation of medicinal cannabis cooperatives and collectives).

[17] Bus. & Prof. Code, § 26032, subd. (a)(2) [commercial cannabis operation requires compliance with local law]; Bus. & Prof. Code, § 26060, subd. (b)(2) [same as to commercial cultivation].

[18] Bus. & Prof. Code, § 26055, subd. (f).

[19] E.g., *City of Monterey v. Carrnshimba* (2013) 215 Cal.App.4th 1068, 1091.

ENFORCEMENT OPTIONS

Cities have these enforcement options: (1) administrative citations; (2) civil injunctions either with (a) contempt proceedings to enforce violations or (b) criminal enforcement for violations; (4) abatement warrants; (5) criminal enforcement; (6) unlawful detainer actions brought by cooperative landowners; (7) state regulatory enforcement; and (8) some combination of 1 through 7.

1. Administrative Citations

Most cities have an administrative citation ordinance under Government Code section 53069.4 that allows the city to impose a fine for any violation of its municipal code. If it has adopted such an ordinance, it may enforce its restrictions on cannabis businesses by issuing administrative fines to any person operating a cannabis business in violation of those restrictions. In addition, each city should review their cannabis business regulations for specific administrative penalties it may issue under that ordinance.

The administrative fines a city may impose on infractions is relatively small: $100 for a first violation; $200 for a second violation within a year of the first citation; and $500 for each additional violation of the same ordinance within one year of the first violation.[20] Although the city's code probably provides that each day of non-compliance constitutes a separate offense, potentially allowing the city to fine a business $800 for three days' operation, the cost of staff time to issue the citations normally does not allow for such aggressive enforcement. In addition, any person cited has the right to an administrative appeal, which may then be appealed to the superior court as an administrative writ of mandate under Code of Civil Procedure section 1094.5.[21]

Under AB 2164, effective January 1, 2019, cities can amend their administrative citation ordinances to allow code enforcement to immediately impose administrative fines for unlawful cannabis cultivation.[22] AB 2164 is aimed at curbing grow operations in residential neighbors. Previously, cities could only impose administrative fines for violations of local ordinances pertaining to building, plumbing, electrical, or other similar structural or zoning issues that create no immediate danger to health or safety only after providing a reasonable time to cure the violations. Under AB 2164, cities that

[20] Gov. Code, § 36900, subd. (b). Cities may impose slightly higher fines for local building and safety code violations.

[21] Gov. Code, § 53069.4, subd. (b).

[22] Stats. 2018, ch. 316 (A.B. 2164), amending Gov. Code, § 53069.4.

amend their administrative citation ordinance may do so without providing a cure period, if the violation exists as a result of, or to facilitate, the cultivation of cannabis.[23]

Although administrative citations may be useful as an initial "shot across the bow" for a cannabis business, there are two primary drawbacks to their use. First, if the city's goal is to shut down a cannabis business quickly and cheaply, repetitive administrative citations are less efficient than other methods, discussed below. Cannabis businesses see the relatively minor penalties associated with citations as a "cost of doing business," and use the administrative appeals process as another opportunity to stall and deplete the city's resources and political will to pursue them. Second, the risk of losing an appeal, or losing on a factual issue, could result in res judicata in in other cases about the particular cannabis business. This would compel the city to seek writs of administrative mandate to overturn those findings. Nevertheless, circumstances may militate toward using administrative citations, particularly with other methods, that each city must consider for itself.

2. Civil Injunction Actions

A city's ordinance should declare that any violation of its cannabis business ordinance constitutes a public nuisance that may be summarily abated by the city under Code of Civil Procedure section 731 or any other remedy available to the city. Under this provision, the city may seek injunctive relief against illegally-operating cannabis businesses. It should also consider bringing the action in the name of the people of the State of California and include a claim for civil penalties under MAUCRSA to increase the cost of the business's wrongdoing. Depending on the ordinance's definition of persons responsible for an illegal cannabis business, the city may also pursue injunctive relief against the property owner, even if that person is not the business operator.

In our experience, courts are generally amenable to issuing preliminary injunctions based on the relatively favorable standard applicable to public nuisances.[24] Once issued, problems may arise when attempting to enforce an injunction. Cities have two primary means of enforcement: (1) civil contempt and (2) criminal prosecution.

a. Civil contempt

Where a cannabis business does not comply with an injunction, whether preliminary or permanent, the city may enforce the injunction through civil contempt proceedings. The city first needs to marshal evidence that the business continues to distribute cannabis in violation of the injunction, often through evidence gathered in

[23] Gov. Code, § 53069.4, subd. (a)(2)(B) & (C).
[24] *IT Corp. v. County of Imperial* (1983) 35 Cal.3d 63, 72.

undercover buy operations. Once the city demonstrates through admissible evidence a prima facie case of contempt, the court will issue an order to show cause for contempt under Code of Civil Procedure section 1209, subdivision (a)(5).

Some judges have been reluctant to enforce preliminary injunctions, which requires strict adherence to noticing and other procedural rules. This approach is often time-consuming and costly because it requires additional undercover purchases which may not demonstrate an absent operator has knowingly violated the injunction. In addition, the city is required to personally serve the order to show cause on the operator, which often requires a costly skip trace to locate the individual consciously avoiding service. As a result, civil contempt proceedings may be difficult to sustain, at least with certain judges.

b. Criminal violations

Cities may also criminally prosecute individuals who violate an injunction under Penal Code section 166, subdivision (a)(4), which makes a misdemeanor of any "[w]illful disobedience of the terms as written of any process or court order …, lawfully issued by any court, including orders pending trial." The police could therefore arrest an individual who violates a preliminary injunction (e.g., after witnessing the purchase of, or purchasing, cannabis in violation of the injunction) and the City Prosecutor could prosecute that individual for violating a court order.

Criminal enforcement is speedier than civil contempt, especially in courts where the city may have to wait months just to have the court issue an order to show cause. To the extent the injunction prohibits cannabis activity by those acting on behalf of an absent operator, it also allows law enforcement to arrest the bud tenders working in these businesses, proving another deterrent. The burden of proof in a civil contempt proceeding is the same as in a criminal enforcement action — beyond a reasonable doubt — so criminal enforcement is no more difficult to demonstrate. However, a defendant has no right to a jury trial in a contempt proceeding, whereas she would in most criminal matters. On balance, the criminal contempt sanction can be an effective tool against cannabis operators, employees, and property owners who continue to operate or allow the operation of a cannabis business in violation of a court-ordered injunction, though it requires a level of resources that may only be available to larger, more affluent cities.

3. Abatement Warrants

The City may also take administrative action by seeking inspection warrants under Code of Civil Procedure section 1822.50, which allows inspections for zoning violations. Inspection warrants are useful where the City's code enforcement staff

suspects building code violations. If building code violations are discovered during the inspection, the City can then obtain an abatement warrant under section 1822.50 to close the cannabis business. Abatement warrants may be quickly issued ex parte, but a court may be less willing to issue a warrant if the only violation relates to an unpermitted cannabis business, as opposed to a building code violation that more urgently threatens public health and safety. However, because of their ease and speed, this option can be fruitful especially if there are building code violations on the premises of any unlawful cannabis business. It may also be an effective tool when combined with administrative citations, particularly the increased fines a city may issue for building code violations under Government Code section 36900, subdivision (c).

4. Criminal Enforcement

Under Government Code section 36900, the City may prosecute any violation of its municipal code as a misdemeanor, including operating an unlawful cannabis business, provided such a violation is not an infraction under the city's ordinance. Previously, there was risk in doing so because Health and Safety Code section 11362.775 exempts qualified patients and caregivers from criminal liability for collectively or cooperatively cultivating cannabis for medicinal purposes. However, under MAUCRSA, this immunity from criminal liability expired January 9, 2019.[25]

Each city will need to review its cannabis regulations to determine the scope of criminal liability for its violation. A city may be able to prosecute unlawful commercial cannabis businesses for operating without a permit or for operating a permitted business in violation of the city's laws. The City Prosecutor may bring these misdemeanor violations as district attorneys' offices seldom have the resources to do so. The misdemeanor carries both jail time and/or financial penalties, but any defendant charged is entitled to counsel and a jury trial. Threats of jail time are often very effective in compelling operators to cease their unlawful activities, but again, criminal prosecution can be expensive, particularly for smaller cities.

5. Unlawful Detainer Actions

Although a city cannot mandate landlords successfully evict unlawful cannabis businesses,[26] it can use its enforcement options to compel landlords to prosecute such actions. Nearly all commercial leases contain provisions requiring compliance with local laws and the existence of a civil injunction can assist landlords in successfully

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[25] Health & Saf. Code, § 11362.775, subd. (e); see *supra* footnote 13.

[26] *Cook v. City of Buena Park* (2005) 126 Cal.App.4th 1 (City's ordinance invalid because it required landlord to succeed in unlawful detainer action against nuisance tenants without adequate due process before imposing fines).

prosecuting unlawful detainer actions against a cannabis business. Unlawful detainer actions have been successful and cost effective where the property owner has been cooperative and hired competent unlawful detainer counsel who can obtain a writ of possession based on noncompliance of local laws and the injunction prohibiting cannabis activities. Often, a city's first step should be to seek cooperation from landlords to initiate unlawful detainer actions, as this is the most cost-effective route. When doing so, seek eviction from all properties the tenant leases, otherwise a successful eviction from one unit will simply send the tenant to the other unit he or she may have leased.

Some property owners are reluctant to evict cannabis businesses because they often pay a premium to lease their location and the property owner may be reluctant to part with this income stream. A city may create an incentive for cooperation by ensuring its cannabis business regulations impose liability for violations on the landlords as well as the operators.

Where the cannabis business or its operator is also the property owner, this option is ineffective. In this case, a city may perform a title search to identify lienholders and provide them notice of the property owners' code violations. The lienholders may enforce deed covenants requiring the property not be used in violation of law and thereby avoid having abatement costs and attorneys' fees recorded as a judgment lien on the property.

6. State Regulatory Enforcement

Under MAUCRSA, the Bureau of Cannabis Control and the Department of Consumer Affairs' Division of Investigation – Cannabis Enforcement Unit have been performing regular enforcement efforts throughout the state against unlicensed cannabis retailers.[27] It often performs enforcement with local law enforcement, seizing the suspect's cannabis and cannabis products. State enforcement is likely a significant deterrent to unlawful behavior and could relieve a city of much of its enforcement cost. However, it is unclear what guides the Bureau's prosecutorial decisions, though it is likely driven by its ability to make the largest impact, focusing on large actors. Nevertheless, the Bureau provides a simple on-line portal for lodging complaints about unlicensed activity.[28] The city may consider notifying the Bureau when dealing with

[27] The California Department of Food and Agriculture CalCannabis Cultivation Licensing division deals with complaints about illegal cannabis cultivation and the California Department of Public Health Manufactured Cannabis Safety Branch oversees unlicensed commercial cannabis manufacturing.
[28] Bureau of Cannabis Control, File a Complaint, <https://aca5.accela.com/bcc/Cap/CapApplyDisclaimer.aspx?CAPType=Enforcement/Cannabis/Complaint/General%20Complaint&Module=Enforcement> (as of Mar. 26, 2019).

large or recalcitrant offenders and, in cities that allow some cannabis businesses, lawfully operating businesses should be informed of this opportunity. In our experience, the licensed businesses have the most to lose from unlicensed dispensaries and can therefore assist in achieving compliance.

CONCLUSION

Cities often find they achieve consistent success by obtaining civil injunctions against cannabis businesses operating in violation of local law and by enforcing those injunctions with contempt or through criminal misdemeanors under Penal Code section 166. To do so, the practitioner should ensure that any injunction the city obtains enjoins not only the named defendants, but also "anyone acting on behalf" of the defendant operators anywhere in the city. Cities should also seek assistance from landlords to initiate unlawful detainer actions against commercial cannabis tenants or include landlords in the civil injunction actions. This should provide cities with the speediest means of closing cannabis businesses without a substantial increase in cost.

If a city has the means, it should also look at working with law enforcement and the City Prosecutor to prosecute unlawful cannabis businesses as criminal misdemeanors. At the same time, cities should continue outreach to property owners so that they apply additional pressure on cannabis businesses through unlawful detainer actions. The choice among the enforcement options this paper discusses is one each city must make for itself depending on its municipal code, the nature of the offender, and the city's goals. However, often it requires more than one enforcement technique to finally extinguish illegal cannabis businesses.

Labor and Employment Litigation Update

Friday, May 10, 2019 General Session; 10:30 a.m. – 12:30 p.m.

Stacey N. Sheston, Partner, Best Best & Krieger

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Labor and Employment Litigation Update

League of California Cities
May 10, 2019
Monterey, CA

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WAGE AND HOUR

STATE MINIMUM WAGE REQUIREMENTS ARE A MATTER OF STATEWIDE CONCERN AND THUS APPLY TO CHARTER CITIES

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

Plaintiffs Wendy Marquez and Jasmine Smith represented a class that alleged causes of action for violations of the Labor Code and the Industrial Welfare Commission's (IWC) wage orders based on the City's alleged failure to pay workers employed as pages and recreation leader specialists wages at or above the statewide minimum wage. The trial court found the authority to determine employee compensation was reserved to the City as a charter city under article XI, section 5 of the California Constitution, and therefore the state could not impose a minimum wage for the City's employees because the City's compensation of its employees was not a matter of statewide concern. Plaintiffs appealed from a judgment of dismissal entered after the trial court sustained without leave to amend the City's demurrer.

On appeal, plaintiffs contended the Legislature's interest in the provision of a living wage to all workers is a matter of statewide concern, and the minimum wage requirement is appropriately tailored to address that concern. The court noted that this case pits article XI, section 5 of the state Constitution (which grants to charter cities authority over municipal affairs, including "plenary authority" to provide for the compensation of city employees) against article XIV, section 1 of the state Constitution (which provides "[t]he Legislature may provide for minimum wages and for the general welfare of employees . . . .") Despite the century-long history of the home rule doctrine, the California Supreme Court had not squarely resolved whether charter cities must comply with state law minimum wage requirements. The court found that legislation setting a statewide minimum wage, generally applicable to both private and public employees, addresses the state's interest in protecting the health and welfare of workers by ensuring they can afford the necessities of life for themselves and their families. Thus the court concluded, in reversing the trial court, that the Legislature may constitutionally exercise authority over minimum wages, despite the constitutional reservation of authority in charter cities to legislate as to their municipal affairs.

EN BANC DECISION OF NINTH CIRCUIT COURT MUST BE SUPPORTED BY MAJORITY OF THE *EN BANC* PANEL AT TIME DECISION IS ISSUED

Yovino v. Rizo, 586 U.S. ___, 139 S.Ct. 706, 2019 WL 886486 (2019)

Aileen Rizo sued the superintendent and her Fresno County Office of Education employer claiming, among other things, that the county was violating the Equal Pay Act of 1963 by considering her lower, out-of-state salary in setting her entry salary in California. Affirming the district court's denial of summary judgment to the defendant on a claim under the Equal Pay Act, the Ninth Circuit held, *en banc*, that prior salary alone or in combination with other factors cannot justify a wage differential between male and female employees. In so doing, the *en banc* court overruled *Kouba v. Allstate*

Ins. Co., 691 F.2d 873 (9th Cir. 1982). Thus the newly announced rule in *Yovino* was that an employee's prior salary does not constitute a "factor other than sex" upon which a wage differential may be based under the statutory "catchall" exception set forth in 29 U.S.C. § 206(d)(1).

Like other courts of appeals, the Ninth Circuit takes the position that a panel decision (like *Kouba*) can be overruled only by a decision of the *en banc* court or the Supreme Court (see *Naruto* v. *Slater*, 888 F.3d 418, 421 (2018)). A clear purpose of the *en banc* decision issued on April 9, 2018, was to announce a new binding Ninth Circuit interpretation of the Equal Pay Act issue previously addressed by *Kouba*. A footnote in the *en banc* opinion noted that Judge Reinhardt had participated fully in the case, voted, and written the opinion prior to his death, but the decision was filed and issued 11 days after his death. Without Judge Reinhardt's vote, the opinion attributed to him would have been approved by only 5 of the 10 members of the *en banc* panel who were still living when the decision was filed. Although the other five living judges concurred in the judgment, they did so for different reasons (so Judge Reinhardt's vote made a difference.)

On appeal, the Supreme Court vacated the judgment and remanded, finding that, because Judge Reinhardt was no longer a judge at the time when the *en banc* decision in this case was filed, the Ninth Circuit erred in counting him as a member of the majority. That practice effectively allowed a deceased judge to exercise the judicial power of the United States after his death. "[F]ederal judges are appointed for life, not for eternity."

DISCRIMINATION/HARASSMENT/RETALIATION

COMMON LAW CONTROL TEST DETERMINES WHETHER ENTITIES ARE JOINT EMPLOYERS FOR PURPOSES OF TITLE VII LIABILITY

EEOC v. Global Horizons, 915 F.3d. 631 (9th Cir. 2019)

Green Acre Farms and Valley Fruit Orchards (the "Growers") retained Global Horizons, Inc., a labor contractor, to obtain temporary workers for their orchards. Global Horizons recruited workers from Thailand and brought them to the United States under the H-2A guest worker program. Two of the Thai workers filed discrimination charges against the Growers and Global Horizons with the Equal Employment Opportunity Commission (EEOC). After an investigation, the EEOC brought this action under Title VII of the Civil Rights Act of 1964 alleging, among other things, that the Growers and Global Horizons subjected the Thai workers to poor working conditions, substandard living conditions, and unsafe transportation on the basis of their race and national origin.

The district court entered a default judgment against Global Horizons after it became insolvent and discontinued its defense. That left this case focused solely on the liability of the Growers. Title VII imposes liability for discrimination on "employer[s]." 42 U.S.C. § 2000e-2(a). Thus the threshold question was whether the Growers and Global Horizons were joint employers of the Thai workers for Title VII purposes. The district court granted in part the Growers' Fed. R. Civ. P. 12(b)(6) motions to dismiss. The district court drew a distinction between orchard-related matters (managing, supervising,

and disciplining the Thai workers at the orchards), primarily the responsibility of the Growers, and non-orchard-related matters (housing, feeding, transporting, and paying the workers), primarily the responsibility of Global Horizons. The EEOC appealed.

The panel noted that this case was the first to determine what test to employ for determining whether an entity is a joint employer under Title VII. In reversing the district court's determination that the Growers could not be held liable under Title VII for non-orchard-related matters.

The court of appeals reversed and remanded, holding that the EEOC had plausibly alleged the Growers' liability as a joint employer for the discriminatory conduct of Global Horizons. The panel held that the common-law agency test (rather than the economic reality test) should be applied. Under the common-law test, the principle guidepost is the element of control, and the panel concluded that the EEOC adequately alleged that the Growers' employment relationship with the Thai workers also subsumed non-orchard-related matters. The panel further directed that the district court should then reconsider the disparate treatment claim (and the related pattern-or practice claim) in light of the EEOC's allegations regarding both orchard-related and non-orchard-related matters.

PLEADING THAT DISCRIMINATION WAS A FACTOR IN THE ACTION TAKEN (I.E. MIXED MOTIVE) IS SUFFICIENT TO ALLEGE A VIABLE RACE DISCRIMINATION CLAIM UNDER 42 U.S.C. § 1981

National Association of African American-Owned Media v. Charter Communications, 915 F.3d 617 (9th Cir. 2019)

Entertainment Studios Networks, Inc. (Entertainment Studios), an African American-owned operator of television networks, sought to secure a carriage contract from Charter Communications, Inc. (Charter). (A "carriage contract" is one with operators, from local cable companies to nationwide enterprises, to carry and distribute channels and programming to the operators' television subscribers.) These efforts were unsuccessful, and Entertainment Studios, along with the National Association of African American-Owned Media (NAAAOM), sued, claiming that Charter's refusal to enter into a carriage contract was racially motivated in violation of 42 U.S.C. § 1981. The district court, concluding that Plaintiffs' complaint sufficiently pleaded a § 1981 claim and that the First Amendment did not bar such an action, denied Charter's motion to dismiss. The court then certified that order for interlocutory appeal.

The court of appeals affirmed, holding that a plaintiff need not plead that racial discrimination was the but-for cause of a defendant's conduct, but only that racial discrimination was a factor (i.e. a mixed motive) in the decision not to contract such that the plaintiff was denied the same right as a white citizen.

INABILITY TO OBTAIN AND USE PRIVILEGED PRIMARY SOURCE DATA SUCH AS TAX RETURNS NOT FATAL TO WHISTLEBLOWER PLAINTIFF'S PROOF OF POTENTIAL RETALIATION FOR HAVING RAISED TAX COMPLIANCE ISSUES

Siri v. Sutter Home Winery, Inc., 31 Cal.App.5th 598 (2019)

Plaintiff Says Siri was employed as a General Ledger Staff Accountant for Sutter Home Winery (doing business as Trinchero Family Estates, or "TFE"). According to her complaint, her primary duties included filing sales and use tax returns for applicable states, including the State of California. Siri believed that TFE was in noncompliance with state law pertaining to use tax payments, and she claimed she repeatedly voiced her concerns to her direct supervisor and to TFE top management. She also communicated in writing to TFE's general counsel her concerns, and later alerted TFE management that she had consulted the California State Board of Equalization ('BOE'). She told them that the BOE had confirmed that Siri was correct relative to her belief that TFE owed use taxes. Siri claimed that TFE management subsequently retaliated against her by singling her out for special scrutiny, withdrawing duties from her, giving to someone else an office that had been promised to her, treating her as a pariah, and, ultimately, terminating her employment. Siri sued for wrongful termination in violation of public policy and for whistleblower retaliation in violation of Labor Code section 1102.5.

A protracted discovery battle ensued over Siri's ultimately unsuccessful attempts to obtain TFE's tax returns, after which TFE successfully moved for summary judgment. Its theory was that the tax returns were privileged, Siri could not prove her case without them, and she was not permitted to use them. ("When a party cannot litigate a claim without disclosing privileged information, the claim must be dismissed." [*General Dynamics v. Superior Court*, 7 Cal.4th 1164, 1190 (1994)].)

The appellate court reversed, holding that while the tax returns themselves might strengthen her case, even without them Siri could prove she was retaliated against and terminated based on her whistleblowing activity of raising the tax-avoidance issue.

SECTION 998 HAS NO APPLICATION TO COSTS AND ATTORNEY AND EXPERT WITNESS FEES IN A FEHA ACTION UNLESS THE LAWSUIT IS FOUND TO BE "FRIVOLOUS, UNREASONABLE, OR GROUNDLESS" WHEN BROUGHT, OR THE PLAINTIFF CONTINUED TO LITIGATE AFTER IT CLEARLY BECAME SO.

Huerta v. Kava Holdings, Inc. 29 Cal.App.5th 74 (2018)

Defendant Kava Holdings, Inc., dba Hotel Bel-Air (defendant) terminated two restaurant servers after they were involved in an altercation during work. One of the fired employees, plaintiff Felix Huerta, sued on a variety of legal theories, most of which were dismissed before or during trial. The trial court granted defendant's motion for nonsuit as to plaintiff's claim for retaliation under the Fair Employment and Housing Act (FEHA; Gov. Code, § 12900 et seq.), and allowed the jury to decide plaintiff's FEHA causes of

action for harassment based on a hostile work environment, discrimination, and failure to prevent harassment and/or discrimination. The jury returned a verdict for defendant. The trial court then found that plaintiff's action was not frivolous and denied defendant's motion for attorney fees, expert fees and costs under Government Code section 12965, subdivision (b) (section 12965(b)). Based on plaintiff's rejection of defendant's pretrial Code of Civil Procedure section 998 settlement offer, however, the trial court awarded defendant $50,000 in costs and expert witness fees under that statute. Plaintiff appealed.

In the published portion of the opinion, the court reversed. It noted that, effective January 1, 2019, section 998 will have no application to costs and attorney and expert witness fees in a FEHA action unless the lawsuit is found to be "frivolous, unreasonable, or groundless when brought, or the plaintiff continued to litigate after it clearly became so." For litigation that predates the application of the amended version of section 12965(b), the court held section 998 does not apply to nonfrivolous FEHA actions and reversed the order awarding defendant costs and expert witness fees pursuant to that statute. (*Arave v. Merrill Lynch, Pierce, Fenner & Smith, Inc.* (2018) 19 Cal.App.5th 525 (*Arave*).)

THE FEDERAL AGE DISCRIMINATION IN EMPLOYMENT ACT APPLIES TO STATE AND LOCAL GOVERNMENT EMPLOYERS REGARDLESS OF THEIR SIZE

Mount Lemmon Fire Dist. v. Guido, 586 U.S. ___, 139 S.Ct. 22, 2018 WL 5794639 (2018)

Faced with a budget shortfall, the Mount Lemmon Fire District laid off two firefighters, John Guido and Dennis Rankin, who also happened to be their oldest firefighters. They filed suit, alleging that the Fire District, a political subdivision in Arizona, terminated their employment as firefighters in violation of the Age Discrimination in Employment Act of 1967 (ADEA). The Fire District successfully moved for summary judgment, arguing that it was too small to qualify as an "employer" under the ADEA, which provides: "The term 'employer' means a person engaged in an industry affecting commerce who has twenty or more employees . . . . The term also means (1) any agent of such a person, and (2) a State or political subdivision of a State . . . ." 29 U.S.C. § 630(b). On appeal, the Ninth Circuit reversed and remanded, holding that the "also means" clause added a new category of employers without restrictions of size. The U.S. Supreme Court took up the petition for review and affirmed.

Initially, both Title VII of the Civil Rights Act of 1964 and the ADEA applied solely to private sector employers, but both were amended (in 1972 and 1974, respectively) to cover state and local governments. The Title VII amendment (to the definition of "persons" engaged in an industry affecting commerce) subjected states and their subdivisions to liability only if they employ a threshold number of workers, currently 15. By contrast, the 1974 ADEA amendment added state and local governments directly to the definition of "employer," and without a size limitation. The Court acknowledged that reading the ADEA's definitional provision to apply to States and political subdivisions regardless of size may give the ADEA a broader reach than Title VII, but found that this

disparity is a consequence of the different language Congress chose to employ. The Court wrote that the better comparator for the ADEA is the FLSA, which also ranks States and political subdivisions as employers regardless of the number of employees they have. The Equal Employment Opportunity Commission has, for 30 years, interpreted the ADEA to cover political subdivisions regardless of size, and a majority of the States impose age discrimination proscriptions on political subdivisions with no numerical threshold. For all these reasons, the court of appeals' decision was affirmed.

ADAAA PLAINTIFF MUST SHOW ONLY THAT HE HAS BEEN SUBJECTED TO A PROHIBITED ACTION BECAUSE OF AN ACTUAL OR PERCEIVED IMPAIRMENT REGARDLESS OF WHETHER OR NOT THE IMPAIRMENT LIMITS OR IS PERCEIVED TO LIMIT A MAJOR LIFE ACTIVITY.

Nunies v. HIE Holdings, 908 F.3d 428 (9th Cir. 2018)

Herman Nunies was a delivery driver for HIE Holdings, Inc. ("HIE"), a company that purchases, sells, and distributes food products for residential and commercial use. Nunies' primary duties included operating HIE's company vehicle; loading, unloading, and delivering five-gallon water bottles; and occasionally assisting in the warehouse. The position required lifting and carrying a minimum of 50 pounds and other physical tasks. Sometime in mid-June 2013, Nunies sought to transfer from his full-time delivery driver position to a part-time warehouse position. The parties dispute the motivation for this switch. Nunies attributed his desire to switch to the pain he had developed in his left shoulder. HIE – through a supervisor, Victor Watabu – contended that Nunies wanted to transfer so that he could focus on his independent side-business. Nunies found a part-time warehouse employee, Sidney Aguinaldo, who agreed to swap positions with him. Watabu contacted HIE's Honolulu office because that office needed to approve the Nunies-Aguinaldo swap. According to Watabu, the Honolulu office "tentatively" approved the switch pending resolution of some pay and duties questions. Nunies asserts that on June 14, 2013, Watabu told him that the switch had been approved.

On June 17, 2013, Nunies notified his operations manager and Watabu that he was having shoulder pain. Two days later (on June 19), Watabu told Nunies that HIE would not extend the part-time warehouse position to him and that Nunies' last day would be July 3. Watabu said "[y]ou gotta resign" because "[y]our job no longer exists because of budget cuts." HIE's termination report (dated June 27) identified Nunies' separation as a "resignation," and it said that the reason for the separation was that the "part-time position [was] not available." However, on June 24, 2013, Watabu emailed his HIE colleagues on an email chain about Nunies' last day of employment, and asked, "can you scan a copy for a job opening for a part-time warehouseman ad[?]" Further, Nunies saw an ad for the position in the newspaper on June 26, 2013, one day before HIE completed Nunies' termination report.

Nunies brought a disability discrimination suit against HIE under the ADA and state law, arguing that HIE terminated him because of his shoulder injury. HIE moved for summary judgment, which the district court granted, concluding that Nunies did not have a "disability" under the ADA because he had not established that his shoulder injury

"substantially limited" any "major life activity." The district court also found that Nunies did not establish a record of impairment. Finally, the district court concluded that Nunies had not established that HIE regarded him as having a disability because Nunies did not come forward with any evidence that HIE subjectively believed that Nunies was substantially limited in a major life activity.

On appeal, the Ninth Circuit reversed. The panel held that, under the ADA Amendments Act adopted in 2008 (ADAAA), the scope of the ADA's "regarded-as" definition of disability was expanded. Prior to the ADAAA, to sustain a regarded-as claim, a plaintiff had to provide evidence that the employer subjectively believed the plaintiff was substantially limited in a major life activity. Under the ADAAA, however, the plaintiff must show only that he has been subjected to a prohibited action "because of an actual or perceived physical or mental impairment whether or not the impairment limits or is perceived to limit a major life activity." Applying the correct law, and viewing the evidence in the light most favorable to the non-moving party, the panel concluded that Nunies established a genuine issue of material fact as to whether HIE regarded him as having a disability. The panel further held that the district court further erred in concluding that the plaintiff did not meet the definition of an actual disability under the ADA, which requires a showing that the plaintiff has a physical or mental impairment that limits one or more major life activities. The panel also concluded that there was at least a dispute about whether the plaintiff's shoulder injury limited the life activities of working and lifting.

998 OFFER THAT IS SILENT ON COSTS OR FEES MEANS THOSE ARE EXCLUDED FOR PURPOSES OF COMPARISON TO A JURY'S ULTIMATE DAMAGE AWARD TO DETERMINE WHETHER PLAINTIFF OBTAINED A MORE FAVORABLE RESULT THAN THE 998 OFFER.

Martinez v. Eatlite One, Inc., 27 Cal.App.5th 1181 (2018)

Plaintiff Samantha Martinez sued defendant Eatlite One, Inc., for employment discrimination among other things. Eatlite made a 998 offer of $12,001 that was silent on the issue of fees and costs. After the jury later found in favor of plaintiff and awarded $11,490 in damages, both parties submitted competing memoranda of costs, and plaintiff filed a motion for attorney fees. The trial court awarded costs and attorney fees to Martinez, finding that because plaintiff won $11,490 plus costs and fees, the win exceeded Eatlite's 998 offer of $12,001. Eatlite appealed, contending that plaintiff did not obtain a judgment more favorable than defendant's offer to compromise under Code of Civil Procedure section 998.

The appellate court reversed. When a 998 offer is silent as to costs and fees, it automatically means those are added to the numerical offer. Thus if Martinez had accepted, she would have received the $12,001 plus her costs and fees. She did not obtain a more favorable judgment than Eatlite's 998 offer, and thus could not recover her post-offer costs or fees.

RESTRICTIONS IN A "LAST CHANCE" AGREEMENT PRECLUDING ANY SPEECH OF A DISPARAGING OR NEGATIVE NATURE ABOUT THE CITY OR POLICE DEPARTMENT ARE AN IMPERMISSIBLE PRIOR RESTRAINT ON PROTECTED SPEECH

Barone v. City of Springfield, 902 F.3d 1091 (9th Cir. 2018)

Plaintiff Thelma Barone was a community services officer for the police department ("Department") at the City of Springfield, Oregon. Some of her primary duties related to victim advocacy and acting as liaison to the city's minority communities. Throughout her tenure (which dated back to 2003), members of the Latino community complained of racial profiling by the Department, and Barone relayed these complaints to the Department's leadership. These complaints increased in 2013 around the same time as the Department was going through a leadership transition to a new chief.

In 2014, the Department began investigating Barone in connection with two Department-related incidents. The first incident involved a school tour Barone led through the Department, during which she allegedly permitted some students to take photos of photo-restricted areas. In the second incident, Barone was unable to reach a sergeant about a crime a victim reported, but she left a message with the dispatchers and asked the sergeant to return her call. The sergeant never returned her call because he said he did not know the phone call pertained to a possible crime, and the parties disputed whether Barone informed the dispatchers that she wanted to speak to the sergeant about an alleged crime.

While these investigations were still ongoing, in early 2015, Barone spoke at a City Club of Springfield event headlined "Come Meet Thelma Barone from the Springfield Police Department." The Department paid her to attend the event; she wore her uniform; and her supervisor attended. She understood that she attended and participated in the event as a representative of the Department. A member of the audience at the event asked her whether she was aware of increasing community racial profiling complaints. She said that she "had heard such complaints." She was placed on administrative leave shortly thereafter (due to alleged dishonesty in the 2014 investigations). The Department later concluded she had violated code of conduct provisions, issued discipline (a 4-week suspension), and presented her with a last chance agreement ("LCA"). The agreement stated: "Consistent with SPD General Order 26.1.1.XIX, Employee will not speak or write *anything of a disparaging or negative manner related to the Department/ Organization/City of Springfield or its Employees*. Employee is not prohibited from bringing forward complaints she reasonably believes involves discrimination or profiling by the Department." (Emphasis added.) When Barone did not sign the LCA, the Department terminated her employment. She sued the City, the chief, and several other officials for First Amendment retaliation and imposing an unlawful prior restraint. The district court granted defendants motion for summary judgment (including qualified immunity for the individuals), and Barone appealed.

The Ninth Circuit affirmed on the retaliation claim, holding that because she spoke as a public employee at the community event, her speech there was not subject to First

Amendment protections. However, the Court reversed and remanded on the prior restraint claim. The LCA language was deemed an impermissibly broad encroachment into "issues of public concern" beyond the scope of her job that would sweep in any disagreement about the City's services, employees, or elected officials, including speech on topics or individuals that do not overlap with Barone (e.g. critique of the City's cleanliness, water quality, or tax and revenue policies.) The Court rejected argument that the Department may not have intended to restrict protected speech, because intent is not the focus of a prior restraint analysis. Rather, the focus is on the chilling effect created, i.e., whether an employee would perceive or understand a policy to prohibit otherwise protected speech.

FAIR EMPLOYMENT AND HOUSING ACT DOES NOT PRECLUDE PUBLIC EMPLOYER FROM TREATING RETIREES AS A GROUP DIFFERENTLY, WITH REGARD TO MEDICAL BENEFITS, THAN EMPLOYEES AS A GROUP

Harris v. County of Orange, 902 F.3d 1061 (9th Cir. 2018)

This is the latest decision in a series of cases between the County of Orange and its retirees. The County restructured two retiree benefits: the Retiree Premium Subsidy (which combined active and retired employees into a single unified pool for purposes of calculating medical insurance premiums); and the so-called "Grant Benefit" (providing retired employees with a monthly grant to defray the cost of health care premiums). The retirees contended that the County's decision in 2006 to eliminate the Retiree Premium Subsidy and to reduce the Grant Benefit increased their health care costs significantly. Their class action suit alleged (1) the reduction in the Grant Benefit breached the County's implied contractual obligations and deprived them of vested rights; and (2) that the elimination of the Retiree Premium Subsidy violated California's Fair Employment and Housing Act ("FEHA") prohibitions against age discrimination. The trial court granted defendants' motion to dismiss, and the retirees appealed.

First, the Ninth Circuit held that the retirees' second amended complaint set forth sufficient allegations regarding the continuation of the Grant Benefit during the employees' lifetime to survive a motion to dismiss. The panel noted that the retirees alleged the existence of annual memorandum of understanding between the union and the County, establishing a right to the Grant Benefit; and the retirees' specific allegations plausibly supported the conclusion that the County impliedly promised a lifetime benefit, which could not be eliminated or reduced. The panel thus reversed the district court's order as to the retirees' contract claims regarding the Grant Benefit.

As to the FEHA claim, the panel noted that California law did not fault the County for offering different benefits to retirees and to active employees at the outset, absent a FEHA violation. Given the novel nature of this theory, the court looked to federal cases interpreting employment discrimination and civil rights for guidance. The panel held that the federal Age Discrimination in Employment Act (ADEA) applied to retirees. The panel further held that changes in retirees' health benefits were covered by FEHA, despite the fact that they were not active employees. The County's elimination of the subsidy did not discriminate among retirees based on age, nor did the subsidy elimination

distinguish among active employees based on age, or against active employees who are old enough to retire but had not. The panel concluded that the County, under the ADEA, and so, under California's FEHA age discrimination provisions, may treat retirees as a group differently, with regard to medical benefits, than employees as a group, taking into account that the cost of providing medical benefits to the retiree group was higher because the retirees were on average older. Thus the court affirmed dismissal of the FEHA claim.

ARTISTIC CHOICE OF MUSICIANS FALLS WITHIN AMBIT OF FREE SPEECH RIGHTS FOR PURPOSES OF AN ANTI-SLAPP MOTION TO STRIKE

Symmonds v. Mahoney, 31 Cal.App.5th 1096 (2019).

Edward Mahoney is a singer and songwriter who performs in concerts across the country. In 2015, he terminated his drummer of 41 years, plaintiff Glenn Symmonds, who subsequently sued Mahoney and his production company for discrimination on the basis of age, disability, and medical condition. Defendants filed an anti-SLAPP motion arguing that Mahoney's decision as to which musicians performed with him was an act in furtherance of the exercise of his constitutional right of free speech in connection with an issue of public interest, and thus protected under Code of Civil Procedure section 425.16. The trial court denied the motion, finding that Symmonds' cause of action arose from defendants' discriminatory conduct, not the decision to terminate him, and thus Symmonds' claim did not implicate Mahoney's free speech rights. Defendants appealed.

The appellate court reversed, holding that defendants met their burden to establish that Mahoney's decision to terminate Symmonds was protected conduct. Specifically, "a singer's selection of the musicians that play with him both advances and assists the performance of the music, and therefore is an act in furtherance of his exercise of the right to free speech." The court remanded so the trial court could conduct the second step of the anti-SLAPP analysis and determine whether Symmonds demonstrated a probability of prevailing on the merits of his claim.

TITLE VII CLAIMS OF RETALIATION AND HOSTILE WORK ENVIRONMENT ARE SUBJECT TO THE "RELIGIOUS ORGANIZATION EXEMPTION" IN THE SAME WAY THAT HIRING AND FIRING DECISIONS ARE EXEMPT

Garcia v. Salvation Army, __ F.3d __, 2019 WL 1233216 (9th Cir. 2019)

Founded in London in 1865, the Salvation Army describes itself as "an evangelical part of the universal Christian church," whose professed mission is "to preach the gospel of Jesus Christ and to meet human needs in His name without discrimination." It operates in the U.S. through 501(c)(3) nonprofit corporations. Ann Garcia's relationship with the Salvation Army dated to 1999, when she began attending religious services at the Estrella Mountain Corps in Avondale, Arizona. In 2002, the Corps hired her to work as an assistant to the pastor, a position she held until July 2010, when Arlene and Dionisio Torres became the new pastors. No longer in need of an assistant, Arlene Torres

reassigned Garcia to the position of social services coordinator in January 2011. In that role, Garcia aided clients under the supervision of Arlene Torres. In late 2011, Garcia and her husband "left the Church" and stopped attending the Salvation Army's religious services, but Garcia continued her work as social services coordinator. Afterward, her relationship with Torres began to deteriorate.

Tensions reached new heights in July 2013, when a client filed a lengthy complaint letter against Garcia, claiming that she "refused to provide help to [the client's] family." Garcia filed an internal grievance of her own against Torres regarding the handling of the complaint, claiming that she "fe[lt] discriminated against and excluded and isolated" at work ever since leaving the church. She filed charges with the EEOC and Arizona state authorities for religious discrimination and retaliation. Following a lengthy period of medical leave, the Salvation Army fired Garcia after she failed to report to work despite being cleared by her doctor. Garcia then filed a second complaint with the EEOC and state authorities alleging that the Salvation Army failed to accommodate her disability.

After right-to-sue letters issued, Garcia brought suit alleging claims under Title VII of the Civil Rights Act of 1964 (Title VII) and the Americans with Disabilities Act (ADA). In sum, Garcia alleged that the Salvation Army subjected her to a hostile work environment because she stopped attending religious services and retaliated against her for filing an internal grievance complaining of religion-based mistreatment. The resulting stress allegedly precipitated health problems that the Salvation Army failed to accommodate. The district court granted summary judgment to the Salvation Army, holding that Title VII's religious organization exemption (ROE) protects the Salvation Army from suit (even though it had originally failed to timely assert the defense.) Garcia appealed.

The Ninth Circuit affirmed. The party seeking benefit of the ROE bears the burden of proving that it is "..a religious corporation, association, educational institution, or society with respect to the employment of individuals of a particular religion to perform work connected with the carrying on by such corporation, association, educational institution, or society of its activities." It does not suffice that an institution be "merely 'affiliated' with a religious organization." *EEOC v. Townley Eng'g & Mfg. Co.*, 859 F.2d 610, 617 (9th Cir. 1988). Rather, an institution must show that its "purpose and character are primarily religious" based upon "[a]ll significant religious and secular characteristics." The court held that the Salvation Army met its burden. It holds regular religious services. It offers social services to customers regardless of their religion "to reach new populations and spread the gospel." The Ninth Circuit held that such exemption applies to retaliation and hostile work environment claims under Title VII, as well as to claims regarding its hiring and firing decisions.

PUBLIC AGENCY

USE OF FORCE POLICIES REMAIN A MATTER OF MANAGERIAL PREROGATIVE NOT SUBJECT TO BARGAINING, ALTHOUGH SUCH POLICIES MAY HAVE EFFECTS REQUIRING NEGOTIATIONS

San Francisco Police Officers' Ass'n v. San Francisco Police Comm'n, 27 Cal.App.5th 676 (2018)

The Association is the recognized employee organization within the meaning of the Meyers-Milias-Brown Act (MMBA) representing SFPD police officers. (See § 3501(b).) Under the San Francisco Charter, the San Francisco Police Commission has authority to "prescribe and enforce any reasonable rules and regulations that it deems necessary to provide for the efficiency of the [SFPD]...." In late 2015, the Commission announced that it planned to revise SFPD's use of force policy and began meeting with use of force policy experts, community members, and other stakeholders, seeking to build public trust and engagement and to ensure that the policy reflected the best practices in law enforcement. The Association requested that the City meet and confer regarding the Commission's proposed policy, the City stated that "[w]hile the formation of the policy is a managerial right outside the scope of bargaining, we welcome the [Association's] participation as a stakeholder in this preliminary process." The City did agree to meet with the Association once the new policy was approved, "to consider the negotiable impacts that the policy may have."

In June 2016, the Commission voted unanimously to adopt the revised policy, subject to "meet and confer" with the Association. Over the following five months, the City met nine times with the Association. From the outset, the City stated that it was reserving "all rights related to its management rights and what matters, if any, fell within the scope of representation." The City ultimately concluded it could not agree to the Association's proposed exceptions to the provision that prohibited carotid holds and shooting at moving vehicles. The City therefore determined that any further discussion of that issue would be futile and declared impasse. The Association filed a grievance under the MOU, alleging that the City had declared impasse prematurely and had failed to negotiate in good faith. The City reconsidered its position, ultimately concluding that it would no longer negotiate regarding "out-of-scope management rights" and that four of the five remaining areas of disagreement "were outside the scope of representation and clearly management rights." These included, inter alia, the strict prohibition against shooting at moving vehicles and the ban of the use of the carotid restraint. The only remaining issues the City believed were within the scope of representation were related to training and discipline. On November 3, the City sent a letter to the Association explaining its position, and the parties subsequently reached agreement on training and discipline under the new policy.

On December 20, 2016, the Association sought a temporary restraining order and a preliminary injunction preventing implementation of the use of force policy and further seeking an order compelling arbitration under the MOU and a writ of mandate ordering the City to participate in impasse resolution procedures under the City Charter or state

law. The next day, the Commission voted unanimously to adopt the revised use of force policy, which included the provisions prohibiting the carotid hold and shooting at moving vehicles challenged by the Association. The Association filed another application for a temporary restraining order and preliminary injunction to stay implementation of the new policy pending arbitration of its grievance. The trial court denied the requested relief based on its findings that (1) the Association was unlikely to prevail on the merits at trial because under California law, a use of force policy is a managerial decision, regarding which the City was not subject to meet and confer requirements, and (2) "the balancing of 'interim harm' " favored the City. The Association then filed a petition to compel arbitration, which the trial court rejected, and the Association appealed.

The appellate court held that the duty to meet and confer did not apply to the Commission's revised use of force policy because the policy fell within the City's exclusive managerial authority and was not subject to arbitration under the MOU with the Association. Where an action is taken pursuant to a fundamental managerial or policy decision, it is within the scope of representation only if the employer's need for unencumbered decision-making in managing operations is outweighed by the benefits to employer-employee relations of bargaining about the action in question. According to the court, that is not the case with revisions to use of force policies as these policies mainly concern public safety as opposed to wages, hours and working conditions. While it could impinge on conditions of employment, the court found that it could only impinge indirectly and as such, the policy was considered a fundamental managerial decision outside the scope of representation and not subject to arbitration.

"AIR TIME" BENEFITS UNDER THE CALIFORNIA PUBLIC EMPLOYEES' RETIREMENT LAW ARE NOT VESTED RIGHTS AND THUS MAY BE LEGISLATIVELY ALTERED

Cal Fire Local 2881 v. California Public Employees' Retirement System, __ Cal. __ (2019), 244 Cal.Rptr.3d 149 (March 4, 2019)

Plaintiffs challenged the elimination of "airtime" benefits due to enactment of the Public Employees' Pension Reform Act, or PEPRA, in 2013. Previously, CalPERS permitted eligible members to purchase up to five additional years of airtime. The plaintiffs challenged the application of Government Code section 7522.46 by filing a petition for writ of mandate and injunctive relief seeking the court to order CalPERS to continue permitting classic members, who otherwise meet the service credit eligibility requirements, to continue to purchase airtime. After losing at the trial and appellate court levels, the plaintiffs filed a petition for review with the California Supreme Court.

The California high court ruled that the ability to purchase airtime was not a vested right, and as such was subject to the Legislature's alteration. In deciding the question narrowly, the court declined to address the so-call "California Rule" (aka vested rights doctrine) which recognizes that public employees obtain a vested contractual right to pension benefits as soon as they begin employment that may not be destroyed, once vested, without impairing a contractual obligation. The court did not rule on to what extent, if at all, a vested right may be impaired, but note that not all public employment benefits are

pension rights, even though they may affect the pension benefit that is paid to an employee upon retirement. The special protection extended to vested pension rights is rooted in the understanding that pension rights are a form of deferred compensation granted in exchange of services rendered, but not paid until a future date.

STATUTORILY REQUIRED PRECURSORS TO DISCIPLINARY ACTION UNDER THE EDUCATION CODE WERE PROPERLY CONSIDERED IN A CLOSED SESSION WITHOUT 24-HOUR NOTICE TO THE EMPLOYEE

Ricasa v. Office of Admin. Hearings, 31 Cal.App.5th 262 (2018)

After Arlie Ricasa was criminally charged for accepting gifts (such as dinners and a scholarship for her daughter) she did not report on Form 700s, the Southwestern Community College District (Southwestern) demoted Arlie Ricasa from an academic administrator position to a faculty position on the grounds of moral turpitude, immoral conduct, and unfitness to serve in her then-current role. Ricasa filed two petitions for writs of administrative mandamus in the trial court seeking, among other things, to set aside the demotion and reinstate her as an academic administrator. The trial court denied the petitions, and on appeal, Ricasa argued that the demotion occurred in violation of the Ralph M. Brown Act (the Brown Act) (Gov. Code, § 54950 et seq.) because Southwestern failed to provide her with 24 hours' notice of the hearing at which it heard charges against her, as required by Government Code section 54957. She further argued that the demotion was unconstitutional because no nexus exists between her alleged misconduct and her fitness to serve as academic administrator. Southwestern also appealed, arguing that the trial court made two legal errors when it: (1) held that Southwestern was required to give 24-hour notice under the Brown Act prior to conducting a closed session at which it voted to initiate disciplinary proceedings, and (2) enjoined Southwestern from committing future Brown Act violations.

The court of appeal concluded that, based on the intersection between the Education Code and the Brown Act, Southwestern had not violated the Brown Act (and that substantial evidence supported Ricasa's demotion.) Specifically, Education Code section 87671 required that the Board hold the May meeting before it could demote Ricasa. Section 87669 allowed the Board to impose an immediate penalty. Section 87671 required that Dr. Nish, the District's president and superintendent, present her recommendation to the Board at a Board meeting, along with copies of specified documents. Southwestern took all these required steps in a closed session with the agenda description of “Public Employee Discipline/Dismissal/Release.” As such, the 24-hour notice required for the presentation of specific complaints or charges was deemed not to apply.

COURT CAN REGULATE ITS OWN EMPLOYEES' DRESS AND INSIGNIA IN PUBLIC AREAS IN ORDER TO ENSURE THE APPEARANCE OF IMPARTIALITY FOR PARTIES INVOLVED IN CASES THERE

Superior Court v. Public Employment Relations Board, 30 Cal.App.5th 158 (2018)

The Superior Court of Fresno County PERB that certain Court personnel rules and regulations (Personnel Rules) violated the Trial Court Employment Protection and Governance Act (Gov. Code, § 71600 et seq.) and, thus, constituted unfair labor practices. The Personnel Rules in question prohibited Court employees from (1) wearing clothing or adornments with writings or images, including pins, lanyards and other accessories; (2) soliciting during working hours for any purpose without prior Court approval; (3) distributing literature during nonworking time in working areas; and (4) displaying writings or images not published by Court in work areas visible to the public. Ruling on a challenge filed by Service Employees International Union Local 521, PERB found several aspects of the rules improper with respect to Union members. Specifically, PERB concluded rules prohibiting employees from wearing certain clothing anywhere in the courthouse and from displaying images that are not published by Court in work areas visible to the public overly broad and interfered with rights protected by the Trial Court Act. It also determined the restriction on soliciting during work hours and the ban on distributing literature in working areas were ambiguous and overly broad. Relatedly, PERB considered and upheld its authority to remedy these violations and ordered Court to rescind the rules. The court sought review via writ petition.

The appellate court reversed on all but one issue. It held that the superior court has a substantial interest in regulating its workforce to ensure that the judicial process appears impartial to all appearing before it. Under the existing law and the facts presented regarding interactions with the public in the relevant courthouses, the court of appeals held this interest is sufficient to justify the broad restrictions on employee clothing adopted in this case. Furthermore, the court ruled that the bans on soliciting during working hours and displaying images in areas visible to the public were not ambiguous and thus were properly adopted. However, the court did agree with PERB that the regulations prohibiting the distribution of literature in working areas were ambiguous as to the meaning of "working areas," and therefore, despite separation of powers concerns PERB was permitted to impose a remedy with respect to that regulation.

POBRA'S ONE-YEAR STATUTE OF LIMITATIONS IS TOLLED DURING A CRIMINAL INVESTIGATION UNTIL FORMAL NOTIFICATION THAT CRIMINAL CHARGES WILL NOT BE FILED

Bacilio v. City of Los Angeles, 28 Cal.App.5th 717 (2018)

Edgar Bacilio was an officer with the LAPD. He and his partner (Escobar) responded to a domestic dispute on March 30, 2011, which resulted in arresting the father and placing the minor child with the wife. Later in the shift they conducted a welfare check of the child at the wife's apartment, and Bacilio later reported he and Escobar spent 115 minutes at the apartment during the shift, but other records including the unit log placed

Bacilio there 12 minutes and Escobar 86 minutes. On August 4, 2011, the mother filed a report alleging that Escobar had spent 90 minutes in her apartment and, while there, had kissed her, touched her breasts and vaginal area over her clothes, and propositioned her for sex. The wife later picked Escobar out of a photo spread, indicating that she was 60 to 70 percent sure he was the one who sexually assaulted her. The Internal Affairs Division commenced an investigation (both criminal and administrative) into both officers' conduct.

The IA investigators presented findings to the District Attorney June 3, 2013, and sought prosecution of Escobar for felony sexual battery under color of authority. The deputy DA interviewed the wife August 6, 2013, and immediately after the interview told the IA investigator she most likely would not be filing charges and that it was "ok to do the administrative interviews" with Bacilio and a third officer as they were not criminally involved. October 3, 2013, the DA's office sent written notification to the LAPD declining to prosecute the three officers.

On September 10, 2014, the LAPD served Bacilio with notice that Internal Affairs was seeking an official reprimand against him based on the underlying incident. In November 2014, the LAPD brought 11 administrative charges against Escobar, Bacilio, and the third LAPD officer. The LAPD alleged two counts of misconduct against Bacilio: (1) "fail[ing] to maintain an accurate daily field activities report (DFAR)" during his March 30, 2011 shift, and (2) making "misleading statements" during his two interviews with Internal Affairs on September 27, 2013, and February 17, 2014. The LAPD sustained the first charge against Bacilio but found the second charge "Not Resolved." Following an evidentiary hearing on Bacilio's appeal, the hearing officer issued a written ruling finding that the LAPD had initiated administrative disciplinary proceedings against Bacilio in a timely manner because POBRA's one-year limitations period was tolled from the time of the wife's initial report until the DA formally declined prosecution on October 3, 2013. Bacilio challenged his discipline via writ petition, arguing that the discipline was barred by the statute of limitations. The trial court agreed with the hearing officer that the discipline had been timely due to the criminal investigation tolling the statute of limitations. Bacilio appealed.

The Public Safety Officers Procedural Bill of Rights Act (POBRA), Government Code section 3300 et seq., requires public agencies investigating misconduct by a public safety officer to complete their investigation and notify the officer of any proposed discipline within one year of discovering the misconduct. (§ 3304(d)(1).) If the possible misconduct "is also the subject of a criminal investigation or criminal prosecution," the one-year period is tolled while the "criminal investigation or criminal prosecution is pending." (§ 3304(d)(2)(A).) This case turned on the issue of when a criminal investigation is no longer "pending" The court of appeals held that a criminal investigation is no longer pending—and section 3304, subdivision (d)(2)(A)'s tolling period ends—when a final determination is made not to prosecute all of the public safety officers implicated in the misconduct at issue. Applying this definition, the court concluded that the tolling period did not end until the Los Angeles County District Attorney officially rejected prosecution of all three officers investigated in this case. Consequently, the investigation and discipline in this case was timely.

PUBLIC EMPLOYMENT RELATIONS BOARD DECISIONS

PUBLIC EMPLOYER MAY NOT SUBJECT UNION ACTIVITIES TO SPECIAL RESTRICTIONS AS TO WHETHER THEY MAY BE CONDUCTED ON WORKING TIME.

County of Orange, PERB Dec. No. 2611-M (2018)

On April 23, 2014, three County employees who were Local 2076 site representatives spent approximately 30 minutes distributing Union surveys to employees at their work stations in a Social Services Agency (SSA) building. An SSA manager directed the three employees to leave. Later that day, the County's human resources manager directed Local 2076 to immediately stop distributing surveys "to employees in work areas during work time." Following a hearing on the union's unfair practice charge, the ALJ found that this interfered with protected rights, and the full PERB Board agreed.

The Meyers-Milias-Brown Act affords both employee and non-employee representatives of employee organizations access to areas in which employees work, subject to reasonable employer regulation. Any such regulation must be both necessary to the employer's efficient operations or safety of employees or others, and narrowly drawn to avoid overbroad, unnecessary interference with the exercise of statutory rights. Because "work time is for work," an employer may restrict non-business activities during work time but "it may not single out union activities for special restriction, or enforce general restrictions more strictly with respect to union activities." Moreover, an employer's otherwise lawful access restrictions may nevertheless interfere with protected rights when applied discriminatorily against unions or protected activity. The Board pointed to evidence in the record that the county "disparately" enforced restrictions on employee activities, while allowing allowed "employee-run social committees to fundraise for office parties, birthday celebrations, and other social events or team-building activities during other employees' work time."

MMBA'S "PUBLIC HEARING" REQUIREMENT REQUIRES AT LEAST NOTICE TO THE PUBLIC OF THE POTENTIAL IMPOSITION OF TERMS AND THE TAKING OF PUBLIC COMMENT PRIOR TO AGENCY ACTION

City of Yuba City, PERB Decision No. 2603-M (2018)

Local 1 and the City began negotiations in March 2014. The City opened with one-year and two-year proposals, also presented to its other units, which sought to move employees toward paying 50 percent of normal pension cost, eliminating a furlough resulting from the prior bargaining cycle, capping the City's healthcare premium contributions at the current contribution rate, eliminating a me-too clause, and eliminating layoff protections. Following several weeks of meetings without significant progress, Local 1 declared impasse on September 23, 2014.

On a parallel path in the summer of 2014, the City had reached agreement with three of its other units that eliminated the furlough in two steps, phased out the employer paid member contributions (EPMC) over two years; split total healthcare premiums 80/20, and

provided two floating holidays. In September 2014, the City Council approved the similar terms for three more groups.

Mediation and factfinding did not resolve the impasse between the City and Local 1. In April, 2015, Local 1 membership voted to authorize a strike. In early May 2015, the City issued the agenda for the May 19 City Council meeting. The agenda included a closed session followed by a "Regular Meeting," at which the public was "welcome and encouraged to participate," with "[p]ublic comment . . . taken on items listed on the agenda when they are called." Item 13 on the agenda for the regular meeting was titled "Local 1 Imposition," and included a summary of the staff recommendation that the Council implement the last best and final offer (LBFO). Local 1's business agent later testified he regularly received City Council meeting agendas and reviewed attached materials on the City's website. He admitted that he had sufficient time to review the agenda materials for the May 19 meeting, discuss them with Local 1 leaders, and prepare for the Council meeting. At the meeting, staff presented its report, and the Mayor then "open[ed] up the public hearing" and invited public comment. Local 1's agent spoke and opposed implementation of the proposed terms. At the conclusion of the public hearing, the City Council voted to adopt a resolution implementing the LBFO term – these terms were less advantageous than those achieved by the other units who previously had reached 2-year agreements with the City. Local 1 filed unfair practice charge challenging (among other things) that the City had not held a "public hearing" regarding the impasse between the parties before it implementing its LBFO.

The ALJ and later the Board rejected the union's arguments. The Board noted that the "public hearing" requirement is not defined in the MMBA. At a minimum, the employer must provide adequate notice to the public that it intends to consider imposing terms and conditions on employees, and to allow public comment concerning the proposed imposition. The Board held the City had met these requirements.

RIGHT TO REQUESTED UNION REPRESENTATION ATTACHES PRIOR TO INVASIVE BODY "STRIP" SEARCH EVEN WHERE NO QUESTIONS ARE BEING ASKED OF THE SUBJECT BEING SEARCH

State of California (Dept. of Corrections & Rehabilitation), PERB Dec. No. 2598-S (2018)

Amy Ximenez went to work as a psychiatric technician for the California Department of Corrections and Rehabilitation (CDCR) in 2005. In order to obtain her CDCR identification, Ximenez signed a preprinted form (Form 894-A) acknowledging the departmental rule against bringing any drug or other contraband into a prison or making any such items accessible to an inmate, and further acknowledging that she is subject to search at any time while on CDCR grounds. Her CDCR career took her to an assignment at the California State Prison (CSP) Sacramento, where she worked as a group facilitator, assisting mental health inmates with coping skills and anger management.

In late June 2015, CSP investigate service members received an inmate tip that on July 1, Ximenez was going to bring narcotic powder into the prison. An "exigent" criminal

investigation was initiated, and two investigators were assigned to search Ximenez's person, bags, and vehicle when she reported for work on July 1. In preparation for the search and in order to demonstrate to Ximenez that she had authorized the search, they obtained a copy of Ximenez's signed Form 894-A.

Investigators stopped Ximenez at the gate on July 1, on her way in to work. She was visibly upset and repeatedly asked why the agents wanted to speak with her and asking whether they were going to "walk her off the grounds." They told her they were conducting a criminal investigation into an allegation that she was smuggling contraband into the prison and they were going to search her bags, her vehicle, and her person. Ximenez consented to the search of her bags, placing them on the table for the agents to go through them. She also consented to the search of her truck. Two female officers prepared to search her person, and they told Ximenez that she needed to remove her clothes for an unclothed body search. Ximenez stood up, pointed her finger down toward the ground, and demanded the presence of a union representative, a supervisor, or someone from peer support. One of the investigators told Ximenez that she did not have a right to a union representative because: (1) she was "only being searched, not questioned," and (2) she signed a consent to search, Form 894-A, when she was first hired. She was required to disrobe for a naked body search including visual inspection of her anal area. No drugs were found. Later that month, the California Association of Psychiatric Technicians filed an unfair practice charge (charge) against the CDCR as to denial of requested union representation prior to the search. After hearing, an administrative law judge found that Ximenez reasonably believed the search might result in disciplinary action and requested a representative, and that denial of her request violated the Dills Act and unlawfully violated the union's right to represent its members.

The Board upheld the ALJ's decision, citing various NLRB decisions holding that employees have a right to a *Weingarten* representative before being required to submit to a reasonable suspicion drug test. Further, the Board noted that both it and California courts, have recognized that, in at least several respects, the language of our state collective bargaining laws is "considerably broader than the federal law on which *Weingarten* rests." The Board went on to state that here, as in a drug testing situation, an invasive body search is such an unusual and stressful situation that an employee is likely to volunteer information in an effort at self-defense, and therefore has a right to union representation even if the employer does not intend to ask questions. The right to union representation therefore attaches before an employee is invasively searched, just as it attaches before an employee takes a drug or alcohol test. Once an employee communicates a request for representation, the employer must: "(1) grant the request; (2) dispense with or discontinue the interview; or (3) offer the employee the choice of continuing the interview unaccompanied by a union representative or of having no interview at all, and thereby dispensing with any benefits which the interview might have conferred on the employee."

RIGHT TO REQUESTED REPRESENTATION ATTACHES TO DIRECTIVE TO PROVIDE WRITTEN MEMO PRIOR TO LEAVING FOR THE DAY DURING INQUIRY INTO EMPLOYEE'S WHEREABOUTS DURING WORK HOURS

San Bernardino Community College Dist., PERB Dec. No. 2599-E (2018)

Adam Lasad was a community services officer in the District's police department who was questioned by his supervisor regarding his whereabouts during his work shift. Lasad, after answering some of Tamayo's questions, requested a union representative. The department's command staff agreed that Lasad had a right to a representative, but directed the supervisor to have Lasad draft a written statement before he was relieved of duty. The supervisor then told Lasad, "[W]e're not going to question you anymore," but "I just need a memo from you explaining where you were." Lasad was then placed alone in an office to draft his statement. In the room, he had his personal cell phone and a landline phone, and the contact information of at least one union representative, but he did not attempt to secure representation before drafting his statement. After evidentiary hearing on an unfair practice charge brought by the California School Employees Association (CSEA), the administrative law judge (ALJ) determined that the District violated the Educational Employment Relations Act (EERA) by denying Lasad his right to be represented in an investigatory interview.

With respect to the representation issue, the Board agreed, holding that an employee has the right to a union representative before submitting a written statement as part of an investigatory interview. The same reasons for providing a union representative during an oral interview apply to a request for a written statement. An employer faced with a valid request for representation has three options. It may: (1) grant the request; (2) discontinue the interview; or (3) offer the employee the choice of proceeding with the interview without union representation or having no interview at all. But the employer may not continue the interview without granting the requested union representation "unless the employee 'voluntarily agrees to remain unrepresented after having been presented by the employer with the choices' described above or 'is otherwise made aware of these choices.'" Here, the Board determined it was incumbent on Lasad's supervisor to act upon Lasad's request, either by granting it or terminating the interview unless it was clear that Lasad was waiving his right to union representation. The requested memo was deemed to be simply a continuation of the interview without doing so.

RIGHT TO REQUESTED REPRESENTATION ATTACHES TO DIRECTIVE TO PROVIDE WRITTEN MEMO WHERE EMPLOYEE REASONABLY BELIEVES DISCIPLINE MAY RESULT FROM THE MEMO AND HAS REQUESTED REPRESENTATION

County of San Joaquin, PERB Decision No. 2619-M (2018).

Joel Madarang worked as a Custody Recreation Supervisor at the County of San Joaquin's jail, where he supervised inmate recreation programs including bingo games for the female general population inmates on Thursday afternoons. His supervisor,

Kristen Hamilton, emailed him directing him to change the start time of the bingo games to 10:30 a.m. to make room for a new mental health program in the afternoon that was designed to decrease the recidivism rate. In the following months, Madarang held numerous bingo games in the morning, but three times he held bingo games in the afternoon. Madarang later acknowledged Hamilton had directed him to move the time of the bingo game, but he also believed he had discretion to make changes to the recreation schedule. He did not seek Hamilton's authorization before holding bingo in the afternoon.

Hamilton learned that the bingo in the afternoon was affecting the attendance at the mental health program, and she emailed him asking why he was holding bingo in the afternoon when she had directed him to hold them in the morning. After Madarang explained verbally, Hamilton sent a follow-up email stating she had "just about had it" with him continuously undermining what she was telling him to do, and she directed him to write a memo explaining why he failed to follow her directions and bring it to her office. Madarang told Hamilton he wanted to speak to a union representative first. Hamilton replied that he did not need a union representative for this and that he should just write the memo so she could get his side of the story and correct his behavior. He continued to request a union representative prior to writing the memo. Hamilton consulted with the jail's captain, who told her that if Madarang wanted to speak with a representative, he should be allowed to bring one when he delivered Hamilton the requested memo. Instead, however, Hamilton requested an internal affairs investigation regarding Madarang's refusal. The County placed Madarang on paid administrative leave and investigated the allegations against him. Madarang received a 10-day suspension for insubordination (later reduced after arbitration to five days).

Service Employees International Union Local 1021 (Local 1021) filed an unfair practice charge alleging that the Sheriff's Department violated the Meyers-Milias Brown Act (MMBA) by: (1) denying Madarang's right to be represented and Local 1021's right to represent him before submitting a written memorandum that he believed could result in discipline; and (2) taking adverse action against Madarang because he requested a representative. The ALJ dismissed the complaint because, ultimately, Madarang did not submit the memorandum, and the ALJ concluded that the County had demonstrated it had disciplined Madarang for a legitimate, non-discriminatory reason.

The Board reversed the dismissal, noting that the representational rights under PERB-administered statutes are considerably broader and are not limited by the requirements of *Weingarten*. "Employees have a right to representation where an employer seeks to elicit incriminating evidence that could potentially impact the employment relationship, either by conducting an investigatory interview or by requesting a written statement." (Citations omitted.) The fact that he did <u>not</u> submit a memo without representation was not determinative. The Board found that Hamilton's order to write and bring it to her, notwithstanding his repeated requests for a representative, was well outside an employer's permissible responses to an employee requesting a representative. "It was incumbent upon Hamilton to act upon Madarang's request, either by granting it or terminating the interview unless it was clear that Madarang was waiving his right to representation."

EMPLOYEE ASSOCIATIONS HAVE RIGHT TO USE EMPLOYER EMAIL SYSTEMS FOR COMMUNICATIONS WITHIN THE SCOPE OF REPRESENTATION

Los Angeles Unified School District, PERB Decision No. 2588-E (2018)

United Teachers Los Angeles (UTLA) represents LA Unified School District's certificated bargaining unit. UTLA and the District were parties to a collective bargaining agreement (CBA) that described UTLA rights entitled "Access." That section stated: "[a]ny authorized UTLA representative shall have the right of reasonable access to District facilities, including teacher mailboxes, for the purpose of contacting employees and transacting UTLA matters." The District assigned an "lausd.net" e-mail address to nearly every member of UTLA's bargaining unit, and it had adopted an Acceptable Use Policy governing employees' use of all computer and network systems, including its e-mail system. Employees were required to agree to the policy upon activating or updating their LAUSD e-mail accounts. The policy described both acceptable and unacceptable uses of LAUSD computer systems. Although network access "is provided primarily for education and District business[,]" employees could also "use the Internet, for incidental personal use during duty-free time." The policy prohibited activity such as unauthorized collection of e-mail addresses, "spamming," spreading viruses, and using threatening, profane, or abusive language.

On August 14, 2013, the UTLA President sent the District's Director of Labor Relations John Bowes an e-mail message "formally asserting [the union's] right to use of institutional bulletin boards, mailboxes and other means of communication to communicate with members of the UTLA bargaining unit." The message went on to request that the District "[p]lease send this document to the lausd.net email accounts of all UTLA bargaining unit members," and it included the text of the requested announcement. The District reviewed and rejected the request. Nothing in the CBA at that time explicitly addressed whether LAUSD must e-mail bargaining unit members on UTLA's behalf, nor was there evidence that LAUSD had previously e-mailed bargaining unit members on UTLA's behalf. UTLA proposed side-letter language regarding the union's use of the District's email system "for the purpose of District-wide announcements concerning Internal Union business, such as meeting schedules and announcements of organizational activities and special events, and on other legitimate communications concerning the exercise of rights guaranteed by the EERA[.]" The request said such union emails would be: (1) subject to the District's use policy; (2) sent only to District e-mail accounts; (3) subject to the content limitations used for other forms of authorized communication; (4) e-mailed to District staff relations at least one day in advance by designated UTLA contacts; (5) limited to 150 kilobytes; and (6) sent by the District between 6:00 p.m. and 3:00 a.m. to avoid interference with District business. However, when over a month passed without a response from the District, the union filed an unfair practice charge. The ALJ ruled that EERA section 3543.1, subdivision (b), gives the organization access to the employer's email system and obligates the employer to send e-mails to employees on the employee organization's behalf.

The Board agreed in part and disagreed in part. First, the Board acknowledged that "e-mail is a fundamental forum for employee communication in the present day," and referenced its decision in early 2018 holding that employees with rightful access to their employer's e-mail system in the course of their work have a right to use the e-mail system to engage in EERA-protected communications on nonworking time. Similarly, the Board wrote that under EERA, employee organizations have the right to use institutional bulletin boards, mailboxes, and other means of communication, and that this right includes use of the employer's internal mail delivery system, which is an "other means of communication" under EERA. As such, the union had a right to use the email system just as it could a bulletin board. However, the Board declined to require the District to send emails to union members at UTLA's request, finding that the employer's participation is not necessary for an employee organization to fully exercise its statutory right to communicate with employees via the employer's e-mail system. Employee email addresses are available to the union through information requests or the Public Records Act, and once they are obtained, the union can send emails to unit members without assistance from the District.

TEACHER'S STATEMENTS TO OTHER TEACHERS ON DISTRICT EMAIL ALLEGING THAT THE UNION PRESIDENT AND HR DIRECTOR HAD A CONFLICT OF INTEREST WERE PROTECTED UNLESS "MALICIOUSLY UNTRUE"

Chula Vista Elementary School District, PERB Dec. No. 2586-E (2018)

In 2012, the President of the Chula Vista Educators (CVE) union resigned to become the school district's Human Resources Director. Manuel Yvellez, a kindergarten teacher and VP of the union sent a message to other teachers at the Chula Vista Elementary School District ("District") using his District email address criticizing the new union president and HR director as having a conflict of interest: *"I am deeply dismayed by your letter describing your ascendency to President of CVE. It does not appear in any way to convey the offense the union should take at what I believe is a clear case of a breach of fiduciary duty by our past President …*"

The District Superintendent ordered an investigation on Yvellez's email misuse and for defamation. In turn, Yvellez filed an unfair practice claim alleging interference and discrimination because of protected activities under the EERA.

Upon review, PERB held that Yvellez's statements were protected and that employees have a right to use district emails for employment related matters, citing Napa Valley Community College District (2018) PERB Dec. No. 2563-E. PERB found that speech between employees on "matters of legitimate concern to employees as employees" is protected unless the speech is "maliciously untrue." Because Yvellez's statements were not found to have risen to the "maliciously untrue" standard enunciated PERB, his statements were protected.

Ethical Principles for City Attorneys

(MCLE Specialty Credit for Legal Ethics)

Friday, May 10, 2019 General Session; 10:30 a.m. – 12:30 p.m.

Joseph M. Montes, City Attorney, Alhambra,
Santa Clarita and Assistant City Attorney, Rosemead

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Notes:

Ethical Principles for City Attorneys (Even More Chockful of Ethics)

League of California Cities
2019 City Attorneys' Spring Conference

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On October 6, 2005, the City Attorneys Department of the League of California Cities adopted "Ethical Principles for City Attorneys." The document was re-presented at the Spring League Conference in 2011 by Pasadena City Attorney Michele Bagneris. I was asked to re-re-present the document, as there might be some individuals in the Department who are not familiar with it. I was also asked if I could cross-reference any applicable California State Bar Rules of Professional Conduct, as new State Bar Rules were just promulgated in November of 2018. So here we go—Ethical Principles for City Attorneys; Even More Chockful of Ethics!

A Note on How to Use This Paper.

The Ethical Principles for City Attorneys document ("Principles") has been broken up into its various sections and inserted below, with commentary discussing the interaction with the State Bar Rules. You are invited to re-familiarize yourself with the document by just reading the shaded text (i.e. the shaded text is the actual Principles).[1] Alternatively, if you want the "Chockful of Ethics" part, you can also read the commentary following each section, to watch me try to conflate the State Bar Rules of Professional Conduct ("Rules") and the Principles. Note that the "conflation" ("conflagration?") is intended to be selective, rather than comprehensive. Further, I have tried to avoid redundancy in the commentary—some of the State Bar Rules intersect with several of the Principles in the Principles, but I have avoided re-hashing the discussion of any particular rule in those multiple instances.

Some footnotes include citations to the State Bar Rules and the reports generated by the California State Bar Commission for the Revision of the Rules of Professional Conduct ("Rules Commission"). Rather than include the link every time in the footnote, you can find the referenced materials at http://www.calbar.ca.gov/Attorneys/Conduct-Discipline/Rules/Rules-of-Professional-Conduct/Proposed-Rules-of-Professional-Conduct.[2]

A further note—the Principles uses the term "city attorney" to refer to "all persons engaged in the practice of municipal law." Given that definition, this paper will use the same vernacular.

First a Word About Ethics in General.

Before talking about the Principles, it is important to focus on what we are talking about when we say "ethical principles." Being ethical is not the same as following the law.[3] Apartheid, Jim Crow laws, pre-19th Amendment voting laws are all laws that today most, if not all, people would say are not "ethical." Ethics are well-founded standards of right and wrong that prescribe what people ought to do. But they are not just "whatever society accepts," as many issues do not have a societal consensus.

[1] Or just using the following link for an unadulterated copy: http://www.cacities.org/Resources-Documents/Member-Engagement/Professional-Departments/City-Attorneys/City-Attorney-Ethics-Resources/Ethical-Principles-for-City-Attorneys (Accessed March 13, 2019)
[2] Accessed March 27, 2019.
[3] The following discussion is paraphrased from the Markkula Center for Applied Ethics, "What is Ethics?" https://www.scu.edu/ethics/ethics-resources/ethical-decision-making/what-is-ethics (Accessed March 6, 2019)

In daily life, ethics involves decision making. In any given situation, we all decide whether to act or not to act. And if we decide to act, we then have to decide which action to take. And a force that can guide those decisions is "ethics."

The Markulla Center for Applied Ethics at Santa Clara University[4] focuses on ethics education, bringing the traditions of ethical thinking to bear on real world problems. The have prepared an app, and an article on their website about how to make ethical decisions.[5] I have included a copy of that article at the end of this paper for your reference. You may also wish to utilize it as a resource in future AB 1234 training.

So Why Talk About Rules at All?

So if being ethical is not the same as following the law, why talk about the Rules of Professional Conduct, which are tantamount to laws, in connection with the Principles, which are largely aspirational?[6] In fact, the Charter to the Rules Commission that drafted the new rules specifically provides that the rules should state clear and enforceable disciplinary standards as opposed to purely aspirational objectives.[7]

There are three reasons why the rest of this paper will try to compare the Rules and the Principles:

1. In some instances the Principles and Rules may overlap—in which case being "aspirational" will keep you from being disbarred.

2. Notwithstanding the language of the State Bar Rules Committee Charter, some of the comments to the new rules do include aspirational objectives.[8] Further, the new rules indicate that not just laws and rules, but also the "opinions of ethics committees in California, although not binding, should be consulted for guidance on proper professional conduct. Ethics opinions and rules and standards promulgated by other jurisdictions and bar associations may also be considered."[9] Given the breadth of that catchall, it's entirely possible that the Principles could be cited by some State Bar Court in the future.

3. Because Lynn Tracy Nerland asked me to.

[4] More information about the Center is available at https://www.scu.edu/ethics/ethics-resources (Accessed March 6, 2019).
[5] https://www.scu.edu/ethics/ethics-resources/ethical-decision-making/a-framework-for-ethical-decision-making/ (Accessed March 27, 2019).
[6] See first bullet, Preamble.
[7] http://www.calbar.ca.gov/Attorneys/Conduct-Discipline/Ethics/Committees/Rules-Revision/Rules-Commission-2014 (Accessed March 6, 2019).
[8] See, for example, Comment [5] to Rule 1.0 which includes goals for pro bono work.
[9] Rule 1.0, Comment [4].

The Principles and the Rules.

Preamble

A city attorney occupies an important position of trust and responsibility within city government. Central to that trust is an expectation and commitment that city attorneys will hold themselves to the highest ethical standards. Every effort should be made to earn the trust and respect of those advised, as well as the community served.

The City Attorneys Department of the League of California Cities has therefore adopted these ethical principles to:

- Serve as an aspirational guide to city attorneys in making decisions in difficult situations,
- Provide guidance to clients and the public on the ethical standards to which city attorneys aspire, and
- Promote integrity of the city and city attorney office.

City attorneys are also subject to the State Bar's Rules of Professional Conduct. For an explanation of how the rules apply to city attorneys, please see *Practicing Ethics* published by the League of California Cities in 2004, available at www.cacities.org/attorneys[10]. These aspirational ethical principles are not an effort to duplicate or interpret the State Bar's requirements or create additional regulatory standards.

The role of the city attorney and the client city varies. Some city attorneys are full-time public employees appointed by a city council; some are members of a private law firm, who serve under contract at the pleasure of a city council. A few are directly elected by the voters; some are governed by a charter. When reflecting on the following principles, the city attorney should take these variations into account.

The city attorney should be mindful of his or her unique role in public service and take steps to ensure his or her words and deeds will assist in furthering the underlying intent of these principles.

The Preamble states that the Principles is being adopted for 3 reasons:

1. To serve as an aspirational guide to city attorneys in making decisions in difficult situations,
2. To provide guidance to clients and the public on the ethical standards to which the city attorneys aspire, and
3. To promote integrity of the city and the city attorney office.

With regard to the first point, I would again refer you to the discussion about ethics as a guide for decision-making and the article attached to this paper[11]. With regard to the second and third points above, the Charter for the Commission for the Revision of the Rules of Professional

[10] But note—*Practicing Ethics* has not been updated to reflect the current Rules.
[11] Honest, I'm not getting a commission from these people.

Conduct states in part: "The Commission's work should promote confidence in the legal profession and the administration of justice, and ensure adequate protection to the public."[12]

Principle 1 (Rule of Law). As an officer of the courts and local government, the city attorney should strive to defend, promote and exemplify the law's purpose and intent, as determined from constitutional and statutory language, the case law interpreting it, and evidence of legislative intent. As an attorney representing a public agency, the city attorney should promote the rule of law and the public's trust in city government by providing representation that helps create a culture of compliance with ethical and legal obligations.

Explanation. *The city attorney's advice and actions should always proceed from the goal of promoting the rule of law in a free, democratic society. Because the public's business is involved, within the city organization the city attorney should consistently point out clear legal constraints in an unambiguous manner, help the city to observe such constraints, identify to responsible city officials known legal improprieties and remedies to cure them, and if necessary, report up the chain of command to the highest level of the organization that can act on the client city's behalf.*

Examples

1. The city attorney should give advice consistent with the law and the policy objectives underlying those laws, but may consider and explain good faith arguments for the extension or change of a legal principle.

2**.** The city attorney should not attempt to justify a course of action that is clearly unlawful. Where the city attorney's good faith legal assessment is that an act or omission would be clearly unlawful, the city attorney should resist pressure to be "creative" to come up with questionable legal conclusions that will provide cover for the elected or appointed public officials to take actions which are objectively unlikely to be in conformance with the legal constraints on the city's actions.

3. The city attorney's guiding principle in providing advice and services should be sound legal analysis. The city attorney should not advise that a course of action is legal solely because it is a common practice ("everyone else does it that way"), a past practice ("we have always done it that way"), or because the risk of suit or other consequence for action is considered low.

4. The city attorney's advice should reflect respect for the legal system.

5. If the city has made a decision that the city attorney believes may be legally harmful to the city, the city attorney should encourage the city to take any necessary corrective action but do so in a way that minimizes any damage to the city's interests.

6. The city attorney should be willing to give unpopular legal advice that meets the law's purpose and intent even when the advice is not sought but the legal problem is evident to the attorney.

[12] http://www.calbar.ca.gov/Attorneys/Conduct-Discipline/Ethics/Committees/Rules-Revision/Rules-Commission-2014 (accessed March 6, 2019).

7. The city attorney should not only explain and advise the city on the law, but should encourage the city to comply with the law's purpose and intent.

This principle and the examples implicate several rules.

In terms of the Principle's Explanation's suggestion to "report up the chain of command to the highest level of the organization that can act on the client's behalf," Rule 1.13 (Organization as Client) now includes an express obligation to report legal violations that are likely to result in substantial injury to the organization up the food chain. However, notwithstanding that city attorneys work for public agencies and have a unique position of public trust, it is important to note that this is a report "up," not report "out" obligation. The prohibition on disclosure of confidential client (here, the organization) information still governs over any sentiment that the public has a "right to know."[13] In fact, the Rules Commission considered whether to create a special carve out to the prohibition on disclosure for government attorneys as whistleblowers—but the Commission felt that the need for trust in the attorney-client relationship would be jeopardized in the government setting if the client knew that confidential communications could be disclosed by the government attorney.[14]

Example 1 above references the duty to follow the law, but also allows for good faith arguments to change the law. Example 2 clarifies this is not intended to encourage attempts to justify illegal conduct. Rule 3.1 (Meritorious Claims and Contentions) prohibits a lawyer from asserting positions in litigation that are not warranted under existing law, unless they can be supported by a good faith argument for an extension, modification, or reversal of existing law. Rule 3.3 (Candor Toward the Tribunal) requires a lawyer to disclose to a tribunal in any litigation adverse legal authority, and now requires the further step of taking remedial measures to clarify or correct for the court any material evidence that the lawyer knows to be false.

In terms of Example 6's suggestion that the city attorney should be willing to give unpopular legal advice, note that Rule 1.4(c) (Communication with Clients) does allow a lawyer to delay communication of certain information where the lawyer reasonably believes that the client would likely react in a way that may cause imminent harm to the client or others. "Imminent harm" is not defined, and the report notes that this is an exception that could swallow the rule in terms of the duty to communicate with a client.[15] Nevertheless, what constitutes "imminent harm" may be relevant when determining whether to communicate certain information during a public council meeting where emotions may be running high, for example.

Principle 2 (Client Trust). The city attorney should earn client trust through quality legal advice and the manner in which the attorney represents the city's interests.

Explanation. *It is difficult for the city attorney to effectively represent the city if public officials do not trust the city attorney's competence and professionalism.*

[13] See Rule 1.13(c).
[14] Rule 1.6 Report of the Rules Commission at p. 49.
[15] Rule 1.4 Report of the Rules Commission at p. 9.

Examples

1. The city attorney should use available resources to maximize his or her ability to advise knowledgeably on issues of municipal law.

2. The city attorney should be clear with individual council members and staff on the extent to which their communications with the city attorney can and will be kept confidential. The city attorney should be especially clear when confidentiality cannot be lawfully maintained.

3. Sometimes the city attorney will be asked a question during a public or private meeting and the city attorney is unsure of the answer. When time permits, the city attorney should advise that additional time is needed to research the matter and provide an appropriate response. If extra time is not available, then the city attorney should be candid regarding any uncertainty he or she feels about the answer given.

4. When a question is posed and the city attorney knows there is no definitive, clear conclusion, the city attorney should describe the competing legal considerations, as well as inform the city of the legally supportable courses of action, together with an evaluation of the course that is most likely to be upheld.

5. In the event the city attorney is asked in a public forum to provide advice that could undermine the city's ultimate position, the city attorney should seek to meet in closed session, if legally permissible, or, if time permits, provide his or her opinion in a confidential memorandum. If the advice must be given during an open session, then the city attorney must be mindful of the impact that advice given in public may have on the city's ultimate position.

6. When the city attorney has a duty to provide documents or other information to outside law enforcement authorities, he or she should do so in a way to minimize harm to the city consistent with that duty.

The first rule implicated by this Principle is Rule 1.1 (Competence). The new Rules break this out from the former rule, which also included diligence and supervision, to more closely track the ABA Model Rules. The rule of competence requires that you possess the requisite learning and skill and mental, emotional and physical ability reasonably necessary to perform the requested legal services. If you do not have sufficient learning and skill, you are required to associate in others who do, or learn what you need to learn prior to the time of performance. For those technologically challenged, the rule of competence includes competence with relevant forms of technology.[16]

Example 2 above, deals with confidentiality of information. Confidentiality is covered in Rule 1.6 (Confidential Information of Client) and Business and Professions Code Section 6068(e)(1) "To maintain inviolate the confidence, and at every peril to himself or herself to preserve the secrets, of his or her client." Confidentiality is also potentially implicated by Example 5 above, and Rule 1.8.2 (Use of Current Client's Information) provides that confidential client information cannot be disclosed without the express consent of the client.

[16] Rule 1.1 Report of the Rules Commission, p. 15.

Example 2 also relates to the identity of the client, in that only confidential information provided by the client is confidential—although ascertaining which constituent members of the political organization are the "client" in any given circumstance may be tricky. Rule 1.13 (Organization as Client) provides that when an organization is the client, the organization acts through its duly authorized directors, officers, employees, members, shareholders or other constituents overseeing the particular engagement. Interestingly and unhelpfully, comment 6 to that rule provides that "It is beyond the scope of this rule to define precisely the identity of the client and the lawyer's obligations when representing a governmental agency." So good luck.

Principle 3 (No Politicization). The city attorney should provide legal advice in a manner that avoids the appearance that the advice is based on political alignment or partisanship, which can undermine client trust.

> ***Explanation.*** *The city attorney and the city attorney's advice needs to be trusted as impartial by the entire council, staff and community.*
>
> **Examples**
>
> 1. The city attorney should provide consistent advice with the city's overall legal interests in mind to all members of the city team regardless of their individual views on the issue.
>
> 2. Each city council member, irrespective of political affiliation, should have equal access to legal advice from the city attorney, while legal work on a matter consuming significant legal resources should require direction from a council majority.
>
> 3. The city attorney or persons seeking to become city attorney should not make campaign contributions to or participate in the campaigns of that city's officials, including candidates running for that city's offices or city officers running for other offices. For private law firms serving as city attorney or seeking to become city attorney, this restriction should apply to the law firm's attorneys.
>
> 4. When considering whether to become involved in policy advocacy on an issue that may potentially come before the city, the city attorney should evaluate whether such involvement might compromise the attorney's ability to give unbiased advice or create the appearance of bias.

Example 2 above, again implicates both Rule 1.13, (Organization as Client), discussed above, and Rules 1.6 (Confidential Information of Client) and 1.8.2 (Use of Current Client's Information) in terms of client confidentiality. Rule 1.13(f) (Organization as Client) requires the lawyer to make clear the identity of the client when the interests of the organization and the particular constituent with whom the lawyer is speaking may be adverse. At times making such a determination can be problematic, for example when speaking with an elected who is advocating a position with which the majority of the council does not agree.

Example 4 speaks to conflicts of interest. Rule 1.7 (Conflict of Interest: Current Clients), comment 1 indicates that loyalty and independent judgment are essential elements in the lawyer's relationship to a client. Comment 4 provides that even where there is no directly adverse conflict, a

conflict may still exist where a lawyer's ability to advise a client will be materially limited as a result of other professional or personal interests.

Principle 4 (No Self Aggrandizement). The city attorney should discharge his or her duties in a manner that consistently places the city's interests above self-advancement or enrichment.

> ***Explanation.*** *The city attorney, by his or her acts and deeds, should demonstrate that his or her highest professional priority is to serve the city's needs.*
>
> **Examples**
>
> 1. The city attorney's operating and legal services budget requests should be based on the goal of efficiently serving the client city's realistic legal needs (*i.e.* avoid "empire building").
>
> 2. The city attorney should provide advice without a focus on garnering personal support or avoiding personal criticism.
>
> 3. While it is appropriate for a city attorneys to provide both advisory and litigation services, a city attorney should give the city a full range of reasonable options including alternatives to litigation for resolving issues.

Rule 1.5 (Fees for Legal Services) generally relates to Example 1, dealing with legal service budgets.

Rule 1.1 (Competence), Rule 1.3 (Diligence) and Rule 1.7 (Conflict of Interest: Current Clients) all speak to having the City's needs as the highest professional priority. Of note, the diligence rule does not require "promptness," that term (included in the ABA Model Rule) was specifically rejected in California, as the Rules Commission felt the "promptness" obligation is specifically referenced in other rules.[17]

Example 3 concerning the range of litigation and non-litigation options speaks to Rule 1.4 (Communication with Clients). Rule 1.4(a)(2) specifically requires a lawyer to reasonably consult with the client about the means by which to accomplish the client's objectives.

Principle 5 (Professionalism and Courtesy). The city attorney should conduct himself/herself at all times in a professional and dignified manner, interacting with all elected officials, city staff, members of the public, and the media with courtesy and respect.

> ***Explanation.*** *The city attorney should be a role model of decorum and composure.*
>
> **Examples**
>
> 1. The city attorney should provide advice and information to the council and individual council members in an evenhanded manner consistent with city policy governing the provision of legal services to the city.

[17] Rule 1.3 Rules Commission Report, Executive Summary p. 2.

2. The city attorney should communicate in a way that is sensitive to both the context and audience, explaining the law in a way that is understandable.

3. In interactions with the public, the city attorney's role is to explain procedures and the law, but not engage in debate.

4. The city attorney should show professional respect for city staff, colleagues, the legal system and opponents. The city attorney should not personally attack or denigrate individuals, particularly in public forums.

5. The city attorney should not seem to endorse, by silence or otherwise, offensive comments made to him/her about others.

6. Sometimes the city attorney will provide advice in public, either because of a city's approved practices or as necessitated during a public meeting. Such advice should be provided in a low-key, dispassionate and non-confrontational manner.

7. The tone of the city attorney's advice and representation should not give the appearance of a personal attack on an individual, even when it is necessary to explain that a particular official's action is unlawful.

8. The city attorney should be open to constructive feedback and criticism.

In terms of communicating with members of the public, Rule 4.1 (Truthfulness in Statements to Others) prohibits lying (materially) to a third party or failing to disclose a material fact when acting on behalf of a client, tempered by the obligations of confidentiality. Of note, this restriction would also apply when appearing before another public body on behalf of a client.[18]

With regards to exhibiting professional respect for city staff, colleagues, the legal system and opponents, Rule 4.2 (Communicating with a Represented Person) governs communication with represented persons. Rule 4.3 (Dealing with Unrepresented Person) now requires a lawyer to clarify that they are representing an adverse party, if that is not understood by the unrepresented person.

Perhaps more interesting, Rule 8.4.1 (Prohibited Discrimination, Harassment, and Retaliation) prohibits unlawful harassment or discrimination based upon a protected characteristic in the representation of a client. This rule was just referenced in *Fernando Martinez v. Stephen Stratton O'Hara*, in which the language in the notice of appeal filed by plaintiff's attorney was determined by the appellate court to manifest gender bias. And even though the notice of appeal was filed before Rule 8.4.1 took effect, the Court referenced the rule in a footnote, and also reported the attorney to the State Bar.[19]

Apparently, the court of appeal did not appreciate the following line from the notice of appeal: "The ruling's succubustic adoption of the defense position, and resulting validation of the defendant's pseudohermaphroditic misconduct prompt one to entertain reverse peristalsis unto its four corners." The appellate court noted that the definition of "succubus" includes "a demon

[18] See Rule 4.1 Rules Commission Report, pp. 7-8.
[19] (2019) 32 Cal.App.5th 853.

assuming female form to have sexual intercourse with men in their sleep," and that the trial court judge was female.

Principle 6 (Policy versus Law). The city attorney's obligation is to understand the city's policy objectives and provide objective legal advice that outlines the legally defensible options available to the city for achieving those objectives.

Explanation. *The city attorney must respect policymakers' right to make policy decisions.*

Examples

1. The city attorney may offer input on policy matters, but should make clear when an opinion is legal advice and when it is practical advice.

2. The city attorney should not let his or her policy preferences influence his or her legal advice.

3. If a city attorney finds it necessary to advise the city that a particular course of action would be unlawful, the city attorney should strive to identify alternative approaches that would lawfully advance the city's goals.

Rule 2.1 (Advisor) is described by the Rules Commission as a core duty of every lawyer:[20] "In representing a client, a lawyer shall exercise independent professional judgment and render candid advice." The comments to the rule indicate that a lawyer may refer to considerations other than the law, such as moral, economic, social and political factors. So even though the Principle indicates a city attorney should respect the rights of electeds to make policy decisions, Rule 2.1 recognizes that a lawyer can include non-legal factors in providing advice.

With regard to Example 2, comment 3 to Rule 1.2 (Scope of Representation) states that "A lawyer's representation of a client, including representation by appointment, does not constitute an endorsement of the client's political, economic, social or moral views or activities." That may give one comfort--when dealing with the State Bar--but I'm not sure that the public always shares the same view.

Finally, as mentioned before, Rule 1.4 (Communication with Clients) does require a lawyer to consult with a client about the means to accomplish the client's goals.

Principle 7 (Consistency). The city attorney should conduct his or her practice in a way that consistently furthers the legitimate interests of cities.

Explanation. *Consistency in the legal positions taken by city attorneys is vital to city attorneys' credibility with the courts, clients, and the public.*

Examples

1. The city attorney should not represent a private client if that representation will necessitate advancing legal principles adverse to cities' clearly recognized and accepted interests.

[20] Rule 2.1 Commission Report, p. 1.

2**.** When providing advice, the city attorney should inform his or her city of any far-reaching negative impacts a position may have on the city's own potential future interests as well as cities' interests in general, particularly when establishing legal precedent.

3. The city attorney should carefully consider whether to hire or recommend a firm that advances legal principles adverse to city interests on behalf of private clients.

With regard to Example 1 above, Rule 1.7 (Conflict of Interest: Current Clients) is a little more specific about that circumstance. Comment 6 to the rule indicates that advocating a legal position on behalf of a client that might create precedent adverse to the interests of another client does not create a conflict that requires written consent. However, where the lawyer may temper the lawyer's advocacy on behalf of one client out of concern about creating precedent adverse to the interest of another client, or where the action on behalf of one client will materially limit the lawyer's effectiveness in representing another client, then a conflict would exist.

Principle 8 (Personal Financial Gain). The city attorney's primary responsibility is to serve the city's interest without reference to personal financial gain.

Explanation. *An important aspect of the city attorney profession is public service.*

Examples

1. The city attorney should provide the highest possible quality work regardless of the remuneration received.

2. The city attorney's representation should be based on a realistic understanding of the city's needs in light of the city's fiscal and other constraints. However the city attorney should advise the city when additional resources are necessary to provide the level of legal services the city requires.

3. The city attorney should refrain from providing unnecessary or redundant services to the city.

4. The city attorney should never use the power, resources or prestige of the office for personal gain.

Rule 1.5 (Fees for Legal Services) prohibits the charging of "unconscionable" fees. An unconscionable fee is one that is so exorbitant and wholly disproportionate to the services performed as to shock the conscience of those to whose attention it is called[21]. The Rules Commission rejected a suggestion that the rule should prohibit "unreasonable" fees, based upon a concern that too many complaints to the bar would turn into fee disputes. California law has other methods to address fee disputes (arbitration, etc.).[22] Regardless of the standard used by the Bar, the public, and non-lawyer electeds may have different measures that need to be taken into consideration.

[21] Goldstone v. State Bar (1931) 214 Cal. 490, 498.
[22] See Rule 1.5 Commission Report, p. 9.

In terms of financial gain from referrals, Rule 1.5.1 (Fee Divisions Among Lawyers) does now allow fee splitting among attorneys—but city attorneys may need to take into consideration the associated Political Reform Act and Government Code Section 1090 implications for such arrangements.

And one further note on a city attorney's pecuniary interest, Rule 1.8.8 (Limiting Liability to Client) does not allow a lawyer to prospectively limit their liability for malpractice.

Principle 9 (Hiring by and of City Attorneys). The selection and retention of the city attorney and city attorney staff should be based on a fair process that emphasizes professional competence and experience. The process should not include inappropriate considerations such as political, personal or financial ties.

> ***Explanation.*** *The public's trust in the quality of the city's legal services is undermined if it appears that considerations other than competence affected the decision to hire someone.*
>
> **Examples**
>
> 1. The city attorney should engage staff and vendors based on objective standards relating to professional competence and experience.
>
> 2. The city attorney should avoid providing gratuities to decision-makers during the pendency of decisions relating to the city attorney's employment.
>
> 3. City attorneys must keep employment negotiations separate from the city attorney's role as the city's legal advisor.
>
> 4. The city attorney should not undermine the employment of an incumbent city attorney. The city attorney may respond to unsolicited inquiries from a potential client about future representation.
>
> 5. The city attorney should maintain an office that is open to employees from diverse backgrounds and remove unnecessary barriers to success in his or her office and in the legal profession.
>
> 6. The city attorney should not award or recommend award of litigation or legal services-related contracts if the public could question whether the contract was awarded for reasons other than merit, such as the contractor (or member of the contractor) providing gifts to or participating in political campaigns of (including making campaign contributions to) officials with the power to award the contracts.
>
> 7. The city attorney should hire or recommend staff and consultants who adhere to these ethical principles and encourage existing staff and consultants to do likewise.
>
> 8. The city attorney should seriously consider refusing to represent cities that do not support the city attorney's adherence to these principles

In terms of the city attorney hiring staff, Rule 8.4.1(b)(1)(iii) (Prohibited Discrimination, Harassment, and Retaliation) prohibits discrimination in hiring. This new rule eliminated the prior

threshold requirement of a determination by a court that the alleged unlawful conduct has occurred—thus the State Bar now has original jurisdiction to deal with claims of alleged discrimination in hiring.

Rule 5.1 (Responsibilities of Managerial and Supervisory Lawyers) now imposes supervisory responsibilities on city attorney offices[23], and violations of the State Bar rules, including the prohibition against discrimination, harassment, etc. can be attributable to the head of the office. The supervisor must ensure that measures are in place to see that lawyers and non-lawyers in the office comply with the State Bar Rules. The supervisor must also take remedial action to correct or mitigate the consequences of a violation of the rules once discovered.

In terms of undermining the employment of the current city attorney set out in Example 4, Rule 7.3 (Solicitation of Clients) prohibits in-person, live telephone or real-time contact to solicit professional employment. "The concern is the ability of lawyers to employ their skills in the persuasive arts to overreach and convince a person in need of legal services to retain the lawyer without the person having had time to reflect on this important decision."[24] A prior similar rule against accountants was overthrown, but the U.S. Supreme Court has drawn a distinction between lawyers and accountants, finding that the latter, as opposed to the former, are not "skilled in the persuasive arts."[25]

And in terms of the issue of gifts mentioned in Example 2, Rule 7.2(b)(5) (Advertising) does allow gifts to a person who recommended hiring of the lawyer, after the lawyer is hired.

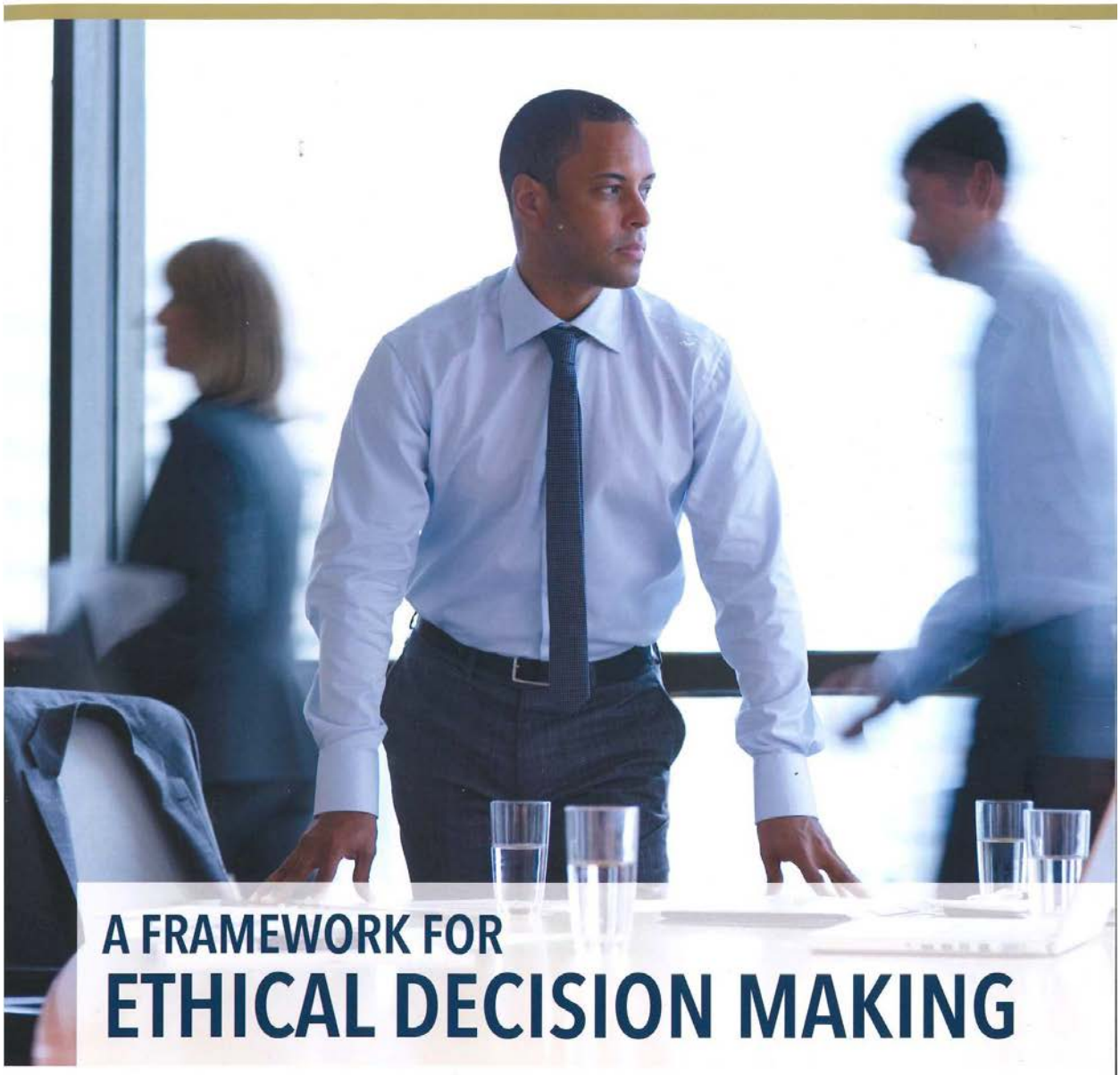
Principle 10 (Professional Development). The city attorney should contribute to the profession's development by improving his or her own knowledge and training and by assisting other public agency attorneys and colleagues in their professional development.

> ***Explanation.*** *For city attorneys to remain a vital, positive part of municipal government, members of the profession should take affirmative actions to advance respect for and proficiency by its practitioners.*
>
> **Examples**
>
> 1. City attorneys have a strong tradition of assisting their colleagues through formal or informal sharing of their knowledge and expertise, including active participation in the League of California Cities, the State Bar and a local municipal attorney group or bar association. This tradition also includes sharing of research and opinions when consistent with protecting client confidences.
>
> 2. The city attorney should continually strive to improve his or her substantive knowledge of the law affecting municipalities through presenting or attending appropriate educational programs.

[23] The Rule speaks in terms of law "firms", but the definition of firm includes the legal department of a government agency—see Rule 1.0.1
[24] Rule 7.3 Rules Commission Report, p. 12.
[25] Edenfield v. Fane (1993) 507 U.S. 761, pp. 774-775.

3. The city attorney should keep in mind the dynamic nature of municipal law and update his or her understanding of the law on an issue, rather than relying on past knowledge.

Rule 1.1, requires competence and Rule 1.3 requires diligence. Aside from that, I guess this Principle would be reason #4 as to why I wrote this paper…



A FRAMEWORK FOR ETHICAL DECISION MAKING

This document is designed as an introduction to thinking ethically. We all have an image of our better selves—of how we are when we act ethically or are "at our best." We probably also have an image of what an ethical community, an ethical business, an ethical government, or an ethical society should be. Ethics really has to do with all these levels—acting ethically as individuals, creating ethical organizations and governments, and making our society as a whole ethical in the way it treats everyone.

MARKKULA CENTER FOR APPLIED ETHICS

A FRAMEWORK FOR ETHICAL DECISION MAKING

SCU.EDU/ETHICS

WHAT IS ETHICS?

Simply stated, ethics refers to *standards of behavior* that tell us how human beings *ought to act* in the many situations in which they find themselves—as friends, parents, children, citizens, businesspeople, teachers, professionals, and so on.

It is helpful to identify what ethics is NOT:

Ethics is not the same as feelings. Feelings provide important information for our ethical choices. Some people have highly developed habits that make them feel bad when they do something wrong, but many people feel good even though they are doing something wrong. And often our feelings will tell us it is uncomfortable to do the right thing if it is hard.

Ethics is not religion. Many people are not religious, but ethics applies to everyone. Most religions do advocate high ethical standards but sometimes do not address all the types of problems we face.

Ethics is not following the law. A good system of law does incorporate many ethical standards, but law can deviate from what is ethical. Law can become ethically corrupt, as some totalitarian regimes have made it. Law can be a function of power alone and designed to serve the interests of narrow groups. Law may have a difficult time designing or enforcing standards in some important areas, and may be slow to address new problems.

Ethics is not following culturally accepted norms. Some cultures are quite ethical, but others become corrupt—or blind to certain ethical concerns (as the United States was to slavery before the Civil War). "When in Rome, do as the Romans do" is not a satisfactory ethical standard.

Ethics is not science. Social and natural science can provide important data to help us make better ethical choices. But science alone does not tell us what we ought to do. Science may provide an explanation for what humans are like. But ethics provides reasons for how humans ought to act. And just because something is scientifically or technologically possible, it may not be ethical to do it.

WHY IDENTIFYING ETHICAL STANDARDS IS HARD

There are two fundamental problems in identifying the ethical standards we are to follow:

1. On what do we base our ethical standards?
2. How do those standards get applied to specific situations we face?

If our ethics are not based on feelings, religion, law, accepted social practice, or science, what are they based on? Many philosophers and ethicists have helped us answer this critical question. They have suggested at least five different sources of ethical standards we should use.

FIVE SOURCES OF ETHICAL STANDARDS

THE UTILITARIAN APPROACH

Some ethicists emphasize that the ethical action is the one that provides the most good or does the least harm, or, to put it another way, produces the greatest balance of good over harm. The ethical corporate action, then, is the one that produces the greatest good and does the least harm for all who are affected—customers, employees, shareholders, the community, and the environment. Ethical warfare balances the good achieved in ending terrorism with the harm done to all parties through death, injuries, and destruction. The utilitarian approach deals with consequences; it tries both to increase the good done and to reduce the harm done.

THE RIGHTS APPROACH

Other philosophers and ethicists suggest that the ethical action is the one that best protects and respects the moral rights of those affected. This approach starts from the belief that humans have a dignity based on their human nature per se or on their ability to choose freely what they do with their lives. On the basis of such dignity, they have a right to be treated as ends and not merely as means to other ends. The list of moral rights—including the rights to make one's own choices about what kind of life to lead, to be told the truth, not to be injured, to a degree of privacy, and so on—is widely debated; some now argue that non-humans have rights, too. Also, it is often said that rights imply duties—in particular, the duty to respect others' rights.

THE FAIRNESS OR JUSTICE APPROACH

Aristotle and other Greek philosophers have contributed the idea that all equals should be treated equally. Today we use this idea to say that ethical actions treat all human beings equally—or if unequally, then fairly based on some standard that is defensible. We pay people more based on their harder work or the greater amount that they contribute to an organization, and say that is fair. But there is a debate over CEO salaries that are hundreds of times larger than the pay of others; many ask whether the huge disparity is based on a defensible standard or whether it is the result of an imbalance of power and hence is unfair.

THE COMMON GOOD APPROACH

The Greek philosophers have also contributed the notion that life in community is a good in itself and our actions should contribute to that life. This approach suggests that the interlocking relationships of society are the basis of ethical reasoning and that respect and compassion for all others—especially the vulnerable—are requirements of such reasoning. This approach also calls attention to the common conditions that are important to the welfare of everyone. This may be a system of laws, effective police and fire departments, health care, a public educational system, or even public recreational areas.

THE VIRTUE APPROACH

A very ancient approach to ethics is that ethical actions ought to be consistent with certain ideal virtues that provide for the full development of our humanity. These virtues are dispositions and habits that enable us to act according to the highest potential of our character and on behalf of values like truth and beauty. Honesty, courage, compassion, generosity, tolerance, love, fidelity, integrity, fairness, self-control, and prudence are all examples of virtues. Virtue ethics asks of any action, "What kind of person will I become if I do this?" or "Is this action consistent with my acting at my best?"

PUTTING THE APPROACHES TOGETHER

Each of the approaches helps us determine what standards of behavior can be considered ethical. There are still problems to be solved, however.

The first problem is that we may not agree on the content of some of these specific approaches. We may not all agree to the same set of human and civil rights. We may not agree on what constitutes the common good. We may not even agree on what is a good and what is a harm.

The second problem is that the different approaches may not all answer the question "What is ethical?" in the same way. Nonetheless, each approach gives us important information with which to determine what is ethical in a particular circumstance. And much more often than not, the different approaches do lead to similar answers.

MAKING DECISIONS

Making good ethical decisions requires a trained sensitivity to ethical issues and a practiced method for exploring the ethical aspects of a decision and weighing the considerations that should impact our choice of a course of action. Having a method for ethical decision making is absolutely essential. When practiced regularly, the method becomes so familiar that we work through it automatically without consulting the specific steps.

The more novel and difficult the ethical choice we face, the more we need to rely on discussion and dialogue with others about the dilemma. Only by careful exploration of the problem, aided by the insights and different perspectives of others, can we make good ethical choices in such situations.

We have found the following framework for ethical decision making (see back page) a useful method for exploring ethical dilemmas and identifying ethical courses of action.

HOW TO MAKE AN ETHICAL DECISION

RECOGNIZE AN ETHICAL ISSUE

1. Could this decision or situation be damaging to someone or to some group? Does this decision involve a choice between a good and bad alternative, or perhaps between two "goods" or between two "bads"?
2. Is this issue about more than what is legal or what is most efficient? If so, how?

GET THE FACTS

3. What are the relevant facts of the case? What facts are not known? Can I learn more about the situation? Do I know enough to make a decision?
4. What individuals and groups have an important stake in the outcome? Are some concerns more important? Why?
5. What are the options for acting? Have all the relevant persons and groups been consulted? Have I identified creative options?

EVALUATE ALTERNATIVE ACTIONS

6. Evaluate the options by asking the following questions:
   - Which option will produce the most good and do the least harm? **(The Utilitarian Approach)**
   - Which option best respects the rights of all who have a stake? **(The Rights Approach)**
   - Which option treats people equally or proportionately? **(The Justice Approach)**
   - Which option best serves the community as a whole, not just some members? **(The Common Good Approach)**
   - Which option leads me to act as the sort of person I want to be? **(The Virtue Approach)**

MAKE A DECISION AND TEST IT

7. Considering all these approaches, which option best addresses the situation?
8. If I told someone I respect—or told a television audience—which option I have chosen, what would they say?

ACT AND REFLECT ON THE OUTCOME

9. How can my decision be implemented with the greatest care and attention to the concerns of all stakeholders?
10. How did my decision turn out and what have I learned from this specific situation?

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This Framework for Ethical Decision Making is the product of dialogue and debate at the Markkula Center for Applied Ethics at Santa Clara University. Primary contributors include Manuel Velasquez, Dennis Moberg, Michael J. Meyer, Thomas Shanks, Margaret R. McLean, David DeCosse, Claire André, and Kirk O. Hanson.

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Conference Program Bios

Michele Bagneris

Michele Beal Bagneris, Esq. is the City Attorney/City Prosecutor for the City of Pasadena, California. She is responsible for managing all civil and criminal legal matters for the city. She and her staff advise the city council, city advisory bodies, commissions and committees, city departments, the Rose Bowl Operating Company, the Pasadena Convention Center, and the Pasadena Community Access Corporation. As City Prosecutor, she oversees prosecution of misdemeanor and infraction violations, and special programs such as the Nuisance Abatement and Domestic Violence programs. She supervises approximately 30 employees and manages all litigation and transactional matters handled by in-house and outside lawyers. She has served as Pasadena's City Attorney since 1997 and prior to joining Pasadena, Ms. Bagneris was a shareholder at Richards, Watson & Gershon, where she worked for 16 years. She received her Bachelor's Degree in International Relations from Stanford University and her Juris Doctorate from Boalt Hall School of Law, U.C. Berkeley. Among other organizations, she is a member of the Board of Directors of the League of California Cities, Chair of the Institute for Local Government (ILG) Board of Directors, and has been very active in a wide range of League activities. She is married to Jules S. Bagneris, III and they have three adult children.

Celia Brewer

Celia A. Brewer's more than two-decade long career in public service has included work on some of the San Diego region's most complex and high profile land use and environmental projects. Brewer is currently city attorney for the City of Carlsbad, where she was a key member of the team that negotiated a historic agreement with NRG Energy and SDG&E to remove the aging power plant from the city's coast. Brewer also led a team in creatively combining a lawsuit settlement, an interested developer, and several environmental groups to provide an extra city park, additional open space, and accelerated road improvements. Prior to joining the City of Carlsbad in 2003, Brewer served as the interim Port attorney and assistant Port attorney for the San Diego Unified Port District. Here she was a key adviser on the Port's efforts to remove the South Bay Power Plant from the San Diego Bay waterfront. As assistant general counsel to the San Diego County Water Authority, she worked on a number of innovative water supply and diversification strategies, including finalizing issues concerning the lining of the All American Canal. Brewer began her public service career in Solana Beach, first as deputy city attorney and eventually as city attorney, where she helped resolve issues related to moving the railroad tracks below street level, a project which improved safety and helped revitalize this small coastal city. In addition to working for public agencies, Brewer was in private practice representing municipalities, special districts and nonprofit organizations.

Brewer currently serves as First Vice President of the League of California City Attorneys Department and has twice been president of the City Attorneys Association of San Diego County. A passionate advocate for people with spinal cord injuries, Brewer serves on the advisory board of the Southern California Chapter of United Spinal Association, is a Christopher Reeve Foundation certified peer mentor and a member of the UCSD satellite fundraising team for the "Swim With Mike" scholarship fund for physically challenged athletes. Brewer currently lives in Cardiff with her teen age daughter and is writing her first book, an inspirational account of her son's triumph over a life changing injury.

Damien Brower

Damien Brower is the City Attorney of Brentwood, a community of 60,000 people located in Northern California (about 50 miles east of Oakland). A graduate of Johns Hopkins University in Baltimore, Damien received his law degree from U.C. Berkeley. In addition, he holds a master's degree in Political Science (U.C. Davis) that he uses to pontificate all things politics to his two teenage sons at the dinner table (and has, sadly, grown used to their rolling eyes and mocking tones when he does).

Before coming to Brentwood in 2005, Damien worked in Redwood City as the Assistant City Attorney, and as a Deputy City Attorney for the City of Carlsbad. In addition to Redwood City and Carlsbad, he worked in Riverside, both as a Deputy City Attorney and as the City Prosecutor, where he made the local papers for, among other things, prosecuting the owner of Frank the Peacock (luckily this was before the Internet and copies of the articles are hard to find).

Damien has long-standing connections to the League's City Attorneys' Department, as well as the larger League itself, where he worked as an intern in the late 1980s while attending U.C. Davis. After law school he was fortunate enough to work for two City Attorneys (Stan Yamamoto and Ron Ball) who allowed him to volunteer his time at Department Conferences, helping JoAnne Speers and League staff with Conference logistics (which is a fancy way of saying that he made sure there were MCLE forms at everyone's seats and that the individual session sign-in sheets were up to date - yes, things were done differently in those days…).

Since being appointed City Attorney, Damien has served on several Department and League Committees (Legal Advocacy, Nominating, Brown Act, Community Services, and the Practicing Ethics Handbook Revision Committee). In 2016, he was selected as the Department's Second Vice President, and currently serves as the Department President. In October 2019, when his term is up, he will rest, and perhaps further expand his aloha shirt collection.

Jeb Brown

Jeb is a graduate of Cal State University, San Bernardino with a B S in Political Science. He obtained his Juris Doctor from the McGeorge School of Law, University of the Pacific. He is licensed to practice law before all of the Courts of the State of California as well as the United States District Court, Central District of California, Southern District of California, 9th Circuit Court of Appeals, and the United States Supreme Court. Jeb began his career with the law firm of Fidler and Bell, (now Orrock, Popka, Fortino Tucker and Dolen) in Riverside, where he represented numerous public entities in both state and federal court. He was hired in 1995 by the Riverside City Attorney's Office as a principal deputy in the Litigation Services Section and was involved in all aspects of tort defense litigation matters, personnel advisory services, supervision and direction of outside counsel, general risk management issues and working closely with the Riverside Police Department in providing police legal services. In May, 2001, he left to work at the municipal law firm of Burke, Williams & Sorensen representing numerous public. In August 2002, he returned to the Riverside City Attorney's Office as Supervising Deputy City Attorney for the Litigation Services Section. Jeb also served as the Legal Advisor to Public Safety (Police and Fire), provided advice on employment issues and represented the City and its employees in both state and federal court. In 2014, Jeb left the City of Riverside to become Assistant County Counsel for Riverside County where he supervises 23 attorneys representing public safety departments including the Probation Department, Fire Department and Sheriff's Department. Jeb is a Past President and board member of the Leo A. Deegan Inn of Court and the Inland Empire Federal Bar Association. He is an adjunct professor at Laverne School of Law (Civil Rights, First Amendment, Federal Courts and Conflict of Laws). Jeb was a former Lawyer Representative to the Ninth Circuit and currently serves the Federal Court as an Attorney Settlement Officer. He has been a speaker for the League of California Cities, Federal Bar Association, California County Counsel's Association, University of Laverne Law School Civil Rights Symposium and the Los Angeles County Bar Association.

Thomas B. Brown

Thomas Brown is a partner of the firm Burke, Williams & Sorensen, LLP and the City Attorney for the City of St. Helena. He served for 12 years as the City Attorney for the City of Napa, prior to which he served as Senior Deputy City Attorney for the City of Berkeley. Tom represents public agency clients. His practice focuses on all aspects of municipal law. He has extensive experience advising clients and litigating in land use, zoning and planning, the California Environmental Quality Act ("CEQA"), real property entitlements, police power, charter cities, municipal taxation, Brown Act, Public Records Act, code enforcement, intergovernmental relations, grand juries, elections, initiatives, and referenda.

Timothy Coates

Tim Coates is a partner at the appellate firm of Greines, Martin, Stein & Richland LLP in Los Angeles, and over the past 34 years he has briefed and argued more than 250 matters in the state and federal appellate courts, including successfully arguing five cases in the United States Supreme Court, and obtaining a per curiam reversal in a sixth case. Tim's Supreme Court victories have addressed absolute and qualified immunity (Van de Kamp v. Goldstein, 555 U.S. 335 (2009), Messerschmidt v. Millender, 565 U.S. 535 (2012), Stanton v. Sims, 571 U.S. __, 134 S.Ct. 3 (2013)), Monell liability (Los Angeles County v. Humphries, 562 U.S. 29 (2010)) and warrantless arrests (County of Riverside v. McLaughlin, 500 U.S. 44 (1991)). He has been named a Southern California Super Lawyer in the area of appellate practice from 2007-2019, and has also been named in The Best Lawyers In America (Appellate Law) (2014-2019). The Los Angeles Daily Journal has repeatedly recognized Tim as one of the Top 100 Attorneys in California, he has received a California Lawyer Attorney of the Year award for his United States Supreme Court work, and Reuters News Service named him one of the "Top Petitioners" in the United States Supreme Court. Tim lectures widely on issues related to appellate practice, as well as section 1983 liability. He is also co-author of the chapter on federal civil rights liability in the CEB publication California Government Tort Liability Practice.

Patricia E. Curtin

With more than 30 years of focused experience, Patricia advises clients on applicable planning and zoning laws, prepares and processes land use applications, and obtains project approvals, including environmental and regulatory permits. Patricia's practice emphasizes local government and land use law representing both private and public sector clients. She advises these clients on all aspects of land use law, including the application of affordable housing and density bonus laws, as well as SB 35, which allows ministerial approvals of qualifying affordable housing projects.

She has worked with landowners and developers of commercial, industrial, residential and agricultural property, including wine growers, wineries and related businesses; shopping center owners; hotel/resort owners; educational institutions; public agencies; and hospitals and other medical facilities. In addition to representing both public and private sector clients, she serves as legal counsel to nine Geologic Hazard Abatements Districts (GHADs). In addition, she counsels other GHADs and similar entities on specific GHAD related issues and represents property owners, cities and counties in forming GHADs. She also serves as Secretary to the California Association of GHADs. The Association of GHADs is a non-profit organization dedicated to improving, enhancing and promoting the effectiveness of GHADs in California and promoting the utilization of GHADs in the prevention, mitigation, abatement, and control of geological hazards.

She has written several articles and papers on issues relating to GHAD formation and implementation. Patricia has presented and written extensively on local government and land use-related topics. She is one of two authors of a national land use publication, "State and Local Government Land Use Liability." (West Group)

Eric Danly

Eric Danly has served as the Petaluma City Attorney since December 5, 2005, and since July 1, 2013 in an in-house capacity. Eric reports directly to the City Council and oversees the City Attorney's Office consisting of, in addition to the City Attorney, two assistant city attorneys and a legal assistant. Prior to joining Petaluma in-house Eric was a partner in the Meyers Nave law firm and managing partner of its Santa Rosa office. Eric also served as Cloverdale City Attorney, General Counsel to the Monterey County Housing Authority Development Corporation, Clearlake City Attorney and Assistant City Attorney for Pinole. Eric has delivered numerous presentations on open meetings and records law, and ethical and other laws applicable to public agency officials. He served on the League of California Cities committee that authored the organization's first published guide to the California Public Records Act, entitled "The People's Business – A Guide to the California Public Records Act." He was appointed to serve on the League's standing committee on the Public Records Act when the committee was formed in September, 2009 and served on the committee through April, 2016. Along with his colleagues on the Public Records Act Committee, Eric helped author updates to The People's Business: A Guide to the Public Records Act, which were published 2010, 2011, 2014, and the Second Edition to The People's Business, which was published in 2017. While serving on the Public Records Act Committee Eric and his colleagues provided annual updates on the Public Records Act for the Municipal Law Handbook, in addition to providing support to League lobbyists on Public Records Act issues and recommendations to the Legal Advocacy Committee on requests for amicus support in public records cases. Currently Eric chairs the League of California Cities' Attorney Development and Succession standing committee. Eric also currently serves on the League's Municipal Law Institute Committee. Eric has also previously served on the Legal Advocacy, Municipal Law Handbook, and Nominating Committees within the City Attorneys Department of the League. Eric received a BA in Interdisciplinary English from Stanford University in 1990, and his JD from University of California, Hastings College of the Law with a public law concentration in 1998. He has been practicing law representing public agencies since 1999.

M. Christine Davi

Christine Davi began working for the City of Monterey in 2006 as the Assistant City Attorney. In May 2012 the City Council appointed her as the City Attorney. Christine previously served as Sr. Deputy City Attorney for the City of Salinas. In past years she has participated as a member of the Legal Advocacy Committee. Christine received her BA in Communication with minors in Political Science and Spansh Literature from University of California, San Diego, and her J.D. from California Western School of Law.

Jeffrey Dunn

Jeffrey V. Dunn is a highly sought after legal counsel to public agencies in complex litigation matters. Recognized as one of California's leading local government litigation attorneys, he was selected as one of California Lawyer magazine's Attorneys of the Year for 2014, the Daily Journal's Top 20 Municipal Attorneys in 2013 and Top 25 Municipal Attorneys in 2011. He was also recognized as one of California's Top 100 Attorneys by the Daily Journal in 2013 and 2016. Jeff gained national recognition for his successful representation in one of the most controversial issues facing California cities and counties — municipal regulation of marijuana distribution facilities. He was trial and appellate counsel in key published decisions affirming local government's authority to protect public safety and local land use authority, including the unanimous decision by the California Supreme Court in City of Riverside v. Inland Empire Patients' Health and Wellness Center. He discussed this subject on the NBC Nightly News, in the Washington Post and in other national and local television, radio and print media. Jeff currently chairs the League of Cities Attorneys Department Cannabis Regulation Committee.

Michael Guina

Michael Guina serves as the City Attorney for the City of Emeryville. He has spent most of his public sector career in Emeryville, having served as its Deputy and Assistant City Attorney. While with the firm of Burke, Williams & Sorensen, he was the Assistant City Attorney for the City of Pacifica and City of St. Helena. Mr. Guina hopes the Attorney Development and Succession Committee will be a valuable resource for new city attorneys and inspire law students to pursue a rewarding career in the city attorney world.

Maila Hansen

Maila works in the General Counsel and Advisory division of the Sacramento City Attorney's Office. She advises Public Works and Homeless Services staff on a variety of issues including Brown Act, Public Records Act, real property transactions, procurement processes for City contracts, eminent domain, environmental compliance, ethics, constitutional issues associated with the City’s Art in Public Places program, administration of City grant programs, and construction-related matters such as prevailing wages and bonds. She went to UC Davis School of Law and has been with the Sacramento City Attorney's Office since 2015.

Zach Heinselman

Zach joined Richards, Watson & Gershon in 2017 as a Summer Associate. While in law school he externed for the Honorable Justice John L. Segal of the California Court of Appeal and clerked for the Office of the Los Angeles City Attorney, General Counsel Division. He was also a Comments Editor for the UCLA Law Review, a Writing Advisor, and a Research Assistant to Professor E. Tendayi Achiume. Prior to his legal career, Zach worked on political campaigns and at the at the Pacific Council on International Policy. Zach received a J.D. from the University of California, Los Angeles School of Law and a B.A. from the University of Wisconsin, Madison.

Michael Hogan

Mike is a magna cum laude graduate of Boston College Law School. He was an associate and partner with Gray, Cary, Ames & Frye in San Diego for 15 years before starting his own firm in 1995, where his practice focuses exclusively on the representation of public agencies in matters involving land use and the California Environmental Quality Act (CEQA). Over the past thirty-eight years, Mike has provided counseling and litigation services on a wide variety of public and private projects, assisting in the preparation and defense of public agencies' CEQA compliance documents and land use approvals. In that role, Mike has been the lead trial and appellate lawyer in scores of lawsuits in federal and state courts involving CEQA claims and other land use issues. Mike currently represents public agencies in Southern and Central California, including the cities of Carlsbad, Coronado, Encinitas, Imperial Beach, La Mesa and Solana Beach, as well as Kern County, Kings County and the San Diego Unified Port District.

Christi Hogin

Christi currently serves as city attorney for Lomita, Malibu, and Palos Verdes Estates and she is interim city attorney for the City of Pomona. She has an active litigation practice including representing the City of L.A. in land use and CEQA cases. She is a former president of the City Attorneys Department and has been practicing public law for 30 years, describing herself as a true believer in local government. Her law firm merged with Best Best & Krieger last year and she practices in the firm's Manhattan Beach office. Her husband is also a lawyer.

Scott Howard

Scott Howard has been practicing Municipal Law for over 40 years. Although he retired after serving as the City Attorney of Glendale, he is currently employed by Colantuono Highsmith & Whatley, providing contract attorney services to various agencies. He is also an Adjunct Professor at California State University, Northridge, where he teaches Urban Studies and Planning.

Michelle Hugard

Michelle is a member of the League of California Cities' Attorney Development and Succession Committee. She currently serves as a Deputy City Attorney in the Civil Liability Division of the Santa Monica City Attorney's Office. Prior to her current position, she served as a prosecutor in the Criminal Division of the Santa Monica City Attorney's Office and a judicial law clerk for the Los Angeles Superior Court.

Michael Jenkins

Michael Jenkins has been a member of the City Attorneys Department for a long, long time. He has sat through many closed sessions, some more entertaining than others. He and Christi take pleasure torturing their colleagues with interactive training programs at League conferences.

Kathleen A. Kane

Kathleen has served as Burlingame's in house City Attorney since 2013. Prior to that she was East Palo Alto's City Attorney, and Interim City Attorney for Belmont.

Barbara Kautz

Barbara E. Kautz practices with Goldfarb & Lipman LLP in the areas of land use, with an emphasis on housing- related legislation; inclusionary housing; CEQA/NEPA compliance; and affordable housing. She is the author of No More Kids! Overcrowded Schools, Housing, and Fair Housing Laws, California Real Property Journal (2015); co-author, Local Government Financing Powers and Sources of Funding, in ABA Legal Guide to Affordable Housing (2005, update 2011); and author of In Defense of Inclusionary Zoning: Successfully Creating Affordable Housing, 36 U.S.F. Law Review 971 (2002). Ms. Kautz has over 30 years of land use experience. Immediately prior to joining Goldfarb & Lipman LLP, she was the Community Development Director and Assistant City Manager for the City of San Mateo, California. She speaks frequently at conferences regarding housing issues and is a Fellow of the American Institute of Certified Planners and past editor of the Land Use chapter in the Municipal Law Handbook. She formerly served on the Board of Directors for the League of California Cities and the California Chapter of the American Planning Association. Ms. Kautz received her law degree summa cum laude from the University of San Francisco, holds a Master of City Planning from the University of California, Berkeley, and is a Phi Beta Kappa graduate of Stanford University.

Goldfarb & Lipman LLP is a real estate law firm with a practice emphasizing affordable housing, land use, economic development, and housing finance. The firm represents non-profit housing sponsors, public agencies, and private developers on real estate related programs and projects. Members of the firm have taken a lead role in drafting legislation regarding housing, California Low Income Tax Credits, and limited equity cooperatives.

Gregg Kettles

Gregg Kettles is a member of the Department's Attorney Development and Succession Committee (ADSC). Formerly a full-time teacher, Mr. Kettles hopes the ADSC's Essential Skills program succeeds in benefitting every attorney in the Department, no matter their years of experience.

Lauren Langer

Lauren Langer serves as assistant city attorney for the cities of West Hollywood, Lomita and Hermosa Beach, which includes serving as counsel to their planning commissions. She also serves as assistant counsel to the Westside Cities Council of Governments and counsel to the West Hollywood business license commission and regularly advises the Malibu Environmental Programs Department.

Lauren's practice consists of advising city clients on land use, zoning, planning and environmental laws (including California Environmental Quality Act, Clean Water Act, and National Pollutant Discharge Elimination System compliance), drafting legislation and contracts and advising on all other legal issues associated with municipal law practice, such as open meeting requirements and public records laws.

In addition to her land use and environmental experience, Lauren is actively involved in creating cannabis ordinances for her city clients in response to Proposition 64, including West Hollywood's cannabis business license ordinance and license selection program. She also is highly skilled in drafting other critical and complex municipal ordinances, including those that address density bonus and wireless infrastructure. Lauren also handles enforcement and regulatory matters with the State and Regional Water Boards and litigation matters. Lauren enjoys practicing municipal law, as it allows her to work on issues that are critical to the community and impact people's daily lives — everything from safe streets to housing to the environment. Lauren focuses on building relationships with clients and consensus among all stakeholders to help cities run well and manage their issues. Before joining Best Best & Krieger LLP, she practiced at Jenkins & Hogin for 12 years.

Lauren has served on the League of California Cities City Attorneys' Cannabis Regulation Committee since 2011. She also hosts programming for new lawyers at the League's City Attorneys' Department Spring Conference. She also regularly presents in-house trainings and seminars on water quality issues and CEQA, cannabis regulations and the Brown and Public Record acts. Lauren co-chairs the Parent Advisory Council at her daughters' school.

Lauren is licensed to practice law in the State of California.

Andrea K. Leisy

Ms. Leisy's practice focuses on advising public agencies, project applicants and citizen's groups during administrative proceedings and in trial and appellate litigation, with a focus on issues arising under the California Environmental Quality Act, the State Planning and Zoning Law, the National Environmental Policy Act, and the Integrated Waste Management Act. Ms. Leisy has also worked on projects involving compliance with, or permitting under, the Resource Conservation and Recovery Act, Toxic Substances Control Act, and the Comprehensive Environmental Response, Compensation, and Liability Act. Her clients include the City of Newport Beach, the City of Los Angeles, Waste Management of California, Inc. and the Port of Los Angeles.

Michelle Marchetta Kenyon

Michelle Kenyon provides legal representation for cities and other public agencies as city attorney and special counsel. Michelle currently serves as City Attorney for the cities of Rohnert Park, Calistoga, Piedmont and Pacifica, Town Attorney for the Town of Moraga, and Special Counsel to several cities in the Bay Area. She previously has served as Acting/Interim City Attorney for many cities including the City of Redwood City, Daly City, Pleasant Hill, and the Town of Danville. Her practice includes advising city councils and staff in all areas of municipal law issues such as annexation procedures, bidding and claims procedures, CEQA, code enforcement, conflicts of interest laws, contract review, elections, Government Tort Claims Act, initiatives, referenda, land use and planning, municipal finance, open meeting laws, personnel, Proposition 218, and water supply assessments.

Michelle's other areas of specialty include land use litigation and appellate advocacy. She is experienced in both state and federal trial and appellate courts, including written appearances in the U.S. Supreme Court. She has successfully served as lead attorney in litigation involving CEQA, inverse condemnation, election law, civil rights, Proposition 218 and rent control, with several outcomes garnering published decisions.

Robert May

Robert “Tripp” May, a partner with Telecom Law Firm, PC, represents and advises public agencies and private and nonprofit landowners in regulatory and transactional matters concerning wired and wireless infrastructure matters. He assists public agencies develop and implement regulatory frameworks for communications infrastructure, including ordinances, policies, design guidelines, permit applications and staff handbooks. He also negotiates, drafts and enforces communications infrastructure agreements, including license and franchise agreements for deployments in the public rights-of-way. Mr. May has represented the League of California Cities in several FCC rulemaking proceedings and currently serves as the League’s counsel in the pending challenge to the FCC’s “small cell order” released in September 2018. Mr. May graduated from University of California at Santa Barbara, with honors, and earned his J.D., also with honors, from the University of San Diego, where he competed for Moot Court Board and served as executive editor on the San Diego Law Review.

Jennifer Mizrahi

Jennifer Mizrahi currently serves as the City Attorney for the City of Desert Hot Springs, Deputy City Attorney for the City of Rancho Mirage and Deputy Counsel for several of the firm's public agency clients. Ms. Mizrahi joined Quintanilla &Associates in 2015, after working with Mr. Quintanilla for over nine years at the firm of Green, de Bortnowsky & Quintanilla ("GdQ"), where she served as Assistant City Attorney the firm's public agency clients including the City of Cathedral City and the City of Victorville. Prior to GdQ, Ms. Mizrahi worked at Beltran & Medina where she served as Deputy City Attorney for the City of Lynwood, and Deputy General Counsel for the Water Replenishment District. During the course of representing public entities for over 15 years, Ms. Mizrahi has acquired extensive experience in many facets of municipal law including land use and planning, infrastructure and public works, and environmental regulation and compliance.

Ms. Mizrahi was admitted to the State Bar of California in January 2003. Ms. Mizrahi received her Juris Doctor from Southwestern University School of Law, and her Bachelor of Arts degree in Latin American Studies/Economics from the University of California, Santa Cruz, where she graduated with honors. Ms. Mizrahi is currently a member of the State Bar of California, the Los Angeles County Bar Association, the Desert Bar Association and the Southwestern Alumni Association. Ms. Mizrahi is admitted to practice before all courts of the State of California, the United States District Court, District 7, and the Ninth Circuit Court of Appeals and she is fluent in speaking, reading, and writing in Spanish.

Joseph Montes

Joseph Montes is the City Attorney for the cities of Alhambra and Santa Clarita. He is a partner at Burke, Williams & Sorensen, LLP, where he has been for 25 years. In past years he has participated as a Policy Committee Representative, as a member of the Public Records Act Committee, the Legal Advocacy Committee, the City Attorney's Section Board Selection Committee, the Attorney Development and Succession Committee, and has spoken at past conferences. He is a survivor of 19 years of Catholic education, 11 of them Jesuit. And while he does not profess to be an Ethics Expert, he generally knows when other people are wrong.

Amara L. Morrison

Amara has extensive experience obtaining land use entitlements for a variety of land use projects including mixed use, residential, commercial and hotel uses. She has a breadth and depth of experience in all aspects of land use work including compliance with the California Environmental Quality Act (CEQA), the Permit Streamlining Act, planning and zoning Law, the Subdivision Map Act, and affordable housing laws, including density bonus and SB 35, which allows ministerial approvals for qualifying affordable housing projects. Her work has involved negotiation with state and federal agencies, including the Federal Aviation Administration, California Department of Fish and Wildlife, and the Delta Protection Commission. Amara has 26 years of experience serving Contra Costa and Alameda County public sector clients, including special districts, with regard to land use, zoning, development and redevelopment, environmental law, and resource protection and conservation. Prior to private practice, she was assistant city attorney for Livermore and Walnut Creek and in connection with those positions advised elected and appointed officials and staff on all aspects of municipal law including the California Public Records Act, the Ralph M. Brown Act, public finance and contracts law, solid waste, risk management and conflicts of interest, First Amendment and redevelopment law. Amara currently is co-general counsel to the Alameda County Transportation Commission and various Geologic Hazard Abatement Districts. She has been lead counsel on the development, implementation and defense of general plans, specific plans and various neighborhood plans and development project approvals based thereon.

Lynn Tracy Nerland

Lynn Tracy Nerland is a member of the Department's Attorney Development and Succession Committee (ADSC), as well as the Department's Second Vice-President. The ADSC is hoping that its Essential Skills program is helpful for attorneys at all levels and encourages all feedback short of throwing rotten tomatoes during the presentation. The role of "Beleaguered City Attorney" is not a stretch for Ms. Nerland whose acting credits range from the Narrator in a first-grade production of "Hansel and Gretel" to the British host on a "Weakest Link" game show riff at the 2001 Annual Conference. Her city attorney credits include current City Attorney for San Pablo and previously City Attorney for Antioch, Assistant City Attorney for Pleasanton and Assistant City Attorney for Emeryville. Ms. Nerland is dedicating this performance to all of those city attorney types trying to stay alert during a late council or commission meeting . . .

Helen Peak

Helen Holmes Peak is a member of the Department's Attorney Development and Succession Committee. She currently serves as the contract City Attorney of San Marcos, and has represented a number of other public agencies as special counsel.

Javan N. Rad

Javan Rad is the Chief Assistant City Attorney for the City of Pasadena, and has been with Pasadena since 2005. Javan oversees the Civil Division of the City Attorney's office, and also handles a variety of litigation and advisory matters in the areas of constitutional, tort, and telecommunications law. Javan has been active in a variety of capacities for the League of California Cities' City Attorney's Department. Javan has previously served as President of the City Attorney's Association of Los Angeles County, and is currently on the Board of Directors of SCAN NATOA (the States of California and Nevada Chapter of the National Association of Telecommunications Officers and Advisors). Javan graduated from Purdue University with a bachelor's degree in Quantitative Agricultural Economics, and from Pepperdine University School of Law.

Michael Roush

Mr. Roush served as City Attorney for the City of Pleasanton for 21 years. After retirement from Pleasanton, he has continued to provide legal services to cities. Michael has been of counsel with the Renne Public Law Group through which he has served as City Attorney for the City of Brisbane since 2014. As of this writing, he is serving as the Interim City Attorney for the City of Alameda. He has also provided legal services to the Cities of San Luis Obispo, Stockton and San Ramon, as well as to the City of Richmond Rent Board. Michael serves as a hearing officer for rent control programs throughout the State. He was President of the League's City Attorneys Department in the early 2000's.

David Ruderman

David Ruderman is contract City Attorney of Lakeport and Senior Counsel at Colantuono, Highsmith & Whatley, a municipal law firm with offices in Pasadena and Grass Valley. His litigation and advisory practice covers a range of public law issues, including municipal finance and public revenues, public utilities, LAFCO matters, land use, medical and adult-use marijuana, election law, employment law, and general contract disputes. In his litigation practice, David has successfully obtained TROs and injunctions against several illegal marijuana dispensaries, including affirmance on appeal of a preliminary injunction against a dispensary in Auburn. He recently obtained published opinions in two cases concerning preliminary injunctions to enjoin the operation of medical marijuana dispensaries: Urgent Care Medical Services v. City of Pasadena (2018) 21 Cal.App.5th 1086 and City of Vallejo v. NCORP4, Inc. (2017) 15 Cal.App.5th 1078. David also serves as a hearing officer for Nevada County in nuisance abatement, administrative citation, and marijuana cultivation appeals. His recent speaking engagements include “All Things Cannabis: Land Use, Cultivation, Water, Ag Land Preservation and Impacts” at the 2017 CALAFCO Staff Workshop. David received his J.D. from UCLA School of Law in 2006 where he was a managing editor of the UCLA Law Review and a judicial extern for the Honorable Harry Pregerson of the Ninth Circuit Court of Appeals. Prior to attending law school, David served as a Peace Corps volunteer in the Russian Far East. He graduated with honors from Lewis & Clark College with a major in History in 1997.

Stacey N. Sheston

Stacey N. Sheston is a partner in the Labor & Employment practice group of Best Best & Krieger LLP. She is also a member of the firm's Executive Committee. Prior to joining BB&K, she was a shareholder, practice group leader and chief talent officer on the management committee of McDonough Holland & Allen in Sacramento.

Stacey's practice includes day-to-day employment advice, such as dealing with problem employees (including discipline and terminations), handling harassment complaints and investigations, responding to requests for disability accommodations, addressing wage and hour and leave of absence questions, responding to grievances and unfair practice charges, and drafting employment agreements, handbooks and policies. On the litigation side, Stacey represents employers in mediations, arbitrations, administrative hearings and court proceedings (including jury and non-jury trials) arising out of employment matters, including wrongful termination, breach of contract, unpaid wages, harassment, discrimination and retaliation.

Stacey is a member of the State Bar of California, the Employee Relations Policy Committee of the League of California Cities, the Sacramento County Bar Association Labor & Employment Section, Women Lawyers of Sacramento, and the California Public Employers Labor Relations Association. She is also former editorial chair of, and contributor to, the Personnel Chapter of the Municipal Law Handbook (CEB 2010).

From 2012 to 2017, Stacey was named by her peers as a Northern California Super Lawyer for employment and labor law. She is admitted to the U.S. District Court for the Central & Eastern districts of California and the Ninth Circuit U.S. Court of Appeals. She is licensed to practice in the State of California.

Daniel G. Sodergren

Daniel G. Sodergren is the City Attorney for the City of Pleasanton. Mr. Sodergren previously served as City Attorney for the cities of Tracy and Livermore and as Special Counsel for the cities of Palo Alto and Oakland. He began his career as a law clerk and served in that capacity in Palo Alto, Santa Clara and San Jose. Mr. Sodergren is a graduate of U.C. Berkeley and Santa Clara University School of Law.

Harriet Steiner

Harriet is a partner at Best Best & Krieger in its Sacramento office. She has been City Attorney of Davis since 1987. She is also General Counsel to the Sacramento Metropolitan Cable Television Commission and Co-General Counsel to the Valley Clean Energy Alliance, a Community Choice Aggregation entity serving Davis, Woodland and Yolo County.

Maggie W. Stern

Maggie helps cities, counties, and special districts navigate the legal issues facing California public agencies. She streamlines routine legal matters and demystifies regulatory compliance, so her clients can spend less time on legal issues and more time on service delivery. Public agencies rely on Maggie for advice on general governance matters, including Brown Act and Public Records Act compliance, conflicts-of-interest evaluation and guidance, constitutional law, procurement and public safety issues. She also represents and defends public agencies in civil actions involving contract disputes, cost recovery, tort defense, tax allocation disputes, land use, public works, and code enforcement. Maggie has a particular fondness for public works and public contracting and has served as a reviewer of the League of California Cities' Municipal Law Handbook, Public Contracting Chapter for the last six years. She regularly speaks and publishes articles on issues related to public works and procurement.

J. Scott Tiedemann

Scott Tiedemann is the Managing Partner of Liebert Cassidy Whitmore, California's largest education and public sector and non-profit labor and employment law firm. Scott is perhaps best known as a leading advocate for, and trusted advisor to public safety agencies across California. He is called upon in high profile cases to advise public safety executives regarding how to conduct complex investigations, manage media relations and navigate the procedural complexities of the Public Safety Officers and Firefighters Procedural Bill of Rights. He has earned a reputation for successfully prosecuting many difficult cases involving allegations ranging from excessive force to sexual abuse to fraud. Scott has prevailed in multiple published appellate cases that have helped public safety employers more effectively manage their employees. His published decisions on behalf of public safety employers include, among others: Upland Police Officers Association v. City of Upland (2003) 111 Cal.App.4th 1294, Benach v. County of Los Angeles (2007) 149 Cal.4th 836 and Thompson v. City of Monrovia (2010) 186 Cal.App.4th 860, Ferguson v. City of Cathedral City (2011) 197 Cal.App.4th 1161, County of Los Angeles v. Mendez (2017) 137 S.Ct. 1539; San Francisco Police Officers' Assoc. v. San Francisco Police Comm. (2018) 27 Cal.App.5th 676. Scott also represents a wide variety of other government agencies and schools in labor and employment matters. Scott serves as lead negotiator for multiple employers in collective bargaining with both safety and general employee bargaining units. Scott's practice also includes conducting complex investigations, counseling and management training. He frequently speaks at national and statewide conferences, including the California Police Chiefs Association, the League of California Cities, and CalPELRA, on subjects such as disciplinary investigations, workplace harassment, employment discrimination, free speech, privacy and ethics. Scott frequently is asked to lend his knowledge and expertise to other professional organizations. He is General Counsel to the Los Angeles County Police Chiefs Association and previously served as Chair of the Southern California Police Legal Advisors Committee, Chair of the Labor Relations subcommittee on the dissolution of redevelopment agencies for the League of California Cities, and served on the Board of Advisors of the California Public Employee Relations (CPER) program. Scott authored the CPER Pocket Guide to the Firefighters Procedural Bill of Rights, is an editor of the CPER Pocket Guide to the Public Safety Officers Procedural Bill of Rights, and Chapter 8 (The Public Safety Officers and Firefighters Procedural Bill of Rights Acts) of California Public Sector Employment Law, State Bar of California/LexisNexis (2018).

Diana Varat

Diana Varat is of counsel in the Los Angeles office of Richards, Watson & Gershon. Drawing from her background in urban planning, Diana advises public agencies on complex land use and housing matters. Since the State's passage of the 2017 Housing Package, Diana has focused her practice on compliance with California's housing-related land use laws. Diana has drafted numerous ordinances to implement housing element law on topics including: accessory dwelling units, inclusionary housing, density bonuses, emergency shelters, transitional and supportive housing, and reasonable accommodations procedures. In addition to her focus on housing and land use, Diana is an expert in ethics laws, helping public officials analyze potential conflicts of interest under the Political Reform Act and Government Code Section 1090. Diana is active in the Los Angeles section of the American Planning Association, for which she served as the Vice Director of Policy from 2010-2012. In addition to her legal practice, Diana is a Lecturer in the Department of Urban Studies & Planning at California State University, Northridge, where she teaches a course on "The Legal Foundations of Planning." Diana also has served as a Lecturer in the Department of Urban Planning at the UCLA Luskin School of Public Affairs. Prior to attending UCLA for her law degree and Master of Arts in Urban Planning, Diana worked for the Woodrow Wilson International Center for Scholars and for the Planning Department for the City of Dresden, Germany.

Marni Von Wilpert

Marni von Wilpert is a Deputy City Attorney in the General Litigation Unit of the San Diego City Attorney's Office, where she prepares and defends civil actions on behalf of the City in state and federal courts. Marni previously practiced civil rights law at the Mississippi Center for Justice, and federal labor law at the National Labor Relations Board's Appellate and Supreme Court Litigation Unit in Washington D.C. She is a San Diego native and is happy to be back in her hometown.

May 2019
City Attorneys' Department Spring Conference
Item No.: 1928