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LEGAL ADVOCACY REPORT

November 4, 2013

The League’s Legal Advocacy Committee considered the following requests for views from the Attorney General and appellate cases for amicus support from **June 24, 2013 through October 24, 2013**. Copies of League amicus filings are available at www.cacities.org/recentfilings. To submit a request for amicus assistance, go to www.cacities.org/requestamicus. For more information about the Legal Advocacy Program, go to the Legal Advocacy Center at <http://www.cacities.org/Member-Engagement/Professional-Departments/City-Attorneys> or contact the League’s Legal Department staff:

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We gratefully acknowledge and thank all of the attorneys identified below who volunteered their time, effort and expertise to assist the League in advocating on behalf of California cities. We also thank their associated public agencies and law firms for the generous support.

Attorney General Requests for Views

AG Opinion 12-901

Pending Court: None

Case Number: AG Opinion 12-901

Citation: None

Attorney General Request No. 12-901 – A request for an opinion of the Attorney General on the following question: Is an owner-operated business with no employees a “place of employment” under Labor Code section 6404.5, which prohibits smoking in a workplace?

Approved Action: Monitor the request for an opinion.

AG Opinion 13-403

Pending Court: None

Case Number: Opinion No. 13-403

Citation: None

Attorney General Request No. 13-403 – A request for an opinion of the Attorney General on the following question: Does Proposition 26 require voter approval before a County Board of Supervisors may enact an ordinance that would require a cable television company to pay to the County a public, educational, and governmental access fee equal to one percent of the “holder’s gross revenues” under the Digital Infrastructure and Video Competition Act?

Approved Action: Submit a letter to the Attorney General stating the League’s view that the answer to the question is no. **Status of Filing:** The League submitted the letter and the matter is pending.

Letter Writer: The League thanks John Bakker with Meyers Nave for preparing the letter.

CEQA

South County Citizens for Smart Growth v. County of Nevada, et al.

Pending Court: 3rd District Court of Appeal

Case Number: C067764

Citation: 2013 WL 5531375

A citizens group brought a CEQA challenge to the county’s approval of a commercial retail development. The group alleged that since county staff recommended a revised project, recirculation of a revised draft EIR adding the recommendation as a feasible alternative was required. The court concluded the staff alternative was not “significant new information” under CEQA Guidelines section 15088.5(a)(3). Further, findings regarding the feasibility of the staff alternative were not required. The court held that recirculation is not required under section 15088.5(a)(3) unless a petitioner shows an absence of substantial evidence on four issues: the alternative “must be feasible; it must be considerably different from other alternatives previously analyzed; it must clearly lessen the significant environmental impacts of the proposed project; and the project’s proponents must decline to adopt it.”

Approved Action: File an amicus letter with the Court of Appeal requesting publication of the opinion. **Status of Filing:** The League filed the letter and the matter is pending.

Letter Writer: The League thanks R. Tyson Sohagi with The Sohagi Law Group for preparing the letter.

Coastal Act

*City of Dana Point v. California Coastal Commission (Headlands Reserve LLC, RPI);
Surfrider Foundation v. City of Dana Point (Headlands Reserve LLC, RPI)*

Pending Court: 4th District Court of Appeal, Div. 1

Case Number: D060260

Citation: 2013 WL 2934682

The city adopted an ordinance mandating pedestrian gates and limited hours of operation for certain access trails to a public beach that run through a partially-completed development of new homes. The Coastal Commission concluded the trail gates and limited hours required a coastal development permit under the Coastal Act. The city sought to set aside the commission's decision, contending the gates and limited hours were required to abate public nuisance conditions. The trial court agreed and the commission appealed. However, in a separate action brought by an environmental group, the trial court also found the ordinance was invalid since "there was no properly declared nuisance and/or the manner of abatement was excessive." The city appealed and the Court of Appeal considered both actions. The court held that a city must "demonstrate that it has exercised its nuisance abatement powers in good faith" and "not as a pretext for avoiding local coastal program obligations." The city filed a petition for review.

Approved Action: File an amicus letter with the Supreme Court, supporting the petition for review. **Status of Filing:** The League filed the letter but the court denied the petition.

Letter Writer: The League thanks Christi Hogin with Jenkins & Hogin, LLP for preparing the letter.

Eminent Domain

City of Perris v. Richard C. Stamper, et al.

Pending Court: 4th District Court of Appeal, Div. 2

Case Number: E053395

Citation: 218 Cal.App.4th 1104

To help establish a new truck route, the city brought an eminent domain action to acquire part of a vacant parcel used for agricultural purposes but zoned for light industrial use. The city appraised the take area as agricultural land since it would not approve any future industrial development unless the owners dedicated the same area to the city. The owners argued the dedication requirement should not be considered in determining the fair market value because it was not reasonably probable the city would impose the dedication condition and it would be unconstitutional if imposed. The court bifurcated the trial on compensation and determined that the dedication requirement was reasonably probable and constitutional. Therefore, agricultural

sales prices were the proper basis for valuation. The owners challenged the ruling and the decision to have the court rather than the jury determine issues related to the dedication requirement. The Court of Appeal reversed and remanded the matter for jury trial on the compensation, holding that “the issues surrounding the dedication requirement are essential to the determination of [valuation and] ‘just compensation’ and therefore must be ‘ascertained by a jury’” as questions of fact. The city filed a petition for review.

Approved Action: Monitor the petition for review. **Status:** The matter is pending.

First Amendment

Town of Greece, New York v. Galloway

Pending Court: United States Supreme Court

Case Number: 12-696

The town had a legislative invocation practice in which local clergy were invited to open monthly board meetings with a prayer. The town did not regulate prayer content, permitted citizens from any religious tradition to volunteer, and did not discriminate in selecting the volunteers. Residents challenged the practice, claiming it violated the Establishment Clause. They argued the volunteer selection process preferred Christianity over other faiths and the prayers were impermissibly sectarian. The Second Circuit Court of Appeals struck down the prayer practice, finding it “impermissibly affiliated the town with a single creed [or endorsed], Christianity.” The Supreme Court granted the town’s certiorari petition presenting the following question: “Whether the [Second Circuit] court of appeals erred in holding that a legislative prayer practice violates the Establishment Clause notwithstanding the absence of discrimination in the selection of prayer-givers or forbidden exploitation of the prayer opportunity.”

Approved Action: File an amicus brief with the Supreme Court, seeking guidance on constitutional legislative invocation policies and practices for those cities that choose to incorporate them. Argue that the standard should be as articulated in the 9th Circuit in *Rubin v. City of Lancaster*. **Status of Filing:** The League filed the brief and the matter is pending.

Brief Writer: The League thanks Allison E. Burns with Stradling Yocca Carlson & Rauth for preparing the brief.

Housing

California Building Industry Association (CBIA) v. City of San Jose (Affordable Housing Network of Santa Clara County, et al., Interveners)

Pending Court: California Supreme Court

Case Number: S212072

Citation: 216 Cal.App. 4th 1373

CBIA challenged the city's inclusionary housing ordinance as violating constitutional standards and "the requirements applicable to such housing exactions as set forth in *San Remo Hotel L.P. v. City and County of San Francisco*." The trial court invalidated the ordinance, finding the city had failed to demonstrate a nexus between the ordinance requirements and the "deleterious public impacts of new residential development." The city and housing nonprofits appealed, maintaining the ordinance is a valid land use regulation to help generate affordable housing in the community -- which must be upheld if reasonably related to the public welfare and not arbitrary or capricious. The Court of Appeal agreed, finding the ordinance should "be reviewed as an exercise of the City's police power" with "substantial deference." The Supreme Court then granted CBIA's petition for review of the following issue, citing *San Remo*: "What standard of judicial review applies to a facial constitutional challenge to inclusionary housing ordinances...?"

Approved Action: File an amicus brief with the Supreme Court, supporting the city on the standard of review and arguing further that the ordinance's waiver provision precludes any finding of facial invalidity. **Status of Filing:** The League has not yet filed the brief.

Brief Writer: The League thanks Thomas B. Brown with Burke, Williams & Sorensen, LLP for agreeing to prepare the brief.

Land Use

Calguns Foundation, Inc., et al. v. County of San Mateo

Pending Court: 1st District Court of Appeal

Case Number: A136092

Citation: 2013 WL 3729575

Calguns challenged the county ordinance that prohibits possession and use of guns or other dangerous weapons in the county's parks and recreational areas. Calguns claimed State law preempts the ordinance because it "does not provide an exception for persons licensed to carry a [concealed] firearm." Further, State law expressly preempts local ordinances related to registration or licensing of commercially manufactured firearms. The Court of Appeal affirmed the trial court's ruling, finding the ordinance is a valid land use regulation with no express or implied preemption.

Approved Action: File an amicus letter with the Court of Appeal, requesting publication of the opinion. **Status of Filing:** The League joined the California State Association of Counties (CSAC) letter requesting publication and the court published the opinion.

Letter Writer: The League thanks Jennifer B. Henning with CSAC for preparing the letter.

Pension and Benefits

Bruce V. Malkenhorst, Sr. v. California Public Employees' Retirement System, et al.

Pending Court: 4th District Court of Appeal, Div. 3

Case Number: G047959

Citation: None

The city's former city administrator/clerk challenged CalPERS' determination to reduce his pension benefits, seeking to prevent CalPERS from continuing the related administrative process to recalculate the pension benefit as not based on his last and highest paid compensation. CalPERS argued that it has the sole authority to determine what reported earnings may be considered "compensation earnable" for purposes of calculating the retirement allowance and the plaintiff failed to exhaust his administrative remedies. The city also answered the complaint as the RPI, denying the plaintiff was entitled to relief and asserting the city fully performed any legal or contractual obligations. CalPERS prevailed and the plaintiff appealed, arguing the city has the non-delegable right (and contractual obligation to its employee) to determine pension benefits and the pension amount is based on compensation paid and the job position held.

Approved Action: Monitor the case. **Status:** The matter is pending.

Proposition 26

Brooktrails Township Community Services District (District) v. Board of Supervisors of Mendocino County, et al. (David Paland, Intervener)

Pending Court: 1st District Court of Appeal

Case Number: A135900

Citation: 2013 WL 3224426

A resident sponsored an initiative to prevent the district from collecting service charges on inactive water or sewer connections. The measure passed by a simple majority on the same ballot as Proposition 26. The district asserted the measure was unenforceable since it did not achieve the two-thirds voter approval required by Proposition 26 for effectively imposing a new "tax" on

active connections due to the increased rates that would result for those connections. The court upheld the initiative, finding that Proposition 26 (effective the day after the election) has no retroactive application to existing local assessments, fees or charges. Therefore, only a simple majority vote was necessary for the initiative to pass and repeal the fee.

Approved Action: File an amicus letter with the Court of Appeal, requesting publication of the opinion since it holds that Proposition 26 is not retroactive as it applies to local governments.

Status of Filing: The League filed the letter and the court published the opinion.

Letter Writer: The League thanks Benjamin P. Fay with Jarvis, Fay, Doporto & Gibson, LLP for preparing the letter.

Public Works

Bay Cities Paving & Grading, Inc. v. City of San Leandro (Oliver DeSilva, Inc., RPI)

Pending Court: 1st District Court of Appeal

Case Number: A137971

Citation: N/A

The city awarded a public works contract to the lowest responsible and responsive bidder. All bidders were required to submit a bid bond with their bids. The selected bidder inadvertently omitted the first page of the standard bid bond form from his bid package. However, the signature page of the bond was properly submitted. The city concluded the bond was enforceable, waived the omission of the first page as a “minor irregularity,” and accepted the bid. Bay Cities challenged the award as the second lowest bidder, claiming the city abused its discretion in waiving the bid bond defect. The trial court found substantial evidence supported the city’s determination that the minor irregularity did not affect the bid amount or give the bidder an unfair advantage. Bay Cities appealed the ruling.

Approved Action: File an amicus brief with the Court of Appeal, supporting the city on the merits. **Status of Filing:** The League filed the brief and the matter is pending.

Brief Writer: The League thanks Clare M. Gibson with Jarvis, Fay, Doporto & Gibson, LLP for preparing the brief.

Redevelopment

Los Angeles Unified School District v. County of Los Angeles, et al.

Pending Court: 2nd District Court of Appeal

Case Number: B243849

Citation: 217 Cal.App.4th 597

The school district sought to compel the county, the city and several former redevelopment agencies to increase the district's allocation of "passthrough" payments of property tax increment by challenging the omission of Educational Revenue Augmentation Funds (ERAF) revenue from the district's property tax allocation base. The court held that the district's share of diverted ERAF revenue must also be included in the base -- resulting in a corresponding increase in the district's passthrough payments. The court concluded that since, under the *City of Alhambra* ruling, the Triple Flip and the VLF Swap diversions were intended to be revenue-neutral and have no effect on the calculation of the base property tax revenue allocation system, they should have no effect on the passthrough allocations. The county filed a petition for review.

Approved Action: File an amicus letter with the Supreme Court, supporting the county's petition for review. **Status of Filing:** The League filed the letter but the court denied the petition.

Letter Writer: The League thanks Susan Y. Cola with the Santa Monica City Attorney's Office for preparing the letter.

Section 1983 Actions

Thomas vs. Dillard

Pending Court: Ninth Circuit Court of Appeals

Case Number: 13-55889

Citation: None

A community college district police officer was dispatched to a domestic violence call on campus. When the officer arrived, the couple in issue emerged from behind a storage container with no signs of violence between them and the suspect refused to raise his hands or consent to a weapons search. The officer ultimately tased and searched the suspect, finding no weapons. The suspect was then arrested and charged with resisting or obstructing a peace officer, but the charge was later dismissed. He thereafter brought this Section 1983 action, alleging unlawful search, seizure and arrest and use of excessive force. The officer moved for summary judgment based on qualified immunity but the district court denied the motion. The court granted summary judgment for the plaintiff, finding no reasonable basis for the forced search and the taser use was excessive force. The officer appealed the ruling.

Approved Action: Monitor the case. **Status:** The matter is pending.

Taxes

Dane v. City of Santa Rosa

Pending Court: 1st District Court of Appeal

Case Number: A138355

Citation: None

The plaintiff filed a taxpayer lawsuit challenging the city's vehicle impoundment procedures and enforcement. She claimed that she had taxpayer standing to bring the action because she pays sales taxes, gasoline taxes and water and sewage fees in the city. The city argued the plaintiff lacked standing because she had no vehicle impounded and there was no actual controversy. Further, she lacked taxpayer suit standing because she pays no assessed real property taxes in the city. The trial court agreed and dismissed the action. The plaintiff appealed the ruling.

Approved Action: File an amicus brief with the Court of Appeal, highlighting the potential impacts on cities if the definition of taxpayer is broadened for purposes of taxpayer suit standing.

Status of Filing: The League filed the brief and the matter is pending.

Brief Writers: The League thanks Thomas B. Brown and Matthew D. Visick with Burke, Williams & Sorensen, LLP for preparing the brief.

Tort Liability

Meddock v. County of Yolo

Pending Court: 3rd District Court of Appeal

Case Number: C070262

Citation: 2013 WL 4816755

The plaintiff alleged dangerous condition of public property when tree limbs fell on him in a paved parking lot within a county park. The tree was located outside of the parking lot, in an unimproved area of the park. The court applied the statutory immunity for injuries "caused by a natural condition of any unimproved public property." The court rejected the plaintiff's contention that the natural conditions immunity should not apply since he was in an improved part of the park when the harm occurred. The court also found there was no liability for failure to warn or for creating a "hidden trap" with decaying trees situated adjacent to the parking lot.

Approved Action: File an amicus letter with the Court of Appeal, requesting publication of the opinion. **Status of Filing:** The League joined in CSAC's letter requesting publication and the court published the opinion.

Letter Writer: The League thanks Jennifer B. Henning with CSAC for preparing the letter.