LEGAL ADVOCACY REPORT
September 15, 2016

The League of California Cities® Legal Advocacy Committee considered the following appellate cases for amicus support from **June 1, 2016 through September 15, 2016.** 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 and devoted their time, effort and expertise to advocate on behalf of California cities. We also thank their associated public agencies and law firms for the generous support.

CEQA

People for Proper Planning v. City of Palm Springs
Pending Court: California Supreme Court

Case Number: S234996

Citation: 247 Cal.App.4th 640

Prior to September 2013, the City's General Plan designated a range for the density of residential units allowed in each land use category. In September 2013, the City adopted a General Plan Amendment (GPA), removing the minimum density from the range to reflect the City's actual practice of considering only the maximum density. The City concluded the GPA was categorically exempt from CEQA under guidelines section 15305 as a minor alteration in land use. PFPP filed this action seeking to set aside the City's approval of the GPA, asserting in part that the GPA was inconsistent with the General Plan and not exempt from CEQA. The trial court denied the petition and PFPP appealed. The Court of Appeal reversed, concluding that the GPA was not categorically exempt from CEQA and that the General Plan itself, rather than the physical environmental conditions in the vicinity of the project, provided the environmental baseline for determining whether a general plan amendment will have environmental impacts.

Approved Action: File a letter with the Supreme Court requesting depublication of the opinion.

Status of Filing: The letter was filed and the Supreme Court ordered depublication.

The League thanks letter writer Jim Moose with Remy Moose Manley LLP.

Civil Rights

C.V. v. City of Anaheim
Pending Court: United States Supreme Court

Case Number: None

Citation: 823 F.3d 1252

On January 7, 2012, the Anaheim Police Department responded to a call about a suspected drug dealer (Villegas), armed with a shotgun, loitering in the parking area of an apartment complex. Four officers arrived and observed Villegas standing next to a wall. The officers shouted at Villegas to show his hands. At this point, the testimony of the officers differs: one officer testified that he saw a shotgun (which was later determined to be a BB gun) leaning against the wall and that Villegas moved quickly to grab it, while another officer testified that Villegas was already holding the gun by the barrel. When the officers commanded him to let go of the gun, Villegas lifted the gun by the tip of its barrel. Officer Bennallack then fired five times and killed Villegas. Villegas' survivors sued under 42 USC § 1983 for excessive force in violation of the Fourth Amendment and asserted state law claims for negligence and wrongful death. Defendants moved for summary judgment. The district court granted summary judgment, holding that the use of force was objectively reasonable as a matter of law, and that Bennallack is entitled to qualified immunity. Plaintiffs appealed. A panel of the Ninth Circuit affirmed in part and reversed in part. The panel affirmed the grant of summary judgment on the Fourth Amendment claim, but reversed the district court's grant of summary judgment on the state law claims, holding that, viewing the facts in the light most favorable to the plaintiffs, the use of deadly force under the circumstances was not objectively reasonable as a matter of law. The City will file a petition for certiorari with the United States Supreme Court.

Approved Action: Monitor

Contracts

California-American Water Company v. Marina Coast Water District
Pending Court: California Supreme Court

Case Number: None

Citation: 2 Cal.App.5th 748

To address Monterey County's Water needs, a private entity – California-American Water Company (California-American), and two public entities – Marina Coast Water District (Marina) and Monterey County Water Resources Agency (Monterey), entered into five agreements to collaborate on a water desalination project. Thereafter, it was revealed that a Monterey board member was a paid consultant for the project manager. California-American sued to have the agreements declared void under Government Code section 1090. Marina asserted that the claim was time barred by the 60-day limitations period for bringing an action under the validation statutes, but California-American and Monterey argued that 60-day limitations period did not apply. The trial court agreed that the claim was not time barred, and held that four of the five agreements were void under section 1090. Marina appealed, but the Court of Appeal affirmed, holding that a public agency is not bound by the 60-day limitation period governing validation actions when it seeks a judicial determination of the validity of a contract under section 1090. Marina will file a petition for review with the Supreme Court.

Approved Action: Monitor

Elections

County of Kern v. T.C.E.F., Inc.
Pending Court: California Supreme Court

Case Number: S234542

Citation: 246 Cal.App.4th 301

In 2009, the County enacted Chapter 5.84, authorizing medical marijuana dispensaries in commercially zoned areas. In 2011, the County amended Chapter 5.84 to ban dispensaries. The 2011 ban was suspended by operation of Election Code section 9144 when the County received a valid referendum petition protesting the ordinance. The County's board of supervisors responded to the referendum petition by repealing Chapter 5.84 in its entirety, and presenting county voters with an alternate ordinance, Measure G, which authorized dispensaries in industrial zones subject to restrictions. Measure G was approved by 69 percent of the voters. After the election, dispensary operators successfully challenged the validity of Measure G under CEQA. The

invalidation of Measure G left the County with no ordinance permitting medical marijuana dispensaries, and in 2014, the County sought a preliminary injunction against respondents for operating dispensary. The trial court granted the preliminary injunction. Respondents appealed. The Court of Appeal reversed. The Court held that the County's repeal of Chapter 5.84 in its entirety violated Election Code section 9145. The County petitioned the Supreme Court for review.

Approved Action: File a letter with the California Supreme Court supporting the County's Petition for Review.

Status of Filing: The letter was filed, but the Supreme Court denied review.

The League thanks letter writer Arthur Wylene, with the Tehama County Counsel's Office.

Government Claims Act

Rubenstein v. Doe No. 1
Pending Court: California Supreme Court

Case Number: S234269

Citation: 245 Cal.App.4th 1037

Rubenstein alleged that an employee of public entity defendant Doe No. 1 sexually molested her around 1993/1994 when she was a high school student, and that in 2012, when Rubenstein was 34 years old, the latent memories of the abuse resurfaced. Rubenstein submitted a claim to Doe No. 1 in 2012. Doe No. 1 rejected Rubenstein's claim as untimely since it was not presented within six months of the alleged molestation. Rubenstein sought permission for leave to present a late claim under the delayed discovery provisions of the Code of Civil Procedure, but Doe No. 1 denied Rubenstein's application. Rubenstein then filed a petition for relief from the Government Claims Act's claim presentation requirements. Doe No. 1 demurred to the petition, and the trial court sustained the demurrer without leave to amend. Rubenstein appealed. The Court of Appeal reversed, holding that the government claim was timely for pleading purposes, because it was submitted within six months after Rubenstein allegedly realized that the coach had sexually molested her.

Approved Action: File a letter with the California Supreme Court supporting the County's Petition for Review supporting Doe No. 1.

Status of Filing: The letter was filed and the Supreme Court granted review.

The League thanks letter writer Jennifer Henning, Litigation Counsel with the California State Association of Counties.

Immunities

Garcia v. City of Pasadena
Pending Court: 2nd District Court of Appeal

Case Number: B267613

Citation: None

Plaintiff Pavon was pushing her young son, Plaintiff Garcia, in a stroller around the Rose Bowl Loop (Loop) when Garcia was struck in the head by an errant golf ball. The Loop is a three-mile paved walkway, adjacent to a city street, that is used by pedestrians, bicyclists, and others for a variety of purposes. It also provides access to other recreational activities. The portion of the Loop where the accident happened is adjacent to Brookside Golf Course. There is an eight-foot chain-link gate separating the Loop from the golf course at the incident location, but no high netting. Plaintiffs filed a lawsuit against the City, arguing that the Loop or the golf course is a dangerous condition of public property under Government Code section 835. The City filed a motion for summary judgment, which the trial court granted. Although the court found triable issues of material fact as to whether the golf course constitutes a dangerous condition, the court held that the City was immune from liability under Government Code section 831.4, which states that a public entity is not liable for an injury caused by a condition of a trail used for recreational purposes. Plaintiffs appealed.

Approved Action: File an amicus brief with the Court of Appeal, supporting the City.

Status of Filing: The brief will be filed shortly.

The League thanks brief writer Lee Roistacher with Daley & Heft LLP.

Labor & Employment

City and County of San Francisco v. Daugherty
Pending Court: 1st District Court of Appeal

Case Number: A145863/A147385

Citation: None

In 2011, the US Attorney's Office (USAO) began investigating allegations that SFPD officers were conducting warrantless searches in hotel rooms and stealing belongings from residents. That investigation uncovered evidence of a criminal conspiracy centered on three SFPD officers: Furminger, Robles, and Vargas. The USAO asked SFPD if officers from the criminal unit of the Internal Affairs Division (IAD-Crim) could assist with the investigation. SFPD agreed, and the

USAO and SFPD prohibited the IAD-Crim investigators from disclosing any evidence or information to anyone outside the investigation. In December 2012, investigators subpoenaed the cell phone records of Furminger. The records revealed text messages sent between Furminger and his co-conspirators, as well as racist, sexist, homophobic and otherwise offensive text messages exchanged between Furminger and other SFPD officers. Because of the confidentiality mandates imposed by the USAO, the IAD-Crim investigators did not disclose the offensive texts to anyone from the administrative unit of the IAD (IAD-Admin). On December 5, 2014, a jury convicted Furminger. On December 8, 2014, with authorization from the USAO, the IAD-Crim investigators gave IAD-Admin the criminal case files, so that IAD-Admin could evaluate the evidence for potential officer misconduct. In April 2015, the SFPD Police Chief initiated disciplinary action with the SF Police Commission against the officers based on the text messages. The officers filed for a writ of mandamus, seeking to halt the disciplinary proceedings by asserting that disciplinary action is barred by the one year statute of limitations set forth in the Public Safety Officers' Procedural Bill of Rights Act. The City argued that the Police Commission was the proper forum for resolving the limitations argument, that SFPD officials authorized to initiate discipline did not know about the officers' texts until January 2015, that the one-year limitations period was tolled until Furminger's conviction, and that several extensions of the limitations period applied. The court granted the writ. The City appealed.

Approved Action: File an amicus brief with the Court of Appeal, supporting the City.

Status of Filing: The brief will be filed shortly.

The League thanks brief writer Katie Zoglin with the San Jose City Attorney's Office.

Flores v. City of San Gabriel
Pending Court: Ninth Circuit Court of Appeals

Case Number: 14-56421,14-56514

Citation: 824 F.3d 890

The City provided a flexible benefits plan to employees under which each employee received a designated amount of money to purchase benefits. Employees could decline the purchase of medical benefits upon proof of alternate coverage, and receive the unused portion as a separate line item in their paycheck, known as a "cash-in-lieu" payment. The City treated cash-in-lieu payments as benefits, not compensation, and thus excluded the payments when calculating the employees' regular rate of pay for overtime. In 2012, a group of City police officers brought suit, alleging the City's exclusion of the cash-in-lieu payments violated the FLSA. The officers sought back overtime pay and liquidated damages. The district court agreed with the officers and ruled that the cash-in-lieu payments were improperly excluded from the City's calculation of the regular rate of pay, but rejected the officers' claim for liquidated damages, and limited back

pay damages to two-years, finding the City's violation was not willful or lacking in good faith. The Ninth Circuit Court affirmed in part, and reversed in part. The Court affirmed the district court's ruling that the City improperly excluded the cash-in-lieu payments from the regular rate calculation. The Court further concluded that the City's flexible benefits plan was not a "bona fide plan" under the FLSA, and therefore ruled that all payments made under the plan – including payments made to a trustee or third person – were improperly excluded when calculating the regular rate. The Court reversed the District Court's ruling on damages, awarding liquidated damages and three years of back pay on the basis that the City's violation was willful and lacking in good faith. The City petitioned for rehearing or rehearing en banc.

Approved Action: File an amicus brief, supporting the City's petition for rehearing.

Status of Filing: The brief was filed but rehearing was denied by the Ninth Circuit.

The League thanks brief writer Arthur Hartinger with Renne Sloan Holtzman Sakai LLP.

Hoeper v. City and County of San Francisco
Pending Court: California Supreme Court

Case Number: S236551

Citation: None

As part of her job duties as Chief Trial Deputy for the San Francisco City Attorney's Office, Joanne Hoeper oversaw an investigation into allegations that unlawful payments were being made by the City on sewer claims. Following her investigation, Hoeper submitted a report detailing her findings, legal conclusions, and recommendations. Hoeper was later replaced as Chief Trial Deputy because of dissatisfaction with her job performance. She was offered a temporary position in the District Attorney's office at the same pay and civil-service position, which she accepted. When her temporary position ended, she sued the City, alleging that she was retaliated against because she had reported wrongdoing in connection with the sewer investigation. The City filed a motion for summary judgment, arguing in part that Hoeper's suit is barred because prosecuting and defending against her claims would require disclosure of attorney-client privileged information and client confidences. The trial court denied the City's motion for summary judgment, holding that Hoeper's work and reports on the investigation did not implicate the attorney-client privilege because she was merely acting in a reporter/ investigator role. The trial court further held that it could protect any attorney-client privileged communications through measures such as sealing and protective orders, limited admissibility, and in camera proceedings. The City filed a writ petition with the Court of Appeal, which the Court of Appeal summarily denied. The City then petitioned the Supreme Court for review.

Approved Action: File an amicus letter with the California Supreme Court, supporting the City's petition for review.

Status of Filing: The letter was filed, but the Supreme Court denied review.

The League thanks letter writer Alison Turner with Greines, Martin, Stein & Richland LLP .

Land Use

Armato v. City of Manhattan Beach
Pending Court: 2nd District Court of Appeal

Case Number: B267734

Citation: None

In 2012, the City's Community Development Director (Director) approved a Coastal Development Permit (CDP) for the demolition of a duplex and construction of a single-family residence. Opposing neighbors appealed, claiming in part that the height of the project was erroneously calculated and impermissible under the City's municipal code, but the Planning Commission and the City Council upheld the Director's decision. The neighbors then petitioned the trial court for a writ of mandate setting aside the permit approval. Thereafter, the Director approved a modification to the project, adding a 200 square foot storage basement to the project description. The modification was made under the terms of the CDP, which allowed minor changes to be approved by the Director without public notice or a hearing. The neighbors amended their petition to include a challenge to the subsequent approval. The trial court upheld the City's decision to issue the initial permit but found that there was no authority for the City to delegate permit modification to the Director, even for minor project changes, without notice and hearing. The permit applicant has appealed, and CSAC will file an amicus brief with the Court of Appeal.

Approved Action: Join in CSAC's brief.

Status of Filing: The brief will be filed shortly.

The League thanks brief writer Johannah Hartley in the Santa Barbara County Counsel's Office.

Mandates

County of San Diego v. Commission on State Mandates
Pending Court: 4th District Court of Appeal, Div. 1

Case Number: D068657

Citation:

In 1998, the Commission on State Mandates issued a test claim concluding that local agencies were entitled to reimbursement under article XIII B, section 6 of the California Constitution for certain activities mandated by the Sexually Violent Predators Act. In 2006, the voters approved Proposition 83 (Jessica's Law), which amended certain provisions of the Act. In 2010, the Legislature established a process to allow the Commission to adopt a new test claim superseding a prior test claim based on a "subsequent change in the law." In 2013, the Commission utilized that process to adopt a new test claim ending reimbursement for six of eight activities that had previously been reimbursable under the 1998 test claim. The Commission reasoned that Jessica's Law is a voter-approved mandate for which the state is not obligated to provide reimbursement. Several counties filed a petition for writ of mandate seeking to overturn the 2013 test claim as unconstitutional. The court denied the petition, and the counties appealed. CSAC will file an amicus brief with the Court of Appeal, supporting the counties.

Approved Action: Join in CSAC's brief.

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

The League thanks brief writer Jennifer B. Henning, Litigation Counsel with California State Association of Counties.

Pitchess Motions

City of Eureka v. Superior Court of Humboldt County (Greenson)
Pending Court: California Supreme Court

Case Number: S237292

Citation: 1 Cal.App.5th 755

City police officers arrested a minor and footage was captured on a patrol vehicle dashboard camera. The video was later reviewed as part of a delinquency investigation involving the minor and an internal affairs investigation involving one of the arresting officers. Both investigations resulted in criminal charges that were ultimately withdrawn or dismissed. A reporter then made a CPRA request to the City for the video and other documents relating to the incident. The City declined to disclose the records because they were a part of the officer's confidential personnel

file. The City informed the reporter that the records could only be disclosed pursuant to the Pitchess motion process. The reporter then filed a "Request for Disclosure of Juvenile Case File" with the Superior Court, seeking the records under Welfare & Institutions Code section 827. Both the County and the City objected to the request – the County arguing the video was part of a confidential juvenile case file and the City arguing the video was part of the officer's confidential personnel file. The trial court ultimately ordered release of part of the video. The City then filed a writ petition with the Court of Appeal, asking that the trial court order be stayed and set aside. The Court of Appeal denied the writ petition. The City then appealed the trial court's order. The Court of Appeal affirmed the trial court's order in a published decision, finding the video is not a personnel record protected by the Pitchess statutes. The Court stated that it expressed no opinion on whether the arrest video is a public record under the CPRA.

Approved Action: Monitor

Proposition 218

Howard Jarvis Taxpayers Association v. Amador Water Agency
Pending Court: 3rd District Court of Appeal

Case Number: C082079

Citation: None

In 2015, AWA determined its water rates were insufficient to meet its ongoing costs of providing water service. AWA conducted a Proposition 218 process, and, after less than 1% of ratepayers submitted a protest, AWA adopted new rates, including a new water rate structure and drought surcharges. In response, a local ratepayer group collected signatures for a referendum petition demanding that AWA's Board of Directors either repeal the new rate structure or suspend collecting the rates until they were approved by a majority of voters at the next regular election. The clerk refused to certify the referendum, asserting in part that the Amador Water Agency Act requires AWA to set rates sufficient to pay its expenses and that the only proper method under California law to repeal a duly adopted water rate increase is through initiative, not referendum. HJTA then filed a writ petition seeking an order commanding AWA to comply with the statutory requirements for processing the referendum petition, which the trial court denied. HJTA then petitioned the Court of Appeal for a writ of mandate, but the Court of Appeal denied the writ. HJTA then appealed the trial court decision.

Approved Action: File an amicus brief with the Court of Appeal, supporting Amador Water Agency on the merits.

Status of Filing: The brief will be filed shortly.

The League thanks brief writers Kelly Salt with Best, Best, & Krieger and Dan Hentschke, Attorney at Law.

Second Amendment

Teixeira v. County of Alameda
Pending Court: Ninth Circuit Court of Appeals

Case Number: 13-17132

Citation: 822 F.3d 1047

Prospective gun store operators (Texeira) filed an application for a Conditional Use Permit (CUP) with the County to operate a retail business that would sell guns and gun-related equipment. After reviewing the application, staff determined that Teixeira would need to obtain a variance, because the premises failed to comply with a County Ordinance, which provides, in part, that no CUPs for firearm stores will be granted if the subject premises are located within 500 feet of any residentially zoned district. Since the store nearly met the distance restriction, and a highway obstructed direct traversable access, the West County Board of Zoning Adjustments voted to grant the variance and issue the CUP. The San Lorenzo Village Homes Association appealed and the Alameda County Board of Supervisors voted to sustain the appeal, thus revoking Teixeira's CUP and variance. Teixeira filed this action, challenging the Board of Supervisors' decision and alleging, among other things, that the Ordinance is impermissible under the Second Amendment. The County moved to dismiss the complaint for failure to state a claim, arguing that the Ordinance is presumptively valid under *District of Columbia v. Heller* (2008) 554 U.S. 570. The district court granted the motion to dismiss and Teixeira appealed. A divided panel of the Ninth Circuit reversed and remanded the case for further proceedings.

Approved Action: File an amicus brief with the Ninth Circuit, supporting the County's petition for rehearing en banc.

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

The League thanks brief writer T. Peter Pierce with Richards, Watson & Gershon.

Section 1983 Actions

Diaz v. City of Anaheim
Pending Court: United States Supreme Court

Case Number: None

Citation: 2016 WL 4446114

On July 21, 2012, two officers were on patrol when they observed Diaz in a neighborhood well known for gang activity, talking to the occupants of a vehicle. The officers turned into the alley to make contact. When Diaz saw the vehicle, he turned and fled on foot. The officers took chase. Diaz led the officers into a courtyard. Based on the way Diaz was running (holding an object in the front of his waistband and not pumping his arms), both officers believed he was armed. When Diaz reached a fenced-in corner, he began to turn. Believing that Diaz was armed and that he was going to shoot, Officer Bennallack shot Diaz. As Officer Bennallack fired, he saw Diaz throw a dark object over the fence and yell, "Gu . . . !" After the shooting, the officers attempted to locate the object, but no object was recovered. Diaz's estate and mother sued for federal civil rights violations including excessive use of force. The case proceeded to a jury trial. Plaintiffs moved to bifurcate the liability phase from the damages phase of the trial, to avoid the risk that prejudicial information unknown to Officer Bennallack at the time of the shooting would taint the jury's consideration of Bennallack's use of deadly force. The district court granted the motion in part, severing punitive damages from liability but not compensatory damages. The trial proceeded for six days – during which the City presented evidence of Diaz's gang membership and drug use. Following trial and after two hours of deliberation, the jury returned a defense verdict. The plaintiffs appealed, arguing that the trial court abused its discretion in refusing to bifurcate liability and damages and admitting certain evidence. A unanimous three-judge panel agreed with the plaintiffs, and in a published opinion, reversed and remanded for a new trial. The City petitioned the Ninth Circuit for rehearing en banc.

Approved Action: Monitor

Taxes

California Cannabis Coalition v. City of Upland
Pending Court: California Supreme Court

Case Number: S234148

Citation: 245 Cal.App.4th 970

California Cannabis Coalition (CCC) proposed a medical marijuana initiative that, among other things, would impose a "fee" of $75,000 to cover the City's permitting and inspection costs

related to medical marijuana dispensaries. The initiative petition received sufficient signatures and was submitted to the City council, which directed staff to prepare a report. The report concluded that the $75,000 "fee" was significantly in excess of the City's estimated costs of permitting and inspection, and therefore the City attorney opined that the "fee" was, in fact, a general tax required to be placed on the statewide general election ballot. As such, the city council directed the initiative to be placed on the November 2016 ballot. CCC sought a writ of mandate in the Superior Court, directing the City to place the initiative on a special election ballot. The Superior Court denied the writ petition and CCC appealed. The Court of Appeal reversed, holding that initiatives imposing taxes are not subject to article XIIIC, sections 1 and 2. The City petitioned for review, and the California Supreme Court granted review.

Approved Action: File an amicus brief with the California Supreme Court, supporting the City.

Status of Filing: The brief will be filed shortly.

The League thanks brief writers Michael Colantuono with Colantuono, Highsmith & Whatley, Robin Johansen with Remcho, Johansen & Purcell, and Dan Hentschke, Attorney at Law.

Leider v. Lewis
Pending Court: California Supreme Court

Case Number: S232622

Citation: 243 Cal.App.4th 1078

Leider filed this Code of Civil Procedure section 526a taxpayer claim against the LA Zoo Director and the City to enjoin them from building a new elephant exhibit and to transfer the elephants to a sanctuary. Leider alleged that the exhibits violated a Penal Code section that prohibits abusive behavior towards elephants, and therefore the City's expenditure of public funds to maintain the exhibits was illegal. The City moved for summary judgment on the ground that Leider's claim presented a non-justiciable issue of public policy. The trial court agreed, and Leider appealed. The Court of Appeal reversed and remanded, finding that the Penal Code could provide a legal standard for Leider's 526a claim. On remand, the City demurred on the ground that under Civil Code section 3369, courts cannot use their equitable powers to enforce penal laws. The trial court overruled the demurrer, finding the City's argument to be barred by the law of the case doctrine. Following a 5-day bench trial, the court issued injunctions prohibiting the zoo from using bull hooks and electric shock to manage its elephants, and requiring the zoo to exercise the elephants 2 hours a day and rototill the soil regularly. The City and Leider both appealed, but the Court of Appeal affirmed. The Supreme Court then granted review.

Approved Action: File an amicus brief with the California Supreme Court, supporting the City on the merits.

Status of Filing: The brief will be filed shortly.

The League thanks brief writers Len Aslanian and Michael G. Colantuono with Colantuono, Highsmith & Whatley.