LEGAL ADVOCACY REPORT
March 14, 2019

The League of California Cities® Legal Advocacy Committee considered the following appellate cases for amicus support from **January 7, 2019 through March 14, 2019.** 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.

Attorney's Fees

City of Oakland v. Oakland Police & Fire Retirement System, et al.
Pending Court: California Supreme Court

Case Number: S253441

Citation: 29 Cal.App.5th 688

The Oakland Police & Fire Retirement System (OPFRS) is a fluctuating pension system, meaning that the retirees' pension benefits fluctuate according to the current compensation received by active officers that is "attached to the average rank" held by the retiree at the time of retirement. In calculating the pension benefit, OPFRS included certain holiday and shift-differential pays received by active officers. The City disagreed with the inclusion of those specialty pays in the calculation, and filed suit seeking a writ of mandate requiring OPFRS both to recalculate benefits prospectively, and to collect refunds of past overpayments from retirees. The Retired Oakland Police Officers' Association (ROPOA) intervened in the case on behalf of the retirees and ultimately defeated several of the City's arguments.

Following entry of judgment, ROPOA moved for attorney fees pursuant to the Private Attorney General Statute (Cal. Code Civ. Proc. § 1021.5), which authorizes a court to award attorney fees

to plaintiffs who have vindicated an important public policy under certain conditions, including where the financial burden of private enforcement warrants subsidizing the successful party's attorneys. The trial court denied the fee motion, finding that ROPOA could not establish that the "financial burden of private enforcement . . . [was] such as to make the award appropriate." ROPOA appealed. The First District Court of Appeal reversed, holding that the trial court should have considered evidence of ROPOA's subjective inability to afford the costs of litigation when evaluating financial burden under section 1021.5. The court then reviewed that evidence itself and found that ROPOA had "conclusively" proven its entitlement to fees under this standard. The City petitioned the California Supreme Court for review.

Approved Action: File an amicus letter supporting the Petition for Review.

Status of Filing: The letter was filed but the Court denied the Petition.

The League thanks letter writer Derek Cole with Cole Huber LLP.

CEQA

Community Venture Partners v. Marin County Open Space District (District)
Pending Court: 1st District Court of Appeal

Case Number: A154867

Citation: None

The District finalized a county-wide road and trail management plan for future trail restoration and environmental improvement projects. The plan provided a framework for the District to follow in proposing, evaluating, and implementing specific trail projects, but did not propose a specific trail project itself. Because the plan would have environmental effects, the District prepared a program environmental impact report (EIR) to comply with CEQA. The first project that the District proposed, evaluated, and attempted to implement according to the plan was a project to modify an existing dirt trail. The project also involved changing the permissible uses of the trail to allow bicycle access (where previously access had been limited to hikers and equestrians). In order to comply with CEQA, the District conducted a "consistency analysis" pursuant to CEQA Guidelines section 15168(c) to determine whether the project would raise any new environmental effects beyond those addressed in the program EIR. Since the consistency analysis showed no new effects, the District did not create any additional environmental documents, and relied on the program EIR to approve the project.

A group of local hikers opposed the change-in-use component of the project, and filed a writ petition, alleging that the District's approval of the project violated CEQA. The trial court granted the petition, finding in part that the District violated CEQA by failing to: (1) conduct an initial study for the proposed project, rather than simply making consistency determinations pursuant to CEQA Guidelines section 15168, and (2) properly consider the "social effects" of converting the trails.

Approved Action: Join in CSAC's amicus brief.

Status of Filing: The brief will be filed shortly.

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

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

Case Number: A151521

Citation: None

After preparing an environmental impact report (EIR) and holding public hearings, the City approved a mixed-use business and residential project (the 5M Project) in San Francisco. In approving the project, the San Francisco Board of Supervisors also voted to amend the San Francisco general plan to establish a Special Use District and approve the development agreement. A group of neighborhood organizations (Plaintiffs) filed a petition for writ of mandate, alleging that the EIR was inadequate. Specifically, Plaintiffs alleged that the EIR failed to provide a stable, accurate project description. Plaintiffs also alleged that the EIR failed to properly analyze the 5M Project's cumulative impacts, traffic impacts, wind impacts, shade and shadow impacts, and inconsistencies between the 5M Project and applicable plans and policies. Finally, Plaintiffs contended that the statement of overriding considerations adopted by the City was not supported by substantial evidence. The trial court denied relief.

Plaintiffs appealed and the Court of Appeal affirmed. Applying the standard of review set forth in *Sierra Club v. County of Fresno* (2018) 6 Cal.5th 502, 511, the court held that: (1) the fact that the EIR's project description included two options for different allocations of residential and office units did not make the project description inadequate; (2) Plaintiffs did not meet their burden to prove that the City failed to properly analyze the 5M Project's cumulative impacts, traffic impacts, wind impacts, shade and shadow impacts, and inconsistencies with the applicable plans and policies; and (3) Plaintiffs failed to demonstrate the statement of overriding considerations was not supported by substantial evidence.

Approved Action: File a letter requesting publication of the opinion.

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

The League thanks letter writer Whitman F. Manley with Remy Moose Manley, LLP.

Turn Down the Lights v. City of Monterey
Pending Court: 6th District Court of Appeal

Case Number: H044656

Citation: None

At a City Council meeting in November 2011, the City approved a contract to replace high-pressure sodium lightbulbs with LED light fixtures in street lights. The agenda for the meeting listed the item as: "Award Street and Tunnel Lighting Replacement Project Contract ***CIP*** (Plans & Public Works – 405-04)." A three-page staff report for that agenda item described the project and noted that "[t]he City's Planning, Engineering, and Environmental Compliance Division determined that this project is exempt from CEQA regulations under Article 19, Section 15302." During the council meeting, city staff gave a presentation on the project, and the item was opened for public comment. No member of the public commented. The City approved the contract, and later filed a Notice of Exemption. Turn Down the Lights filed a petition for writ of mandate, challenging the Notice of Exemption. The trial court granted the writ, concluding the project was not exempt under Guidelines section 15302. The trial court also excused plaintiff from the duty to exhaust administrative remedies, finding that "the exhaustion requirement does not apply because the City did not provide the 'notice required by law.'"

The City appealed and the Court of Appeal reversed. Relying on *Tomlinson v. County of Alameda* (2012) 54 Cal.4th 281 (*Tomlinson*), the Court of Appeal held that Turn Down The Lights failed to exhaust its administrative remedies by not objecting to the project before the City Council approved it.

Approved Action: File a letter requesting publication of the opinion.

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

The League thanks letter writer Sabrina Teller with Remy Moose Manley, LLP.

Fees and Exactions

Austin v. County of El Dorado
Pending Court: 3rd District Court of Appeal

Case Number: C088409

Citation: None

Thomas and Helen Austin, owners of property in the County, filed a Petition for Writ of Mandate seeking the refund of approximately $30,000,000 in development impact fees in various County mitigation fee accounts on the grounds that the County failed to make 5-year findings required under section 66001, subdivision (d)(2) of the Mitigation Fee Act (MFA) (Gov. Code § 66000 et seq.). The County demurred on the grounds that the petition was untimely under the one-year

statute of limitations set forth in Code of Civil Procedure section 340, subdivision (a), and that Petitioners failed to allege prejudice and substantial injury as required by Government Code section 65010, subdivision (b). The trial court overruled the County's demurrer on both grounds. The court held that the continuing accrual doctrine applied to the claims, so as to preclude the bar of any statute of limitations in this case. The court reasoned that each time a fee is collected under the MFA after a public agency fails to make the required 5-year findings, it is a new breach or violation of the MFA. The court also held that Government Code section 65010, subdivision (b) does not apply to MFA claims such that Petitioners' need not demonstrate that the failure to make 5-year findings was prejudicial and that the Petitioners' suffered substantial injury as a result and that a different result would have been probable if the findings had been made. The County petitioned the Court of Appeal for a Writ of Mandate and the Court of Appeal issued an order to show cause.

Approved Action: File an amicus brief with the Third District Court of Appeal in support of the County.

Status of Filing: The brief will be filed shortly.

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

Inverse Condemnation

Ruiz v. County of San Diego
Pending Court: 4th District Court of Appeal, Div. 1

Case Number: D074654

Citation: None

An underground storm drain pipe on the Ruiz's property receives surface water runoff from areas uphill of the property and conveys that runoff to areas downhill from the property. The storm water that drains into the pipe includes water draining from County streets; however, the pipe was constructed by the developer of the property after the County specifically rejected the developer's offer for an original storm drain easement for the pipe. The pipe ruptured, causing flooding and damage to the Ruiz's home, and the Ruiz's sued the County for inverse condemnation.

The trial court held the County liable in inverse condemnation and ordered the County to pay for repairs to the pipe as well as damage to the property. The court concluded that the fact that water flowing through the pipe comes from County streets was sufficient to impose liability because: (1) by draining water through it for 50 years, the County impliedly accepted an easement with maintenance obligation over the pipe; and (2) the damages suffered by the Ruiz's were proximately caused by the County because the continuous use of the pipe to drain water from the County's drains and inlets caused the pipe to deteriorate and fail.

Approved Action: File an amicus brief with the Fourth District Court of Appeal in support of the County.

Status of Filing: The brief will be filed shortly.

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

Labor & Employment

Kaanaana v. Barrett Business Services, Inc.
Pending Court: California Supreme Court

Case Number: S253458

Citation: 29 Cal.App.5th 778

Barrett Business Services, Inc. (BBS), a company providing staffing and management services, provided employees for two publicly owned and operated recycling facilities under contracts with Los Angeles County Sanitation Districts. The employees were "belt sorters," who stood at sorting stations along a conveyor belt, removing recyclable materials from the conveyor belt and placing them in receptacles at their sorting stations. The employees sued BBS, alleging, in relevant part, noncompliance with the prevailing wage law. BBS brought a motion to strike the prevailing wage claims, contending it was not required to pay prevailing wage as a matter of law. The trial court granted the motion, concluding that the work the employees performed did not come within the definition of "public works" under the prevailing wage law, because it was not in the nature of construction work. The employees appealed.

In a 2-1 decision, the Second District Court of Appeal reversed. The court reasoned that the recyclable sorting work fell within the plain terms of Labor Code section 1720, subdivision (a)(2), which defines public work as "[w]ork done for irrigation, utility, reclamation, and improvement districts, and other districts of this type." The court rejected BBS's argument that subdivision (a)(2) cannot be read in isolation, but instead must be read to be limited to construction work and other types of work expressly identified in Labor Code section 1720, subdivision (a)(1). BBS petitioned the California Supreme Court for review.

Approved Action: File a letter supporting the Petition for Review.

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

The League thanks letter writer Lann G. McIntyre with Lewis Brisbois Bisgaard & Smith LLP.

Liability

B.B. v. County of Los Angeles
Pending Court: California Supreme Court

Case Number: S250734

Citation: 25 Cal.App.5th 115

Sheriff's Deputies Aviles and Fernandez responded to a call that Burley tried to strangle a pregnant woman. As the deputies approached Burley, he began making grunting sounds while moving toward them in slow, stiff, exaggerated robotic movements, leading the deputies to believe he might be on PCP. Aviles ordered Burley to get on his knees. Burley did not comply. After a struggle, the deputies maneuvered Burley to a prone position, face-down on the concrete. While they were trying to restrain Burley, other deputies arrived, including Deputy Beserra. Eventually the deputies handcuffed Burley. While the other deputies disengaged, Beserra stayed with Burley. Beserra later heard Burley's breathing become labored and felt his body go limp. Beserra did not administer CPR. When paramedics arrived, Burley had no pulse. Paramedics began CPR, but Burley never regained consciousness and died 10 days later. The autopsy listed the COD as brain death and swelling from lack of oxygen following a cardiac arrest "due to status post-restraint maneuvers or behavior associated with cocaine, phencyclidine (PCP) and cannabinoids intake." The manner of death was marked, "could not be determined."

Plaintiffs sued. A jury found Aviles liable for intentional battery by use of excessive force and Beserra liable for negligence resulting in Burley's death. The jury awarded Plaintiffs $8 million in noneconomic damages, but found Burley had been 40% at fault for his own death. The jury attributed 20% fault each to Aviles and Beserra while allocating the remaining 20% to the other deputies. Following a hearing on the apportionment, the court entered judgment against Beserra and the County for $1.6 million (20 percent of the damages award) but entered the full $8 million award against Aviles and the County. The County appealed. The Court of Appeal reversed, holding that Civil Code section 1431.2 mandates comparative fault apportionment even when tortious conduct is intentional.

Approved Action: File an amicus brief with the California Supreme Court in support of the County.

Status of Filing: The brief will be filed shortly.

The League is recruiting a brief writer.

Pension and Benefits

Retired Oakland Police Officers Assn, v. Oakland Police and Fire Retirement System, City of Oakland
Pending Court: 1st District Court of Appeal

Case Number: A148987

Citation: 2019 WL 910973

Under the Oakland City Charter, all sworn Oakland police officers hired on or before June 30, 1976 are members of the Oakland Police and Fire Retirement System (the System). The System is a "fluctuating pension system," meaning that the retirees' pension benefits fluctuate according to the current compensation received by active officers that is "attached to the average rank" held by the retiree at the time of retirement.

Between 2009 and 2015, master police officer-terrorism pay (MPO pay) was paid to all officers who: (1) completed 20 years of service with the Oakland police, (2) maintained fully effective overall performance appraisals, (3) completed an approved anti-terrorism/law enforcement response course, and (4) had been assigned to the patrol division. Under the Memoranda of Understanding (MOUs) then in effect, officers who met these criteria were entitled to a five percent premium in addition to their base rate of pay.

The retirees' association asserted that MPO pay was attached to rank, and sued to compel the City of Oakland to include MPO pay as compensation in the computation of retirement benefits. The trial court agreed with the association, but the Court of Appeal reversed in an unpublished opinion. The Court of Appeal concluded that MPO pay was attached to the officer's assignment, not to the officer's rank. The Court noted that employees of several ranks – officers, sergeants, and lieutenants – could have worked a portion of their career in the patrol division, and that employees in any of those ranks would have earned MPO pay, if otherwise qualified, by virtue of that assignment, not their rank.

The City will request publication of the Court of Appeal's opinion.

Approved Action: Join in the City's letter requesting publication of the opinion.

Status of Filing: The letter was filed and the Court published the opinion.

The League thanks letter writer Howard Golds with Best Best & Krieger LLP.

Proposition 218

City of Oxnard v. Starr
Pending Court: 2nd District Court of Appeal

Case Number: B295252

Citation: None

The City of Oxnard's wastewater treatment plant had not been adequately maintained and was running a deficit. The finances were so poor that the ratings agencies downgraded the City's wastewater bonds and placed them on "negative credit watch." Moreover, because of its dilapidated state, the wastewater treatment plant's control systems failed on numerous occasions, resulting in sewer spills and inadequate supplies of processed water. In January 2016, the City adopted Ordinance 2901 to increase rates by 35 percent. On November 8, 2016, Oxnard voters approved Measure M, which repealed the rate increase. The City sued to enjoin enforcement of Measure M, arguing that (1) Measure M fails to generate sufficient revenue to cover the cost of service, and (2) Measure M impairs Oxnard's ability to meet its bond and contractual obligations.

The trial court ruled against the City. Relying on its obligation to resolve any reasonable doubts in favor of the right of the People to legislate through the initiative process, the Court held that because the wastewater system was "operational" under the Measure M rates, the voters were allowed to lower the rates to pre-January 2016 levels. The City has appealed.

Approved Action: File an amicus brief with the Court of Appeal in support of the City.

Status of Filing: The brief will be filed shortly.

The League thanks brief writer Benjamin Fay with Jarvis, Fay & Gibson LLP.

Plata v. City of San Jose
Pending Court: 6th District Court of Appeal

Case Number: H046064

Citation: None

The Platas filed a claim under the Government Claims Act related to the City's Municipal Water System. The Claim stated that Muni Water customers were unconstitutionally overcharged for water; that fees and charges for water were too high; revenues exceeded the funds required to provide water and water-related services; and that the costs of water-related services were higher than necessary. The City rejected the claim. Plaintiffs then brought a class action lawsuit on behalf of "all past and current customers of [Muni Water] who have paid for water service…since January 1, 1997," claiming that between 1997 and the present the City improperly transferred money from Muni Water to the General Fund for non-water purposes in violation of Proposition 218. In addition, Plaintiffs claimed the City's use of tiered rates for residential customers between 1997 and 2017 violated Proposition 218.

After a bench trial, the court concluded that all claims for violations that occurred before November 2012 were time-barred under the Government Claims Act. As to the Overhead Transfers and City Hall Debt Service Transfers, the court held that the City did not violate Proposition 218 because the transfers reasonably represent the cost of providing the water service. As to the Late Fee Transfer, the court held that the City did not violate Proposition 218 because the payment of late fees is not a requirement imposed on property owners in their capacity as property owners. After rejecting the City's argument that the tiered rate theory was barred because it was not fairly reflected in the Plaintiffs' government claim, the court concluded that the tiered rates did violate Proposition 218. However, the court decertified the class as to that issue. The court did not award any refunds or impose declaratory or injunctive relief.

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

Status of Filing: The brief will be filed shortly.

The League thanks brief writer Adam Hofmann with Hanson Bridgett.

Public Records Act

National Lawyers Guild (NLG) v. City of Hayward, et al.
Pending Court: California Supreme Court

Case Number: S252445

Citation: 27 Cal.App.5th 937

NLG submitted a CPRA request to the City for bodycam video relating to the actions of Hayward officers during a demonstration. City staff initially identified 90 hours of bodycam video responsive to NLG's request, but NLG agreed to temporarily narrow its request to six hours of videos taken by five officers during three distinct time frames. City staff reviewed the videos for exempt material, and used video editing software to redact the exempt portions. The City made the videos available for NLG to inspect free of charge, but invoiced NLG a cost of $2,938.58 to produce a copy of the videos. The City reasoned this fee was appropriate under Gov. Code §6253.9(b)(2), which provides that the CPRA requestor must bear the cost of producing a copy of an electronic record if the request requires "data compilation, extraction, or programming to produce the record." Although NLG disputed the validity of the City's fee calculation, NLG paid the invoice and the City produced a copy of the videos. NLG then made a second CPRA request for an additional hour of body camera videos. Again, the City redacted the videos to remove exempt information, made the redacted videos available for free inspection, and was willing to provide NLG with a copy of the redacted videos for $308.89. Again, NLG paid the $308.89 and the City produced copies of the videos. NLG then sought a writ of mandate requiring the City to return NLG's money.

The trial court granted the writ, holding that Government Code sections 6253 and 6253.9 do not permit the City to charge a CPRA requester for costs incurred in making a redacted version of an

existing public record. The City appealed. The Court of Appeal reversed, holding the city's expenditures to produce copies of police body camera video recordings, including the cost of extracting exempt material from those recordings with the aid of special computer programming software, were recoverable costs under Government Code section 6253.9(b)(2).

Approved Action: File an amicus brief with the California Supreme Court in support of the City.

Status of Filing: The brief will be filed shortly.

The League thanks brief writers Jennifer Gore and Maila Hansen with the Sacramento City Attorney's Office.

Voting Rights

Kaku v. City of Santa Clara
Pending Court: 6th District Court of Appeal

Case Number: H046696

Citation: None

Plaintiffs filed suit alleging that the at-large method of election used by the City of Santa Clara (City), a charter city, violates the California Voting Rights Act (CVRA). At the liability phase of the trial, the court held that Plaintiffs proved the City violated the CVRA by showing by a preponderance of the evidence that the at-large method of election used by the City impaired the ability of Asians to elect candidates as a result of the dilution and abridgment of their rights as voters. At the conclusion of the remedies phase of the trial, the court ordered that six City Council members be elected in district-based elections, and the City mayor be elected in an at-large election. The City appealed.

Approved Action: Monitor.

Rent Control

Hotop v. City of San Jose
Pending Court: Ninth Circuit Court of Appeals

Case Number: 18-16995

Citation: None

In 1979, San Jose enacted a rent control ordinance. In order to facilitate monitoring and enforcement of the ordinance, the City amended the ordinance and related implementing regulations in 2017 to establish a "Rent Registry" requirement, under which landlords subject to the ordinance must complete and submit to the City a registration form for each rent-stabilized unit. The landlord must include on the form the unit's address, occupancy status, history of rent charged for the unit, amount of the security deposit charged, the number and names of the

current tenants, and the household services that are being provided at the inception of the tenancy. In addition, landlords must give the City a copy of any Notice of Termination the landlords issue to tenants, inform the City when a tenant vacates a rent-stabilized unit, and disclose information related to buyout agreements. The ordinance prohibits rent increases for units that are not registered, but allows landlords of unregistered units to petition for rent increases in order to obtain a fair return.

Plantiffs, a group of landlords in the City and a trade association of landlords, challenged the disclosure requirements of the ordinance. Plaintiffs alleged the requirements violate numerous provisions of the United States Constitution, including (1) the Fourth Amendment's prohibition on unreasonable search and seizure; (2) the guarantee of substantive and procedural due process under the Fourth and Fourteenth Amendments; (3) the takings clause of the Fifth Amendment; (4) the equal protection clause of the Fourteenth Amendment; and (5) the contracts clause of Article I. The City moved to dismiss the complaint for failure to state a claim, and the Court granted the motion, finding Plaintiffs claims were too conclusory and failed to state facts sufficient to constitute a cause of action. The court granted leave to amend, but Plaintiffs instead appealed.

Approved Action: File an amicus brief with the Ninth Circuit Court of Appeals in support of the City.

Status of Filing: The brief will be filed shortly.

The League thanks brief writers Jaclyn Harris and Kent Qian with the Oakland City Attorney's Office.

Worker's Compensation

Gund v. County of Trinity
Pending Court: California Supreme Court

Case Number: S249792

Citation: 24 Cal.App.5th 185

Law enforcement received a 911 call for help originating in a remote area. Because he was hours away, the officer to whom the call was assigned contacted the caller's neighbors (the Gunds) and asked that they check on the caller. The Gunds responded, as requested, and encountered a murder in progress. The Gunds were attacked by the assailant and suffered serious injuries. They sued the county and the officer for negligence and misrepresentation, alleging that the County and officer created a special relationship with the Gunds and owed them a duty of care, which they breached by allegedly failing to disclose available facts indicating the danger of the situation.

The County filed a motion for summary judgment on the ground that the Gunds' exclusive remedy was workers' compensation, because Labor Code section 3366 provides that any person "engaged in the performance of active law enforcement service…at the request of [a] peace

officer, is deemed to be an employee of the public entity that he or she is…assisting…, and is entitled to receive compensation from the public entity in accordance with [the workers' compensation statute]." The trial court granted the motion, and the Gunds appealed. The Court of Appeal affirmed, reasoning that responding to a 911 call for help of an uncertain nature is active law enforcement. The California Supreme Court granted review on its own motion.

Approved Action: Join in an amicus brief with the Rural County Representatives of California.

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

The League thanks brief writer Arthur Wylene, General Counsel with Rural County Representatives of California.