2015 Spring Conference

City Attorneys' Department

Hyatt Regency
Monterey, California

May 6-8, 2015

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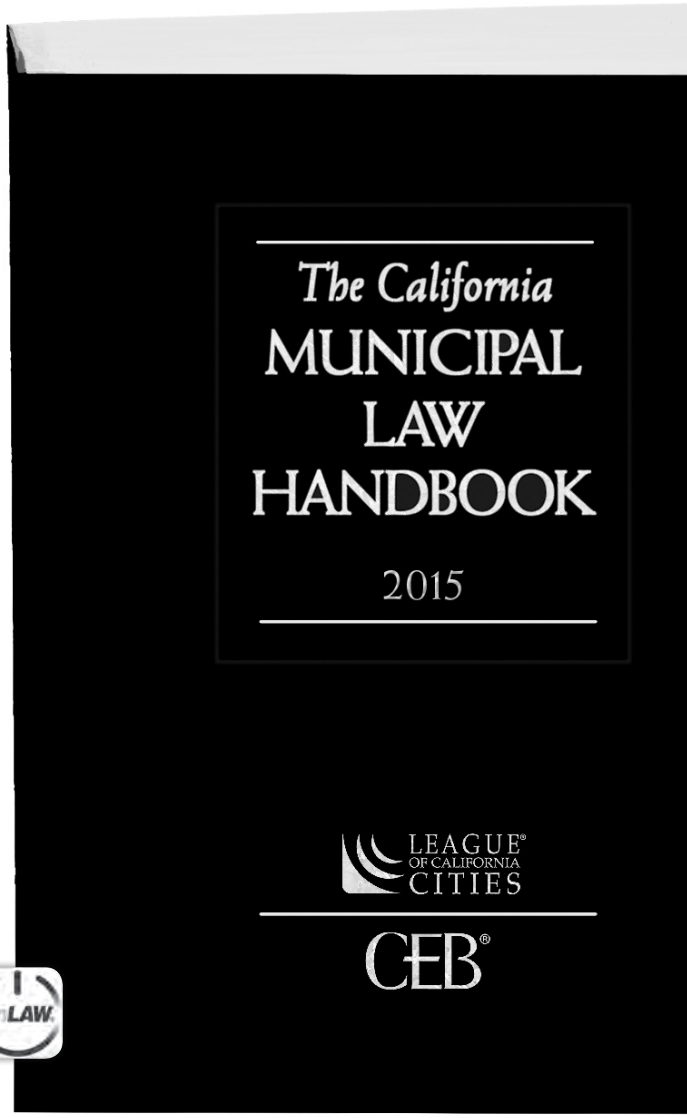

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City Attorneys' Department
2015 Spring Conference
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2015 City Attorneys' SPRING CONFERENCE

Wednesday, May 6 - Friday, May 8

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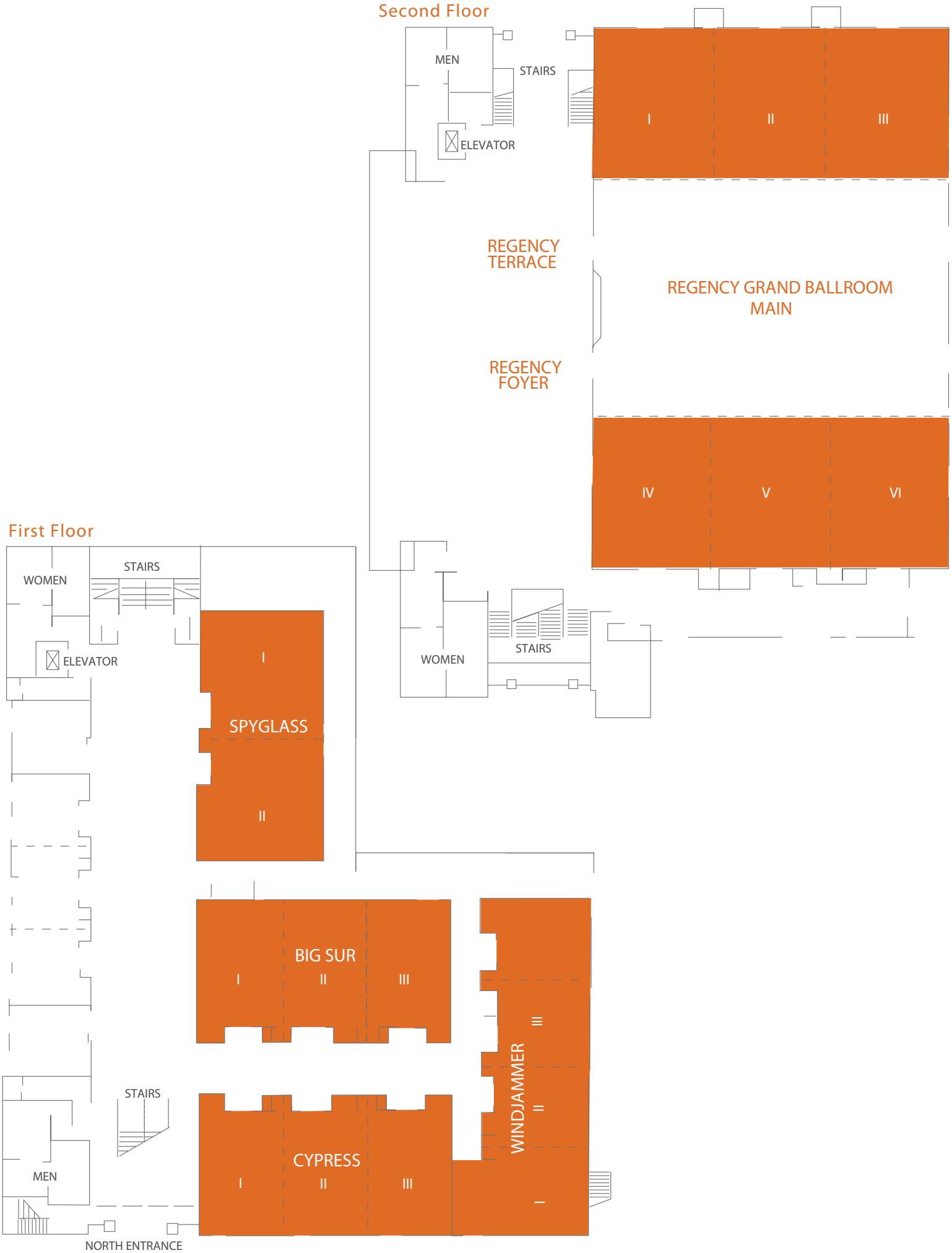
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Wednesday—May 6

9:00 a.m. – 4:30 p.m. **REGISTRATION OPEN**
Regency Foyer, 2nd Floor

1:00 – 3:00 p.m. **GENERAL SESSION**
Regency Main & 4-6, 2nd Floor
Moderator: Thomas B. Brown, City Attorney, St. Helena

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

Land Use And CEQA Litigation Update
Speaker: Christian L. Marsh, Downey Brand

AB 2188 Implementation Requirements For Rooftop Solar Systems
Speaker: Stephen E. Velyvis, Burke, Williams & Sorensen

Navigating RLUIPA: Recent Developments In Religious Land Use Litigation
Speaker: Lauren B. Langer, Assistant City Attorney, Lomita and Hermosa Beach

FCC's Wireless Facility Rules Implementing Section 6409(a)
Speaker: Harriet A. Steiner, City Attorney, Davis

Wednesday—May 6

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GENERAL SESSION
Regency Main & 4-6, 2nd Floor
Moderator: Craig Labadie, City Attorney, Albany

FPPC Update
Speaker: Shawn M. Mason, City Attorney, San Mateo

Massage Regulation And Restoration Of Local Land Use Authority Under AB 1147
Speakers: Chris McKenzie, Executive Director, League of California Cities
Patrick Q. Sullivan, Assistant City Attorney, Torrance

Bid Protests: Minimizing And Managing Liability
Speaker: Clare M. Gibson, Assistant City Attorney, Hercules

Design-Build For Public Works Projects
Speaker: David S. Gehrig, Hanson Bridgett

7:00 – 10:30 p.m.

EVENING RECEPTION
Monterey Bay Aquarium

Thursday—May 7

8:00 a.m. – Noon **REGISTRATION OPEN**
Regency Foyer, 2nd Floor

8:00 – 9:00 a.m. **BREAKFAST**
Regency 1-3 & Regency Terrace, 2nd Floor

9:00 – 10:30 a.m. **GENERAL SESSION – ELECTIONS ISSUES PANEL**
Regency Main & 4-6, 2nd Floor
Moderator: Christi Hogin, City Attorney, Lomita, Malibu & Palos Verdes Estates

Initiatives/Referendums
Speaker: Craig A. Steele, City Attorney, Highland and Monrovia

Impartial Analysis
Speaker: Michael Jenkins, City Attorney, Hermosa Beach, Rolling Hills and West Hollywood

Filling Vacancies & Cancelling City Council Elections
Speaker: Randy E. Riddle, Renne Sloan Holtzman Sakai

10:45 a.m. – Noon **GENERAL SESSION**
Regency Main & 4-6, 2nd Floor
Moderator: Gregory W. Stepanicich, City Attorney, Fairfield and Mill Valley and Town Attorney, Ross

General Municipal Litigation Update
Speaker: J. Stephen Lewis, General Counsel, Santa Monica Rent Control Board

Revenue And Taxation Update (Propositions 26 And 218 / *Shapiro* Case)
Speaker: Michael G. Colantuono, City Attorney, Auburn and Grass Valley

12:15 – 2:00 p.m. **BUSINESS LUNCHEON WITH KEYNOTE SPEAKER**
Monterey Grand Ballroom, Lobby Level

Department Business Meeting And Colleague Recognition
- *President's Report*
- *Director's Report*
- *Colleague Recognition*

A Judge's Perspective On Municipal Law – District Judge Vince Chhabria In Conversation With Buck Delventhal
Speakers: The Honorable Vince G. Chhabria, Judge, United States District Court for the Northern District of California
Buck Delventhal, Deputy City Attorney, San Francisco

Thursday—May 7

(Continued)

2:15 – 4:15 p.m.

GENERAL SESSION

Regency Main & 4-6, 2nd Floor

Moderator: Gregory W. Stepanicich, City Attorney, Fairfield and Mill Valley and Town Attorney, Ross

Demystifying How The ADA Applies To Public Facilities And Services

(Panel Presentation And Interactive Breakout Groups)

Facilitator: Gregory W. Stepanicich, City Attorney, Fairfield and Mill Valley, Town Attorney, Ross

Speakers: Alison D. Alpert, Best Best & Krieger
Gregory F. Hurley, Sheppard, Mullin, Richter & Hampton
Neil D. Okazaki, Deputy City Attorney, Riverside

Town Hall On City Attorneys' Department Listserv Issues

Facilitators: Thomas B. Brown, City Attorney, St. Helena
Christi Hogin, City Attorney, Lomita, Malibu & Palos Verdes Estates

- **Substance and Volume of Posts**
- **Eligibility**

4:30 – 5:30 p.m.

CONCURRENT GROUP DISCUSSIONS

- **Coastal Cities**
  Big Sur 1-2, 1st Floor
  Moderator: Christi Hogin, City Attorney, Lomita, Malibu, and Palos Verdes Estates

- **Medical Marijuana**
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  Moderator: Jeffrey V. Dunn, Best Best & Krieger

- **Mobilehome Parks**
  Spyglass 1, 1st Floor
  Moderator: Tim W. Giles, City Attorney, Goleta

- **Post Redevelopment**
  Windjammer 1, 1st Floor
  Moderator: William H. Ihrke, Rutan & Tucker

- **Solo and Small City Attorney Offices**
  Cypress 1-2, 1st Floor
  Moderator: Kathleen A. Kane, City Attorney, Burlingame

- **Sharing Economy Issues – Rides And Residential Rentals In Cities**
  Spyglass 1-2, 1st Floor
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  Trevor L. Rusin, Assistant City Attorney, Malibu
  Andrea S. Visveshwara, Assistant City Attorney, Petaluma

5:30 p.m. **EVENING ON YOUR OWN**

Friday—May 8

7:00 a.m. – 7:45 a.m. **FUN RUN –** *Sponsored by Richards Watson Gershon*
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7:45 a.m. – 8:45 a.m. **BREAKFAST**
Regency 1-3 & Regency Terrace, 2nd Floor

9:00 a.m. – 10:15 a.m. **GENERAL SESSION**
Regency Main & 4-6, 2nd Floor
Moderator: Thomas B. Brown, City Attorney, St. Helena

Municipal Tort And Civil Rights Litigation Update
Speaker: Eugene P. Gordon, Office of the City Attorney, San Diego

The Voting Rights Act: Where We've Been And Where We're Going
Speakers: Sean D. De Burgh, Deputy City Attorney, Oroville
Derek P. Cole, City Attorney, Angels Camp, Oakley and Sutter Creek

10:30 a.m. – 12:15 p.m. **GENERAL SESSION**
Regency Main & 4-6, 2nd Floor
Moderator: Craig Labadie, City Attorney, Albany

Labor And Employment Litigation Update
Speaker: Timothy L. Davis, Burke Williams & Sorensen

Ethics (Conflicts When Representing Multiple Boards And Confidentiality/Waiver Of Attorney-Client Privilege Issues)
(MCLE Specialty Credit for Ethics)
Speaker: Steven L. Dorsey, City Attorney, Buena Park, Norwalk and San Marino

Closing Remarks / Evaluations / Adjourn

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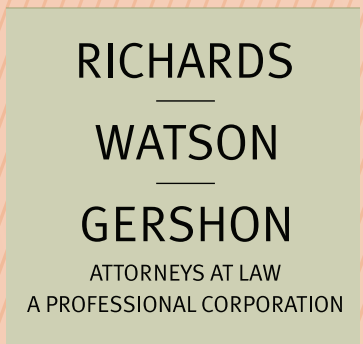

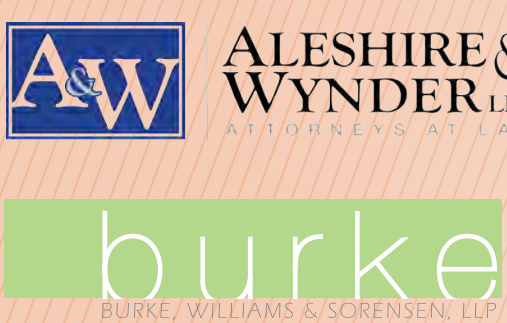

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Land Use And CEQA Litigation Update

Wednesday, May 6, 2015 Opening General Session; 1:00 – 3:00 p.m.

Christian L. Marsh, Downey Brand

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Notes:

CEQA and Land Use Litigation Update

Cases Reported from
August 29, 2014 through April 13, 2015

Christian Marsh
Downey Brand LLP
455 Market Street, Suite 1420
San Francisco, California 94105
(415) 848-4830
cmarsh@downeybrand.com

Wednesday, May 6, 2015
General Session: 1:00 – 3:00 pm

2015 City Attorneys'
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May 2015

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I. PUBLISHED CEQA DECISIONS

The Appellate Courts of California published 17 CEQA decisions from August 29, 2014 through April 13, 2015, granting relief in favor of the petitioner in only four cases. The four cases involved review of negative declarations and environmental processes that followed earlier CEQA review (e.g., an addendum). Notably, public agencies prevailed in all other types of cases (e.g., exemption, EIR, and procedural cases).

A. Scope of CEQA

1. *Saltonstall v. City of Sacramento*
(2014) 231 Cal.App.4th 837

- Legislative act, Public Resources Code Section 21168.6.6, modifying CEQA review and litigation deadlines for the construction of a sports arena in downtown Sacramento, including factors justifying an injunction to stop work, does not violate the California Constitution.

- Trial court did not err in refusing to grant injunctive relief pursuant to section 21168.6.6.

Summary

The Legislature enacted section 21168.6.6 of the Public Resources Code in 2013, in an effort to facilitate timely completion of the new Kings arena in downtown Sacramento. Section 21168.6.6, as relevant to the case, creates accelerated deadlines for the lead agency, directs the Judicial Council to adopt a rule to facilitate completion of judicial review of the arena's compliance with CEQA within 270 days, and provides that an injunction to stop construction of the arena may only be granted upon a showing of imminent threat to public health and safety or unforeseen important historical, archaeological, or ecological values.

Saltonstall (and others) sued to challenge the constitutionality of section 21168.6.6 and the project's compliance with CEQA. After the trial court denied Saltonstall's motion for a preliminary injunction, she appealed the trial court's rulings with respect to section 21168.6.6, arguing that the section represented an unconstitutional infringement of the Legislature on the core function of the courts, and that the preliminary injunction should have been granted because it would not harm the defendants.

The court of appeal rejected the argument that section 21168.6.6 is unconstitutional. First, the section did not deny courts the ability to issue injunctive relief, but instead simply reflected a legislative re-balancing of the factors courts must consider in deciding whether to enjoin construction of the particular project at issue, the new Kings arena. Saltonstall admitted that the Legislature could, constitutionally, exempt the arena from CEQA entirely, and so the mere specification of the factors that would warrant an injunction in the event of a CEQA challenge to the arena project did not impermissibly infringe upon the power of the courts. Second, the court found that because section 21168.6.6 directed the Judicial Council to create a rule providing for 270-day review of the arena project *if feasible*, and did not include any penalty for review that

exceeds 270 days, the 270-day deadline is suggestive, not mandatory, and so does not materially impair the ability of the courts to fulfill their adjudicatory functions with respect to judicial review of the project's compliance with CEQA.

The court of appeal also found that the trial court properly denied Saltonstall's motion for a preliminary injunction. Under section 21168.6.6, to obtain a preliminary injunction, Saltonstall had the burden of showing that the project posed an imminent threat to public health and safety or unforeseen important historical, archaeological, or ecological values. She failed to do so, and instead argued that the respondents would not be harmed by an injunction. As Saltonstall failed to make the showing section 21168.6.6 required, the trial court did not err in denying the motion for a preliminary injunction.

2. *Picayune Rancheria of Chukchansi Indians v. Brown* (2014) 229 Cal.App.4th 1416

- Governor is not a public agency as defined under CEQA.

Summary

The Picayune Rancheria of Chukchansi Indians (Picayune Tribe) are owners and operators of a resort and casino in Madera, California. Another tribe, the North Fork Rancheria of Mono Indians sought U.S. Department of Interior authorization to acquire 305 acres in Madera County to develop its own resort and casino there. After issuing an environmental impact statement on the project in 2009, the Secretary of Interior determined that, pursuant to the Indian Gaming Regulatory Act (IGRA), "a gaming establishment on newly acquired lands would be in the best interest of the Indian tribe and its members, and would not be detrimental to the surrounding community." Pursuant to provisions in the IGRA, Governor Brown concurred in that determination without considering or preparing an EIR under CEQA.

The Picayune Tribe filed a petition for a writ of mandate, among other claims, against the Governor, for failure to prepare an EIR in advance of his concurrence with the Department's determination.

The appellate court concluded that the Governor is not a public agency subject to the mandates of CEQA. In pertinent part, the court found that the Governor, as an individual, had issued his concurrence pursuant to provisions in the IGRA. And, despite CEQA's inclusive nature, there was nothing in the explicit language of that statute that suggests the Legislature intended to subject a government official, such as the Governor, to the CEQA's requirements; rather, the term "public agency" as used by that statute means a government body. Therefore, because the Governor is not a "public agency" within the meaning of CEQA, the appellate court affirmed the lower court's ruling, sustaining demurrer without leave to amend.

B. Exemptions

1. *CREED-21 v. City of San Diego*
(2015) 234 Cal.App.4th 488

- Environmental baseline is the current physical conditions of the site, including intervening and superseding events (here, earlier emergency repair work).

- Revegetation plan falls within "common sense" exemption because it would not result in any adverse change in physical conditions of environment where site consisted mostly of bare dirt and nonnative vegetation after the completion of emergency work.

- Where lawsuit pertains to multiple agency actions and approvals, petitioner lacks standing to challenge earlier actions that are beyond the statute of limitations.

Summary

The Fourth Appellate District upheld an exemption adopted by the City of San Diego for revegetation work approved in 2011. The Court also found earlier repair work to be beyond challenge.

In 2010, a storm event caused a recently constructed storm drain to fail and erode a hillside below single family homes in La Jolla. At that time, the City issued an emergency coastal permit and found the emergency work exempt from CEQA. In 2011, approximately eight months after completion of the emergency storm drain repairs, the City applied the "common sense" and other categorical exemptions to issue a coastal permit authorizing revegetation of the hillside.

In challenging the revegetation and repair work, the plaintiff took the position that a 2007 environmental baseline was appropriate because the city initially proposed the project at that time and its emergency repairs were only "temporary." The trial court agreed and ruled that, among other things, the City had violated CEQA when it determined the revegetation plan and earlier storm drain repair work were exempt from CEQA.

Concerning the environmental baseline, the Appellate District concluded that the trial court erred by finding that the baseline for the project consisted of the physical conditions existing at the site in 2007, *before* the 2010 storm drain repair work was completed. The court described the 2010 repair work as an "intervening and superseding event that changed the physical environment…." Thus, the earlier repair work became part of the environmental baseline for evaluation of the later revegetation project.

The court then went on to hold that CREED lacked "standing" to challenge the City's earlier exemption determination for the 2010 emergency storm drain repair work as CREED had failed to file a timely challenge to that determination. As the court emphasized, "[a]bsent a timely challenge to an agency's emergency exemption determination, any emergency work completed pursuant to that exemption determination cannot thereafter be collaterally challenged." Further,

while the 2011 Notice of Exemption confusingly described both the original storm drain repairs and revegetation project, that description did not give CREED a "second bite at the apple."

The court upheld the city's application of the common sense CEQA exemption for the 2011 revegetation work. A consultant and city planner memorandum in the administrative record provided substantial evidence that revegetation would "indisputably" improve baseline environmental conditions. The common sense exemption therefore applied because it could be shown with certainty that the project would have no adverse significant effect on the environment.

Lastly, the court rejected CREED's claim that the unusual circumstances exception precluded use of a categorical exemption for the 2011 revegetation work. In relevant part, CREED had provided no evidence showing that the revegetation work authorized in 2011 was unusual compared to other typically exempt projects. And, even assuming unusual circumstances did exist, the court was careful to find that there was no evidence showing a reasonable possibility of a significant adverse effect as a result of the revegetation project. In this way, the court applied the fair argument and substantial evidence standards of review and avoided the question pending before the California Supreme Court in *Berkeley Hillside Preservation* (next).

2. *Berkeley Hillside Preservation v. City of Berkeley* (2015) 60 Cal.4th 1086

- Whether the "unusual circumstances" exception applies is a two-step inquiry, with the first step focusing on whether there are unusual circumstances.

- Evidence of a project's significant effects may show that the circumstances are unusual.

- In determining whether circumstances are unusual, agency may consider "conditions in the vicinity of the proposed project."

- Court will apply a "bifurcated" approach to the standards of review: (i) "substantial evidence" standard of review governs agency determinations concerning "unusual circumstances"; and (ii) less deferential "fair argument" standard applies to the question of whether an unusual circumstance gives rise to possible adverse impacts.

Summary

The City of Berkeley had approved construction of a 6,478 square-foot, single-family home and attached 10-car garage on a steep slope in Berkeley, finding the project exempt from CEQA under the categorical exemptions for single-family homes and infill developments (CEQA Guidelines sections 15303(a) and 15332, respectively). While CEQA requires extensive environmental review for many projects with potentially significant environmental effects, CEQA's "categorical exemptions" enable expedient implementation of hundreds of routine projects each year (including water projects). Several residents sued claiming that CEQA's categorical exemptions did not apply due to "unusual circumstances"—namely, the project's "unusual size, location, nature and scope." In addition to the building's size, the challengers

argued that to achieve the home's proposed elevations, massive grading and retaining walls would be necessary. The appeals court invalidated the exemption, holding that evidence of a potentially significant impact "is itself an unusual circumstance" that precludes reliance on an exemption.

After pending for three years, the Supreme Court reversed the appeals court and settled four important questions:

> First, the Court held that determining whether the unusual circumstances exception applies is a two-step inquiry: (1) the agency must first evaluate whether there are any unusual circumstances; and (2) the agency must then determine whether there is a reasonable possibility that the activity will have a significant effect on the environment due to the unusual circumstances. According to the Court, the appeals court below "erred by holding that a potentially significant environmental effect itself constitutes an unusual circumstance"—such a construction "would render useless and unnecessary the statutes the Legislature passed to identify and make exempt classes of projects that have no significant environmental effect."
>
> Second, while seemingly at odds with the Court's clear delineation of the two-step inquiry, the Court held that a project's significant environmental effects could nevertheless evince an unusual circumstance: "[E]vidence that the project will have a significant effect does tend to prove that some circumstance of the project is unusual."
>
> Third, the Court provided useful guidance clarifying that the local setting is important: "In determining whether the environmental effects of a proposed project are unusual or typical, local agencies have discretion to consider conditions in the vicinity of the proposed project." Thus, for example, while replacement of a water pipeline in an existing right-of-way might be typical in an urban area, placement of a pipeline in pristine habitat might be deemed uncommon (or unusual).
>
> Fourth, the Court settled the long-standing question of whether courts should provide deference to an agency in its exemption determination. Here, the Court applied a "bifurcated" approach. While the determination as to whether "unusual circumstances" exist is reviewed under the deferential "substantial evidence" standard, the question of whether an unusual circumstance gives rise to possible adverse impacts is reviewed under the less-deferential "fair argument" standard. The Court reasoned that this bifurcated approach makes sense because, "when unusual circumstances are established, . . . the typical environmental effects of projects in an exempt category no longer control."

The Court has provided important clarity concerning the steps in the inquiry and the standards of review. Particularly helpful is the Court's guidance that local conditions can be considered in determining whether circumstances are unusual. The decision is perplexing, however, in that it signals that evidence of adverse impacts must also be considered. When combined with the "bifurcated approach" to the standard of review, the Court has left enough ambiguity to spawn more litigation over the exemptions and their exceptions.

C. NEGATIVE DECLARATIONS

1. *Citizens for the Restoration of L Street v. City of Fresno* (2014) 229 Cal.App.4th 340

- City violated CEQA by granting approval authority to Historic Preservation Commission, pursuant to its municipal code, for demolition permit without also delegating environmental review authority.

- Whether a cultural resource constitutes a "historical resource" is a threshold question subject to the deferential "substantial evidence" standard of review.

Summary

After approving a residential infill development project in downtown Fresno to build 28 two-story townhouses, a citizens group interested in historical resources challenged the City's approval and related issuance of demolition permits for two early-20th century houses. The trial court held in part that the City violated procedural requirements under CEQA and both sides appealed.

On appeal, the appellate court examined whether the City had properly delegated its decisionmaking authority to the City's Historic Preservation Commission (HPC). The Court of Appeal found that the City had granted the HPC authority to approve the project but failed to also delegate environmental review to that entity, as required by Public Resources Code section 21151, subdivision (c). The court also held that the City's attempts to cure the CEQA defects were insufficient because (1) the City acted merely as an appellate body addressing limited issues and was not acting as the final independent decision-making body for the project and related environmental review documents, and (2) the procedures used by the City in handling the appeal did not comply with the notice requirements imposed by CEQA. Specifically, the City did not provide notice of its intent to adopt a mitigated negative declaration along with a 20-day public review period.

The court also confirmed that a lead agency's determination of whether the resource at issue is historic for the purposes of CEQA is reviewed under the deferential "substantial evidence" standard. In determining this threshold question, the lead agency must evaluate the resource under the three analytical categories established by section 21084.1 and Guidelines section 15064.5, subdivision (a), before it applies the fair argument standard to determine whether the project may have a significant adverse impact on the environment.

2. *Rominger v. County of Colusa*
(2014) 229 Cal.App.4th 690

- Approval of a of a subdivision map is a CEQA "project" even if it does not include any specific plans for development and is not otherwise exempt under the common sense exemption, where there is a reasonable possibility that creation of smaller parcels could lead to development that might not otherwise occur.

- County's 29-day review period for MND failed to comply with the 30-day requirement, but shortened review period did not preclude informed decisionmaking or informed public participation, and therefore was not prejudicial abuse of discretion.

- Letter from air quality consultant too vague to amount to substantial evidence supporting a fair argument of significant odor impacts notwithstanding the mitigation measure to which the county had committed itself.

Summary

The Third Appellate District held that approval of a subdivision map is a CEQA "project" even if it does not include any specific plans for development. The Court also confirmed that when determining whether an environmental impact report ("EIR") is required, the issue is whether there was substantial evidence to support a fair argument that the Project may have a significant impact on the environment.

Project applicant Adams Group Inc. applied for approval of a tentative subdivision map to divide four parcels (the "Project") located in Colusa County into 16 parcels. The applicant indicated no specific plan for future expansion and that the intention was to continue the existing uses: agricultural, light industrial, and open space. The County prepared an initial study and mitigated negative declaration ("IS/MND") for the Project. The Petitioners, the Romingers, commented that even though the County did not know the exact future uses for the subdivided lots, the County was required to analyze the potential impacts of the operations based on the most reasonably foreseeable significant impacts. In response to the Petitioners' comments, the County prepared a revised IS/MND. The revised IS/MND evaluated potential industrial development related to agriculture. The County argued that because the future development scenario was presented for analysis only, and was not currently proposed, the analysis was not required by CEQA. Notwithstanding the Petitioners' complaints, the planning commission voted to approve the revised mitigated negative declaration for the project. The Romingers appealed that determination to the board of supervisors, which denied the appeal and adopted a resolution approving the project and the revised MND.

Petitioners sought judicial review arguing that the revised IS/MND was deficient and that the County violated CEQA by failing to prepare an EIR for the Project. The Petitioners argued that the County should have been barred from asserting in the trial court that the subdivision was not a project for purposes of CEQA because the County treated the subdivision as a project by approving an MND. The County and Real Party in Interest argued that the County actually exceeded the legal requirements of CEQA by preparing an MND for a Project that has no potential to result in any physical change in the environment. The trial court denied Petitioners'

mandamus petition and held in favor of the County, determining that even though the County treated the activity as a "project," the Project was not a "project" for purposes of CEQA. The Petitioners appealed.

On review, the Court of Appeal held that the Project qualified as a CEQA project because an activity is a project if CEQA has identified the activity as a project regardless of whether the activity will have an environmental impact. In this case, the Court found that by enacting subdivision (a) of section 21080, the Legislature determined that approval of tentative subdivision maps always has at least the potential to cause a direct physical change or reasonably foreseeable indirect physical change in the environment. On this standard, the Court held that the Project in this case constituted a CEQA project, and the Project was not otherwise exempt under the common sense exemption, given the reasonable possibility that creation of smaller parcels could lead to development that might not otherwise occur.

Upon review of the record with regard to Petitioners' specific challenges to the MND, the Court sided with Petitioners on only a single issue. The Court found that there was substantial evidence in the record supporting a fair argument that the Project would result in development and have a significant effect on traffic, and that the County was required to prepare an EIR. The County argued that its contrary traffic assumptions were supported by substantial evidence. The Court explained that the issue was not whether there was substantial evidence to support the County's conclusions, but whether there was evidence to support a fair argument that the Project may have a significant impact on traffic. The Court held that the Petitioners had met this standard and that the County prejudicially abused its discretion by failing to prepare an EIR.

Finally, the Court concluded that the County did not entirely comply with the requirement to provide a full 30-day review period for the MND, but held that the 29-day review period did not preclude informed decisionmaking or informed public participation. Since that error was not prejudicial, it could not provide a basis for relief.

D. Environmental Impact Reports

1. *Paulek v. California Department of Water Resources* (2014) 231 Cal.App.4th 35

- Public participant made an adequate objection in administrative hearing for standing purposes because his questions raised environmental issues sufficient to invoke CEQA standing under Public Resources Code section 21177.

- EIR's omission of project feature did not result in any significant environmental impacts being unmitigated because project sought to reduce existing risks.

- Department did not engage in piecemeal environmental review because subsequent project is not a consequence, future expansion, or integral part of the Project.

- Final EIR's responses to comments were sufficient because a general comment only requires a general response.

Summary

Petitioner Albert Paulek, on behalf of himself, filed a petition for writ of mandate under CEQA challenging the Department of Water Resources' (DWR) certification of a Final Environmental Impact Report (FEIR) for the Perris Dam Remediation Project (Project). The Project consisted of two parts: (1) remediation of structural deficiencies in the dam, and (2) replacement of the facility's outlet tower. Originally, the EIR also included analysis of an Emergency Outlet Extension, but in response to comments on the Draft EIR, that extension was split off into a separate project subject to separate environmental review.

The Perris Dam and Reservoir was constructed in 1972 in Riverside County. A 2005 structural foundation study found that the dam had structural issues that could lead to failure of the dam in the event of an earthquake. The report recommended dropping the water level in the reservoir as well as remediation of the facility and further study.

DWR claimed that Paulek lacked standing because he failed to comply with Public Resources Code section 21177(b), in particular that his comments during the public hearing on the project constituted questions, not objections. During the public workshop on the Draft EIR, Paulek had asked questions about the nature of the project and the project's capacity. The Court held that Paulek had not merely stated "generalized environmental comments" but rather, stated "expressions of concern specifically regarding the proposed project" that were "sufficiently specific in both subject and level of detail to allow the Department to evaluate and respond to them." The Court emphasized that an "objection challenging a project's purported benefits is just as pertinent to the required balancing analysis as an objection regarding environmental risks, and is equally adequate for satisfying section 21177, subdivision (b)."

Paulek argued that the removal of the outlet extension from the Project left a significant environmental impact of the project unmitigated, pointing to flooding that would occur in residential areas downstream of the dam in the event of an emergency water release. The Court rejected this claim, finding that "nothing in the administrative record suggests the proposed dam remediation or outlet structure replacement activities will cause or increase the risk of flooding that the emergency outlet extension is intended to remedy." The flooding risks to residential areas below Perris Dam are risks that were created by the original design—not the existing Project. The Project would not increase that existing risk; instead, the two proposed activities that remain part of the Project would *reduce* those risks.

Paulek also claimed that the deferral of the outlet extension constitutes improper segmentation of the project and that the outlet extension is an integral part of the Perris Damn Remediation Program and must be a part of the FEIR. The Court disagreed, holding that there was "no basis in the administrative record to conclude that the emergency outlet extension is a 'reasonably foreseeable consequence' of the dam remediation and tower rebuilding projects." The need for the outlet extension is not a *consequence* of the dam, making the facts distinguishable from those cases where "one stage of a project is the first domino to fall in a causally-related series of events

to follow." The Court also found that the outlet extension was not a "future expansion" of the existing Project and thus distinguishable from the facts in *Laurel Heights Improvement Assn. v. Regents of the University of California* (1988) 47 Cal.3d 376. In addition, the outlet extension was not an "integral part of the same project." The Court instead found that, similar to the facts present in *Communities for a Better Environment v. City of Richmond* (2010) 184 Cal. App. 4th 70, "the principal purpose of the dam remediation and the outlet tower reconstruction—to improve the ability of the Perris Lake facility itself to withstand seismic events—is different from, and does not depend on, the function of the emergency outlet extension."

Finally, Paulek contended that DWR's responses to the comments submitted by an environmental organization were inadequate. Paulek pointed first to a comment letter submitted in response to the notice of preparation—not the Draft EIR. The Court held that because the letter did not (and could not) provide comments on the Draft EIR, DWR had no obligation to respond to it. Paulek pointed to a second letter that was submitted in response to the Draft EIR. As to this letter, the Court held that DWR's general responses to the general comments submitted were sufficient. Finally, as to the citation by commenters to other documents in the administrative record, those commenters failed to cite specific deficiencies in the EIR, and thus DWR's general responses to these comments were legally sufficient.

2. ***Friends of the Kings River v. County of Fresno***
(2014) 232 Cal.App.4th 105

- Under the Surface Mining and Reclamation Act, where the State Mining and Geology Board considers an appeal of the lead agency's approval of a reclamation plan, it does not have the authority to set aside the lead agency's approval of that plan; it may only direct the lead agency to reconsider its approval.

- A lead agency is not required to adopt agricultural conservation easements as mitigation for the loss of farmland.

Summary

Friends of the Kings River petitioned for a writ of mandate under CEQA challenging the County of Fresno's certification of an EIR and approval of a revised reclamation plan for the Carmelita Mine and Reclamation Project at the base of the Sierra Nevada foothills in the Central Valley. After certification of the EIR, Friends successfully appealed the County's approval of an original reclamation plan to the State Mining and Geology Board (SMGB). After remand, the County approved a revised reclamation plan and the SMGB denied Friends' second appeal of the revised plan.

The court held that Friends' first successful appeal to the SMGB did not serve to set aside or nullify the County's approval of the reclamation plan or certification of the EIR. Rather, under the Surface Mining and Reclamation Act (SMARA), the SMGB only has the power to remand to the lead agency for reconsideration of the approval of a reclamation plan. Quoting *Security National Guaranty, Inc. v. California Coastal Com.* (2008) 159 Cal.App.4th 402, 419, the court reasoned that just because an agency "has been granted *some* authority to act within a given area

does not mean that it enjoys *plenary* authority to act in that area." As a result of this holding, the court further held that evidence of the SMGB proceedings (which occurred after the County certified the EIR) was inadmissible extra-record evidence.

The court approved the mitigation measures adopted by the County to address the significant impacts to agricultural resources due to the loss of a maximum of 583 acres of farmland. The court held that the County was not required to adopt a mitigation measure that would require agricultural conservation easements (ACEs) and that the County's consideration of ACEs was sufficient. The court distinguished *Masonite Corp. v. County of Mendocino* (2013) 218 Cal.App.4th 230, because there the county had categorically excluded ACEs as a potential mitigation measure. The court did not read *Masonite* to require the adoption of ACEs as mitigation, but rather that ACEs not be categorically excluded from consideration—which the County here did not do.

3. *Center for Biological Diversity v. California Dept. of Fish & Wildlife* (2015) 234 Cal.App.4th 214

- The existing operations of a long-running program may be included in the environmental baseline to evaluate that program even if as a result some elements of that existing operation may never receive environmental review.

- The purpose of the "no project alternative" is to compare against the status quo, so a no-project alternative should include a project's existing operations, even if those operations have not been previously reviewed.

Summary

Since the 1800s, the California Department of Fish and Wildlife has been responsible for overseeing and implementing the state's fish hatchery and fish stocking program for trout, salmon, and steelhead. In 2007, following a challenge to the program's categorical exemption, the Department began preparing an Environmental Impact Report (EIR) for its hatchery and stocking operation for trout, salmon, and steelhead. The scope of that document was later expanded to include the Department's entire fish hatchery and stocking enterprise statewide, various educational and outreach programs, and a private stocking program. A joint EIR/EIS was released in 2010.

In three cases that were consolidated for the purposes of issuing this decision, the Center for Biological Diversity and its co-plaintiffs argued that the EIR/EIS was flawed because it (1) did not perform site-specific review for each site the Department stocks with fish; (2) it improperly relied on future development of management plans as deferred mitigation measures; (3) it should not have relied on the current stocking enterprise as the environmental baseline; (4) the project alternatives considered in the EIR were inadequate; and (5) the mitigation measures imposed on the private stocking program and other ancillary programs amounted to underground regulations in violation of the Administrative Procedures Act.

The court found that the EIR/EIS was properly considered a program-level document, and contained a level of analysis appropriate for such a document. In particular, the EIR/EIS "disclosed and evaluated all known impacts from hatchery operations and stocking to each decision species… It allows the Department to go forward with its enterprise, knowing the likely impacts from any stocking decision it makes should it find a decision species in the water body to be stocked." Because the EIR/EIS provided evaluation protocols under which to evaluate future sites, and committed the Department to mitigating potential impacts at those sites as appropriate, it was sufficiently comprehensive to meet CEQA's requirements.

The court additionally found that it was appropriate for the Department to use the hatchery and stocking operations from 2004 through 2008 as an environmental baseline for its analysis in the EIR/EIS. Observing that the conditions used by the Department as a baseline had been in place for more than a century, the court reasoned that the baseline necessarily must include the continuing operations of a project even if those operations had never received and may never receive environmental review.

The EIR/EIS did not impermissibly defer mitigation of the operations' impacts when it relied on the development of management plans to mitigate impacts of future fish stocking. Rather, it provided sufficient performance standards for future mitigation, and committed the Department to mitigating the future impacts that it discovered.

Finally, the court concluded that the Department considered an appropriate range of alternatives. The purpose of a no project alternative is to identify the environmental impacts of preserving the status quo, so the Department correctly identified the existing operation, which had been in place for more than 100 years as the "no project alternative." The Department correctly rejected as infeasible an alternative that would have terminated the stocking program, as the Department was legally obligated to continue that program.

Considering all of these arguments, the court upheld the EIR/EIS on CEQA grounds, though it found that certain mitigation measures related to private fish stocking and outreach programs were unground regulations prohibited by the Administrative Procedures Act.

4. *Saltonstall v. City of Sacramento*
(2015) 234 Cal.App.4th 549

- The City can engage in land acquisition for its preferred site before finishing environmental review for project approval.

- The City did not have to evaluate the remodeling of the current arena as an alternative because the review of a no project alternative and an adjacent building location in Natomas were sufficient, and none of those three possibilities would have satisfied the project objectives.

- Speculation of post-event crowd violence does not trigger CEQA.

- Review of trial court orders on Public Records Act motions may only be made by writ petition, not by direct appeal.

Summary

Seeking to keep the Kings basketball team in Sacramento, the City of Sacramento (City) partnered with Sacramento Basketball Holdings LLC to build a new entertainment and sports center in downtown Sacramento. In May 2013, the Board of Governors for the National Basketball Association (NBA) approved the sale of the team to Sacramento Basketball Holdings, but reserved the right to acquire the Sacramento Kings and relocate the team to another city if a new arena in Sacramento does not open by 2017.

To meet the NBA's deadline, the City and Sacramento Basketball Holdings developed a schedule that targets October 2016 as the opening date for the new downtown arena. To facilitate timely completion of the project, the California Legislature added section 21168.6.6 to the Public Resources Code which modified CEQA deadlines for review of the construction of the downtown arena in Sacramento. From the modified environmental review process by the City, several CEQA challenges grew and the 12 petitions were consolidated into the current case.

In this CEQA challenge, the Appellate Court affirmed the trial court's judgment dismissing the challenge to the sufficiency of the City's EIR and approval of the downtown arena project, and the denial of plaintiff Saltonstall's motion to augment the administrative record. The Appellate Court held: 1) under CEQA, the defendant was allowed to engage in land acquisition for its preferred site before finishing its EIR, and that the defendant did not prematurely commit itself to approving the downtown arena project before completing its environmental review; 2) defendant considered a feasible "no project" alternative; 3) the EIR's traffic study of the project's effects on traffic were not deficient; 4) mere speculation about possible crowd violence and its effect on the environment does not compel EIR review; and 5) review of trial court orders on Public Records Act motions may only be made by writ petition, not by direct appeal.

E. Certified Regulatory Programs and EIR Equivalent Documents

1. *Center for Biological Diversity v. California Dep't of Forestry* (2014) 232 Cal.App.4th 931

- In determining findings of significant impacts, a lead agency has discretion to choose between different expert opinions.

- Recirculation is not required even though an expert's memo was not disclosed during the comment period when: (1) the lead agency allowed for discussion of mitigation measures contained in the memo; (2) the lead agency extended the comment period; and (3) those mitigation measures were subsequently adopted by real parties in interest.

- Writ of mandamus is not available to assert an expert agency improperly failed to oppose a lead agency's determination. While an expert agency has a ministerial duty to take

statutory and public trust responsibilities into account in providing review and comment, it is a discretionary determination to actively oppose a lead agency's action.

Summary

The Court found California Department of Forestry and Fire Protection (Cal Fire) did not violate CEQA when it approved a Nonindustrial Timber Management Plan (NTMP) that allowed logging on a private parcel north of Gualala in Mendocino County. An NTMP for all purposes functions as an EIR.

In 2008, real parties in interest the Bower family submitted a proposed NTMP to lead agency Cal Fire, seeking approval of timber harvesting on 615 acres. Cal Fire, expert agency Department of Fish and Wildlife (DFW), and the Bowers' forester conducted two pre-harvest site inspections to primarily evaluate a 17-acre section of larger trees (the Late Succession Forest Stand or "LSFS") for potential marbled murrelet habitat – a species protected under the California Endangered Species Act (CESA). DFW's report identified the LSFS as suitable murrelet habitat and proposed mitigation measures to avoid take. Cal Fire approved a revised NTMP that included many of the mitigation measures identified by DFW.

Petitioners asserted Cal Fire's approval of the NTMP violated CEQA on the grounds that (1) the NTMP should have been recirculated because Cal Fire did not disclose a 2009 one-page memorandum by its biologist that recommended additional protective measures for large trees in the LSFS; and (2) the cumulative impacts of logging would eliminate over 90% of large trees in the LSFS, thereby harming or eliminating critical murrelet habitat.

Reviewing the record for substantial evidence in support of Cal Fire's decision to not recirculate the NTMP, the Court found that Cal Fire's 2009 memo did not constitute significant new information, as it did not disclose new environmental impacts or a substantial increase in the severity of any impact. Indeed, the additional mitigation measures contained in the 2009 memo were in fact discussed in a second round review of the NTMP – which was extended 30 days to consider additional information pertaining to the protection of large trees in the LSFS – and Petitioners in fact participated in that review. Moreover, the additional mitigation measures ultimately required by Cal Fire were accepted by the Bowers eight days prior to the close of public comment. The Court further noted that recirculation of an EIR after the close of public comment period is the distinct procedural exception rather than a general rule.
The Court also found Cal Fire's record contained substantial evidence supporting a fair argument that – with implementation of the identified mitigation measures – timber harvesting in and around the LSFS would have no significant impact on murrelet habitat.

The Court highlighted its required deference to the agency's substantive factual conclusions, and characterized petitioners' contentions as disagreements over fixed evidence; the parties merely drew "dramatically differing conclusions from the same record." Petitioners' assertions that the NRMP did not contain analysis of how the LSFS would be retained as functional murrelet habitat, and that the protected species was positively identified in the NTMP biological assessment area did not alter the propriety of Cal Fire's ultimate determination that logging activities would not harm murrelet habitat. The Court highlighted Petitioners' burden to show a lack of substantial evidence, and moreover, Cal Fire was entitled to choose between differing

expert opinions. Petitioners thus failed to affirmatively show that Cal Fire's findings lacked supporting substantial evidence. The court also rejected Petitioners' claims that the NTMP did not analyze a reasonable range of alternatives, as again, alternatives in Cal Fire's 2009 memo were discussed and the comment period was extended for this purpose.

Separately, the Court held Petitioners' CESA claims failed because Cal Fire found implementation of the plan, as mitigated, would not result in take; the finding was supported by substantial evidence because adopted mitigation measures would retain and provide a buffer for suitable murrelet nesting habitat.

Petitioners' writ of mandamus directed at DFW similarly failed, as there is no authority for the proposition that an expert agency has a ministerial duty to oppose an environmental document. DFW has only advisory authority, and while the agency must take its statutory and public trust responsibilities into account in providing its review and comment, any determination to actively oppose a lead agency's actions is purely discretionary. Thus, DFW's decision not to actively oppose Cal Fire's approval of the Bowers' NTMP provides no basis for a writ of mandamus under Code of Civ. Proc. Section 1085.

2. *Conway v. State Water Resources Control Board* (2015) --- Cal.App.4th ---

- Certified regulatory programs are subject to the "broad policy goals and substantive standards of CEQA."

- Because a total maximum daily load (TMDL) is merely a "goal" for water quality (and not an "implementation plan"), first-tier programmatic review was sufficient.

- Dredging—which was one possible remedial measure for eventually achieving water quality goals—was beyond the scope of the TMDL and did not require environmental review.

Summary

California's Second District Court of Appeal upheld a functionally equivalent CEQA document prepared by the Regional Water Quality Control Board under its certified regulatory program. State programs certified by the State Resources Agency are exempt from CEQA. Here, the Regional Water Quality Control Board had amended its water quality control plan to establish total maximum daily load (TMDL) pollutant limits for a lake near Oxnard, California. The Regional Board had prepared a functionally equivalent CEQA document under its certified regulatory program to support the TMDL. A CEQA-equivalent document must, in turn, "include a description of the proposed activity with alternatives to the activity and mitigation measures as well as written responses to significant environmental points raised during the evaluation process." (citing Pub. Resources Code, §§ 21080.5(d)(2)(D), (d)(3)(A); Guidelines, § 15252(a).)

Plaintiffs filed suit, claiming that the CEQA-equivalent document should have analyzed the effects of remedial actions—dredging—that would be needed to achieve the proposed TMDL.

According to the plaintiffs, dredging was the only "practical method" for remediating the water quality problem.

The Second District Court of Appeal disagreed. Referring to a TMDL as an "informational document" and not an "implementation plan," the court noted that the TMDL itself does not "prohibit any conduct or require any actions." Consequently, the court reasoned, "only a first-tier analysis [was] necessary." The Basin Plan Amendment that accompanied the TMDL called on the parties and the Regional Board to formulate a memorandum of agreement (MOA) on how the TMDL for lake sediment would be implemented. Until such MOA was formulated, however, the court found that full environmental analysis of any particular method of remediation was "premature." The court finally assured the parties that if dredging is ultimately chosen as the remedial method, "a full analysis can be made on a second tier."

F. Subsequent Environmental Review

1. *Sierra Club v. County of San Diego*
(2014) 231 Cal.App.4th 1152

- County's failure to bind itself to implement detailed greenhouse gas emission reduction targets and deadlines under its Climate Action Plan violated CEQA.

- Adoption of the Climate Action Plan constituted a separate project which required separate determination of environmental impacts and a supplemental EIR.

Summary

The Fourth Appellate District upheld a lower court decision that County of San Diego's ("County") climate action plan ("CAP") violated the California Environmental Quality Act ("CEQA"). The Court held the County failed to properly conduct environmental review of the CAP as required by CEQA and failed to provide detailed deadlines and enforceable measures to ensure that greenhouse gas ("GHG") emissions would be reduced as required by mitigation measures included in the County's General Plan update.

In 2011, the County amended its General Plan and certified a program environmental impact report ("PEIR"). In the PEIR, the County recognized that it must reduce GHG emissions in the county to 1990 levels by 2020. Therefore it adopted various related mitigation measures, which included a commitment to prepare a CAP with more detailed GHG emissions reduction targets and deadlines. The CAP was intended to develop comprehensive and enforceable GHG emissions reductions measures that would achieve the targeted GHG reductions by the year 2020, consistent with the requirements of AB 32 (the California Global Warming Solutions Act of 2006) and a 2005 executive order by Governor Arnold Schwarzenegger. Thereafter, the County prepared the CAP and associated guidelines for determining environmental significance. The CAP and Thresholds project was approved by the Board of Supervisors in June 2012.

The Sierra Club challenged the County's approval of the CAP and Thresholds project and its associated environmental review on both substantive and procedural grounds. The complaint alleged that the CAP did not meet the requirements of Mitigation Measure CC-1.2, which

provided that the CAP must achieve the comprehensive and enforceable emissions reductions specified in AB 32 and the governor's executive order. The Sierra Club also argued that the Thresholds were not adopted pursuant to the requirements of CEQA Guideline section 15064.7, and that an EIR should have been prepared.

Affirming the trial court's decision, the Court held that the County failed to adopt a CAP that complied with the mitigation measures set forth in the County's general plan update. The Court reasoned that the CAP lacked enforceable GHG emissions reductions and contained no detailed deadlines for achieving those reductions. The Court of Appeal noted in its opinion that once mitigation measures have been incorporated into the PEIR, they "cannot be defeated by ignoring them or by attempting to render them meaningless by moving ahead with the project in spite of them."

The Court also held that the County violated CEQA by (1) failing to make required findings regarding the environmental impact of the CAP and Thresholds projects and (2) failing to incorporate mitigation measures directly into the CAP as a plan-level document that itself would facilitate further development. Finally, the Court affirmed the trial court's finding that the County should have prepared a supplemental environmental impact report for the CAP under CEQA instead of merely providing an addendum to the County's existing PEIR for the general plan update. The Court elaborated that additional environmental review was particularly necessary where the County's own documents demonstrated that the CAP and Thresholds project would not meet the requirements of AB 32 and thus would have significant impacts that had not previously been addressed in the PEIR.

2. *Ventura Foothill Neighbors v. County of Ventura*
(2014) 232 Cal.App.4th 429

- A supplemental environmental impact report, instead of an addendum, was required to evaluate a substantial project change: an increase in height from 75 to 90 feet of a new medical building.

- The 30-day statute of limitations in Public Resources Section 21167 to challenge a decision announced in a Notice of Determination does not apply where the decision does not mention or notify the public as to the proposed change (here, the increase in building height). Neighborhood interest group had 180 days from date they were informed of increased building height to bring action for mandamus relief seeking supplemental EIR based on changed height.

Summary

Neighbors to a medical clinic constructed in the City of Ventura petitioned for a writ of mandate under CEQA challenging the County of Ventura's filing of an EIR addendum (instead of circulating a supplement) when it changed the location and height of the building. The EIR addendum considered the environmental impact of the change in location, but did not mention the change in the building's height. In upholding the trial court's writ of mandate, the Court of

Appeals rejected the County's argument that it acted within its discretion to prepare an addendum instead of a supplement and that the action was barred by the statute of limitations.

Acknowledging the presumption that an appealed judgment is correct, the Court upheld the trial court ruling that the County abused its discretion by not preparing a supplemental EIR because the change in the building height was a "material discrepancy" with "substantial changes as far as the general public and any reasonable reader of the EIR were concerned." The Court noted that the addendum said nothing about the increase in height and recited facts from a declaration filed in support of a preliminary injunction motion (that was denied) that the new height would "significantly diminish the superior ocean view" of neighboring residences.

The Court also agreed with the trial court that the 30-day statute of limitations of Section 21167 was inapplicable because the County did not provide notice to the public of the increase in the Clinic's height. Although the County filed a Notice of Determination for the addendum, the NOD announced only the decision to change the location of the building and did not include anything about the height of the building. Therefore, the 180-day statute of limitations applied.

It is notable that construction of the Clinic was completed four years before the trial court issued the writ of mandate. The trial court held that it is not a reasonable mitigation measure to reduce the height of the new clinic, but (assuming significant impacts are found) "the county is obligated to consider other forms of mitigation."

G. Litigation Procedures

1. *Coalition for Adequate Review v. City and County of San Francisco* (2014) 229 Cal.App.4th 1043

- A Petitioner's election to prepare the record does not preclude a public agency from recovering supplemental record preparation costs when incurred to ensure a statutorily complete record.

- Time spent by the agency in review of the record for completeness, however, was not recoverable.

Summary

After prevailing in a CEQA action brought by petitioners Coalition for Adequate Review and Alliance for Comprehensive Planning (collectively "Coalition"), the City and County of San Francisco ("City") filed a memorandum of costs totaling $64,144, which largely reflected costs incurred in preparing a 4,000-page supplemental administrative record comprising 12 volumes. The trial court granted the Coalition's motion to tax costs, and denied all costs to the City, on two grounds: (1) the Coalition elected to prepare the record; and (2) a sizeable cost award would have a chilling effect on CEQA lawsuits. The Court of Appeal reversed.

Disagreeing with the lower court, the appellate court stated, "the fact that a petitioner elects to prepare the record [], does not ipso facto bar the recovery of record preparation costs by a public agency." Indeed, where, as here, a record prepared by the petitioner is incomplete, and the

public agency "is put to the task of supplementation to ensure completeness, the language of the statute allows, and the purpose of the record preparation cost provision to protect public monies counsels, that the agency recoup the costs of preparing the supplemental record."

The appellate court also addressed the Coalition's challenge to the City's specifically claimed costs. The Court of Appeal held that the City's $50,191.50 in paralegal costs were recoverable so long as they were reasonably incurred as part of compiling the supplemental record certified by the City—and not incurred as part of the review for completeness of the Coalition's record. The Court likewise held that messenger costs incurred by the City were recoverable so long as they were incurred as part of compiling the supplemental record. The Court rejected the City's request for recovery of $8,053.14 in costs for City Planning Department staff time spent responding to the Coalition's requests for documents, finding that the trial court did not abuse its discretion in denying those costs. Finally, the Court of Appeal held that excerpts of the record can qualify as a photocopy of an exhibit under Code of Civil Procedures section 1033.5(a)(13), so long as they were reasonably helpful to the trier of fact.

2. *Otay Ranch, L.P. v. County of San Diego*
(2014) 230 Cal.App.4th 60

- A public entity may recover "reasonably necessary" costs for retained counsel and paralegals to prepare the administrative record where the entity does not have the resources or experienced personnel to prepare the record.

Summary

The County of San Diego ("County") sought recovery of $66,638.14 in costs for preparation of an administrative record, which included $59,545 for attorney and paralegal time. While petitioners elected to prepare the record, after several stipulations to extend the deadline for preparation of the record, the County ultimately undertook preparation of the entire administrative record. One day after certifying an 18,000-page record, petitioners voluntarily dismissed the entire action.

In opposing petitioners' motion tax its costs, the County argued that the paralegal and attorney costs were reasonably necessary, and submitted declarations from its attorney and a paralegal supporting that argument. In particular, the County argued that it required outside counsel to prepare the record because the record necessitated "specific knowledge and a comprehensive understanding of the project over the previous decade to reassemble various documents and technical reports with supporting documentation to prepare an adequate administrative record, but the County did not have adequate staffing to undertake this effort."

The trial court allowed the County to recover only attorney and paralegal time expended after the County decided to prepare the record and disallowed time prior to that date. These costs totaled $37,528.14 ($30,435 in attorney and paralegal time and $7,093.14 in unchallenged costs). The Court of Appeal affirmed the trial court's award, finding the award appropriate based on the "history and complexity of the project and how the documents were maintained." Based on a review of similar awards of costs for staff and paralegal time to prepare an administrative record, the Court held that the trial court did not abuse its discretion in determining that the costs were

"'reasonably necessary' for the County's retained counsel and paralegals to prepare the administrative record since the County 'did not have the resources or experienced personnel to prepare the [r]ecord.'"

3. *Save Our Uniquely Rural Community Environment v. County of San Bernardino*
(2015) --- Cal.App.4th ---

- Upheld trial court's substantial reduction in the attorneys' fees amount requested by prevailing plaintiff under Code of Civil Procedure section 1021.5—from $221,198 to $19,176.

- Appeals court could not find abuse of discretion where trial court outlined "legitimate reasons" for reduction of the fee award, including lack of overall success, excessive hours, inflated billings, and no justification for not charging local billing rates for the county.

- Although based on a contingent fee, plaintiff was not entitled to a multiplier due to partial contingency, lack of complexity, and no showing that the plaintiff's attorneys had to turn down other work in order to handle the case.

Summary

After a citizens organization (SOURCE) successfully challenged a mitigated negative declaration for an Islamic community center and mosque on a single ground under CEQA, the organization filed a motion for attorneys' fees under Section 1021.5. The motion sought $221,198 in fees, including a lodestar multiplier of 2.0 for the alleged complexity of the work and partial contingency of the matter. Finding the fee amounts "outrageous" and that the CEQA questions were not particularly "long" nor "difficult," the trial court reduced the fee amount to $19,176.

The Fourth Appellate District held that the trial court had not abused its discretion in reducing the plaintiff's fee award. First, the trial court reduced the lodestar for legitimate reasons, including: (1) plaintiff only prevailed on one out of multiple alleged violations of CEQA and local zoning ordinances; (2) the time to prepare the reply brief and "run of the mill" attorney fees motion were "excessive"; (3) the billings were unjustly inflated based on the lack of complexity and billings at partner rates for "clerical" or "basic" tasks, some of which appeared "excessive" or "duplicative"; and (4) plaintiff "provided no evidence . . . that experienced CEQA attorneys were not available in the San Bernardino-Riverside market."

Likewise, the appeals court held that SOURCE was not entitled to a lodestar because, while on a partial contingency, it had mitigated the contingent risk to its attorneys by paying $10,000. Further, in presenting that its attorneys had expended 246 hours on the case over the course of a year, SOURCE had not shown that its attorneys "had to turn down other work" during that time. Lastly, the matter was not particularly "difficult" or "complex," further providing support for the trial court's lack of abuse of discretion.

II. PUBLISHED LAND USE DECISIONS

1. *Levin v. City and County of San Francisco*
(N.D. Cal. 2014) --- F.Supp.3d ---

The Northern District of California struck down part of San Francisco's rent control ordinance requiring relocation payments to tenants evicted from units withdrawn from the rental market under the Ellis Act. Under the ordinance, property owners were required to pay evicted tenants up to twenty-four times the difference between the tenant's monthly rent and the fair market value of a comparable unit. The court held that the relocation payment ordinance was an unconstitutional taking under *Nollan* and *Dollan* because it was a monetary exaction lacking an essential nexus and rough proportionality to the permitted removal of the unit from the rental market.

2. *Bowman v. California Coastal Commission*
(2014) 230 Cal.App.4th 1146

On rehearing, the Court of Appeal reversed a California Coastal Commission determination that a coastal access easement condition in a previously issued coastal development permit was permanent and binding. The court found that the public access condition amounted to an unconstitutional taking under *Nollan* and *Dollan* because it lacked an essential nexus to the owner's maintenance and repair activities. Moreover, the court held that the owner was not collaterally estopped from challenging the permit condition after performing work on the property because the maintenance and repairs had been completed under separate "over-the-counter" permits, and such work is exempt from requiring a coastal development permit in the first place. Therefore, the court held the easement invalid.

3. *Woody's Group, Inc. v. City of Newport Beach*
(2015) 233 Cal.App.4th 1012

In a stinging rebuke, the Court of Appeal held that the City Council of Newport Beach could not hear an appeal of a planning commission decision approving a conditional use permit and variance authorizing late-night dancing at a popular restaurant and bar, because the appeal was requested by a council member who had failed to pay the filing fee and follow other requirements in the municipal code. The City argued that such appeals are brought "for the benefit" of the City's residents, and therefore are exempt from the requirements of the municipal code. However, the court was not persuaded, stating that such reasoning "does not withstand the proverbial smell test. There's a fancy Latin phrase for that sort of thinking—*Quod principi placuit, legis habet vigorem* (what pleases the prince has the force of law)—but it's not one that is consistent with due process." Moreover, that council member's participation in hearing the appeal violated due process because "a person cannot be a judge in his or her own case." Therefore, the court nullified the council's decision reversing the planning commission's issuance of the conditional use permit.

4. ***City of San Marcos v. Loma San Marcos, LLC***
(2015) 234 Cal.App.4th 1045

The Court of Appeal affirmed the lower court's ruling upholding an agreement between the City and property owner that required the owner to pay over $2 million in impact mitigation fees prior to the issuance of building permits, finding that the conditional use permit did not preclude such an agreement. The court also found that the current owners and their predecessors had waived their right to challenge the mitigation fees by entering into numerous agreements affirming the fee agreement. Last, the court held the mitigation fees did not constitute an unconstitutional taking because there was rough proportionality and nexus between the fees and impacts of the proposed development.

5. ***City of Berkeley v. 1080 Delaware, LLC***
(2015) 234 Cal.App.4th 1144

The Court of Appeal upheld the lower court's judgment compelling a landlord's compliance with a condition in the use permit for the project requiring compliance with the inclusionary housing ordinance of the City of Berkeley. Despite acknowledging that the City's ordinance was subsequently preempted by the Costa-Hawkins Rental Housing Act, the court held that the City could enforce the condition in the use permit because the condition had not been timely challenged, either through petition for a writ within 90 days of the issuance of the permit, or within three years after passage of the Act.

6. ***Great Oaks Water Co. v. Santa Clara Valley Water District***
(2015) --- Cal.App.4th ---

Plaintiff Great Oaks Water Company at trial succeeded in challenging a groundwater extraction fee imposed by the Santa Clara Valley Water Management District. Great Oaks is a private water retailer that draws groundwater from wells at its property. The trial court held that the fee violated certain procedural and substantive provisions of Article XIII.D of the California Constitution (Proposition 218), and ordered that the District refund the fees paid (plus interest). In a stunning rebuke of the trial court, the Sixth Appellate District reversed the judgment and held that the groundwater extraction fee was a property-related charge for water service and thus exempt from key procedural trappings of Article XIII.D (including voter ratification). The appeals court further ruled that Great Oaks was precluded from pursuing certain monetary claims that it failed to present in its pre-litigation claim under the Government Claims Act. Lastly, the court held that the setting of fees and charges is a legislative act subject to the deferential "arbitrary and capricious" standard of judicial review—a level of deference that the trial court failed to provide.

III. CEQA AND LAND USE CASES PENDING IN THE CALIFORNIA SUPREME COURT

A. Pending CEQA Cases

1. *City of San Diego v. Board of Trustees of the California State University* (Review granted April 18, 2012)

In this case, the Supreme Court will consider whether a state agency obligated to make "fair-share" payments to mitigate off-site project impacts may make a finding that such mitigation is "infeasible" when the agency seeks funding from the Legislature but the Legislature does not approve the request. There, the California State University ("CSU") certified an EIR and revised its master plan to expand a university, but in doing so deemed certain traffic mitigation measures "infeasible" based on the Legislature's failure to appropriate money for those measures. The Fourth Appellate District disagreed, stating that CSU could not avoid the duty to mitigate simply because it has no legal power to actually construct off-site improvements. The case is fully briefed, and the Court is likely to set the case for oral argument this Summer.

2. *City of Hayward v. Board of Trustees of California State University* (Review granted October 17, 2012)

The Supreme Court granted review but deferred briefing pending a decision in *City of San Diego v. Trustees of the California State University*. In *City of Hayward*, CSU certified an EIR and approved a master plan for the expansion of the University. The city argued that the resulting population increase would cause a significant impact on fire protection services and that CSU was required to mitigate by funding additional services. The First Appellate District disagreed and rejected the city's argument that CSU was required to pay for the additional fire protection services.

3. *California Building Industry Assn. v. Bay Area Air Quality Management Dist.* (Review granted November 26, 2013)

Petition for review after the Court of Appeal reversed the judgment in an action for writ of administrative mandate. The court limited review to the following issue: Under what circumstances, if any, does CEQA require an analysis of how existing environmental conditions will impact future residents or users (receptors) of a proposed project? The case is fully briefed, and the Court is likely to set the case for oral argument this Spring or Summer.

4. *Friends of the College of San Mateo Gardens v. San Mateo County Community College Dist.* (Review granted January 1, 2014)

The San Mateo Community College District approved a change to a previously-approved campus master plan, which change involved demolition of a building that had originally been slated to be preserved. The District relied on a previous EIR, finding that the "change" did not require major revisions to the EIR under CEQA or its Guidelines. In an unpublished opinion, the

First Appellate District invalidated the District's approval, holding that the District could not rely on the previous EIR because the demolition constituted a "new" project with new and potentially significant impacts. The Supreme Court accepted review and will address the circumstances under which public agencies must prepare subsequent EIRs when evaluating "changes" to previously-approved projects, as well as the level of deference agency decisions may receive from the courts. The case is fully briefed.

5. ***Citizens for Environmental Responsibility v. State ex rel. 14th Dist. Ag. Assn.***
(Review granted July 9, 2014)

Briefing was deferred pending a decision in *Berkeley Hillside Preservation v. City of Berkeley*. This case raises a similar issue of how agencies and the courts should evaluate categorical exemptions and the exceptions thereto.

6. ***Center for Biological Diversity v. Department of Fish & Wildlife***
(Review granted July 9, 2014)

This case involves a challenge to the California Department of Fish & Wildlife's certification of an EIR and related approvals for a resource management and conservation plan, streambed alteration agreement, and incidental take permits for the Newhall Ranch Specific Plan Project, a 12,000-acre development project proposed in the Santa Clara River Valley. The Second Appellate District upheld the EIR and other approvals under CEQA and the California Fish and Game Code. In addition to addressing issues of first impression related to the interplay among CEQA and the Fish and Game Code's provisions governing "endangered" versus "fully protected" species, the Supreme Court granted review to address CEQA's rules for exhaustion of administrative remedies and for determining the significance of a project's contribution to global climate change. This will mark the Court's first occasion to review the "Business as Usual" approach for assessing the impacts of a project's greenhouse gas emissions under CEQA and AB 32. Briefing is complete, and oral argument is expected later this year.

7. ***Sierra Club v. County of Fresno***
(Review granted October 1, 2014)

This case presents issues concerning the standard and scope of judicial review under the California Environmental Quality Act of an EIR for an active adult community in Fresno County. After an adverse ruling in the appellate district below, the County petitioned for review to address the applicable standard of judicial review when evaluating claims that an EIR provides insufficient information on an issue and to clarify when mitigation measures are adopted to reduce but not eliminate an unavoidable impact.

8. ***Friends of the Eel River v. North Coast Railroad Authority***
(Review granted December 10, 2014)

This case includes the following issues: (1) Does the Interstate Commerce Commission Termination Act preempt the application of the CEQA to a state agency's proprietary acts with respect to a state-owned and funded rail line or is CEQA not preempted in such circumstances

under the market participant doctrine (see *Town of Atherton v. California High Speed Rail Authority* (2014) 228 Cal. App. 4th 314)? (2) Does the ICCTA preempt a state agency's voluntary commitments to comply with CEQA as a condition of receiving state funds for a state-owned rail line and/or leasing state-owned property?

9. *Cleveland National Forest Foundation v. San Diego Association of Governments*
(Review granted March 11, 2015)

The Court limited review to a single issue—whether an EIR for a regional transportation plan must include an analysis of the plan's consistency with the greenhouse gas emission reduction goals reflected in Executive Order No. S–3–05 (80% below 1990 levels by the year 2050) in order to comply with CEQA.

B. Pending Land Use Cases

1. *California Building Industry Assn. v. City of San Jose*
(Review granted September 11, 2013)

This case will address the standard of judicial review that applies to a facial constitutional challenge to inclusionary housing ordinances where the ordinance require set asides or in-lieu fees as a condition of approving a development permit.

2. *Orange Citizens for Parks and Recreation v. Superior Court*
(Review granted October 30, 2013)

This case presents the issue of whether a proposed development project of low density housing was consistent with the city's general plan.

3. *Property Reserve, Inc. v. Superior Court*
(Review granted June 25, 2014)

The issues to be briefed and argued are limited to the following: (1) Do the geological testing activities proposed by the Department of Water Resources constitute a taking? (2) Do the environmental testing activities set forth in the February 22, 2011 entry order constitute a taking? (3) If so, do the precondemnation entry statutes provide a constitutionally valid eminent domain proceeding for the taking?

4. *Lynch v. California Coastal Commission*
(Review granted December 10, 2014)

In a matter under the Coastal Act, this case addresses issues: (1) Did plaintiffs, who objected in writing and orally to certain conditions contained within a coastal development permit approved by defendant California Coastal Commission waive their right to challenge the conditions by subsequently executing and recording deed restrictions recognizing the existence of the conditions and constructing the project as approved? (2) Did the permit condition allowing plaintiffs to construct a seawall on their property, but requiring them to apply for a new permit in

20 years or to remove the seawall violate Public Resources Code section 30235 or the federal Constitution? (3) Were plaintiffs required to obtain a permit to reconstruct the bottom portion of a bluff-to-beach staircase that had been destroyed by a series of winter storms, or was that portion of the project exempt from permitting requirements pursuant to Public Resources Code section 30610(g)(1)?

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AB 2188 Implementation Requirements For Rooftop Solar Systems

Wednesday, May 6, 2015 Opening General Session; 1:00 – 3:00 p.m.

Stephen E. Velyvis, Burke, Williams & Sorensen

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Monterey, CA
May 2015

AB 2188 Implementation Requirements For Rooftop Solar Systems

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AB 2188 Implementation Requirements For Rooftop Solar Systems

I. INTRODUCTION.

The French physicist Alexandre-Edmond Becquerel, who studied the solar spectrum, magnetism, electricity and optics, is credited with the discovery of the photovoltaic effect, the operating principle of the solar cell, in 1839. The word photovoltaic, commonly known as "PV" for short, describes the process of converting sunlight into electricity – "photo," meaning pertaining to light, and "voltaic," meaning producing voltage. Amazingly, Edmond Becquerel purportedly discovered the PV effect at the age of 19 during an experiment in his father's laboratory that resulted in the illumination of the chemical compound silver chloride (which generated voltage and current) when it was placed in an acidic solution while connected to platinum electrodes. It took more than 100 years, however, for the concept of producing electricity from sunlight to take off, but solar energy innovation finally broke through in the 1950's when scientists at Bell Laboratories created and publicly demonstrated the first practical PV cell and has advanced quickly ever since, and exponentially as of late.

California has long embraced solar energy, and officially began promoting and encouraging solar energy in the 1970's when it began to provide solar energy technology investment incentives[1] and enacted the Solar Rights Act and the Solar Shade Control Act[2] to protect a consumer's right to install and operate solar energy technology on homes and businesses.

Despite this long-held commitment to the promotion of solar energy, and the fact that California leads the nation in rooftop solar installations, even greater solar adoption is needed to achieve the state's ambitious renewable energy and greenhouse gas (GHG) emissions reduction goals (e.g., requiring at least one-third of the state's electricity come from clean energy sources and statewide GHG emissions be reduced to 1990 levels by 2020.). Further, recent studies, including two prepared by or in conjunction with the Lawrence Berkeley National Laboratory, report that the time delays and procedural variations associated with the issuance of solar system building permits elevates the installed price of solar higher than it should be and that the implementation of streamlined permitting practices at the local level can significantly reduce the cost of residential solar systems and cut development time.[3] Together, the need for greater

[1] A solar energy tax credit was instituted in 1976 and codified in California Revenue and Taxation Code section 23601 (and then repealed in 1987).
[2] The Solar Rights Act and Solar Shade Act were both adopted in 1978.
[3] Two of these reports, entitled: (1) "The Impact of City-level Permitting Processes on Residential Photovoltaic Installation Prices and Development Times: An Empirical Analysis of Solar Systems in California Cities," and (2) "How Much Do Local Regulations Matter? Exploring the Impact of Permitting and Local Regulatory Processes on PV Prices in the United States," can be found at the following links,

solar adoption and the desire to further spur residential solar systems by reducing costs and delays lead former Democratic Assemblyman Albert Muratsuchi to introduce, the Legislature to pass and Governor Brown to sign AB 2188 into law. So now, cities, especially those that currently do not have an ordinance addressing solar system permitting, must focus on preparing and adopting an ordinance doing just that by September 30, 2015 to comply with AB 2188.

This paper begins with a brief summary of the Solar Rights Act and related laws and programs, moves on to demonstrate the specific amendments made thereto by the passage of AB 2188, and concludes by examining those changes as they pertain to development of the required ordinance in the first instance, and then to each step of the typical permitting process - from permit application, to the review/approval/denial thereof, and, if approved, to the final inspection.

II. THE SOLAR RIGHTS ACT AND RELATED SOLAR ENERGY LAWS AND PROGRAMS PROMOTING SOLAR ENERGY SYSTEMS AND RESTRICTING LOCAL REGULATION THEREOF.[4]

A. The Solar Rights Act.

The Solar Rights Act was enacted in 1978 (AB 3250), went in to effect on January 1, 1979, and is comprised of the following laws: Civil Code Sections 714, 714.1, 801 and 801.5; Health and Safety Code Section 17959.1; and Government Code Sections 65850.5, 66473.1 and 66475.3. The Legislature made its intention crystal clear early on by declaring, in Section 65850.5(a), as follows:

> It is the intent of the Legislature that local agencies not adopt ordinances that create unreasonable barriers to the installation of solar energy systems, including, but not limited to, design review for aesthetic purposes, and not unreasonably restrict the ability of homeowners and agricultural and business concerns to install solar energy systems. It is the policy of the state to promote and encourage the use of solar energy systems and to limit obstacles to their use. It is the intent of the Legislature that local agencies comply not only with the language of this

respectively: http://emp.lbl.gov/sites/all/files/lbnl-6140e.pdf and http://emp.lbl.gov/sites/all/files/lbnl-6807e_0.pdf.

[4] This section is not a comprehensive review of all solar energy-related laws, but rather, a focused summary of select solar energy-related laws associated with laying the foundation for and encouraging the growth of small rooftop residential solar energy systems, and restricting local government regulation thereof.

> section, but also the legislative intent to encourage the installation of solar energy systems by removing obstacles to, and minimizing costs of, permitting such systems.

Generally speaking, the California Legislature enacted the Solar Rights Act to initiate a legal framework for solar access and to protect a homeowner's right to install a solar energy system by limiting the ability of local governments and homeowners associations (through its covenants, conditions, and restrictions ("CC&Rs")) to restrict solar installations. Prior to the amendments made by AB 2188, the most important provisions of the Solar Rights Act created:

- Limits on CC&Rs: by prohibiting CC&Rs from unreasonably restricting the use or installation of solar energy systems (*see* Civil Code Sections 714 and 714.1).
- Solar Easements: which created the legal rights to a solar easement and to receive sunlight across real property of another for use by a solar energy system (*see* Civil Code Sections 801 and 801.5), and allows cities and counties to require the dedication of solar easements in certain subdivisions as a condition of tentative map approval (*see* Gov't Code Section 66475.3).
- Limits on Local Government Restrictions: by discouraging local governments from adopting ordinances creating unreasonable restrictions on the installation of solar energy systems and requires local governments to employ a non-discretionary administrative permitting process therefor (*see* Gov't Code section 65850.5 and Health and Safety Code Section 17959.1), and requires local governments seeking state-sponsored grant or loan funds for solar energy systems to certify its compliance with certain provisions of the Act (*see* Civil Code Section 714).
- Passive Solar Opportunities: by requiring specified subdivisions to provide for future passive and natural heating and cooling opportunities (*see* Gov't Code Section 66473.1).

Notably, the amendment to the Solar Rights Act made by AB 2473 (Wolk), Chapter 789, Statutes of 2004, introduced the significant language now contained in Government Code Section 65850.5(a) that is and continues to be the foundation for the Legislature's substantial restrictions on the land use authority of local governments over solar energy systems. In that Section, the Legislature declares that "[t]he implementation of consistent statewide standards to achieve the timely and cost-effective installation of solar energy systems is not a municipal affair . . . but is instead a matter of statewide concern."

The Solar Rights Act provisions contained in Civil Code Section 714 and Government Code Section 65850.5 are reproduced in their entirety in Exhibits A and B hereto to not

only provide easy access to and understanding of the key historical components of those Code Sections, but to demonstrate exactly how AB 2188's amendments modified them to create the mandate that cities and counties adopt (or amend existing) ordinances to create a streamlined, expedited permitting process for small residential rooftop solar energy systems and even further strengthened the Act's prohibitions against actions that significantly increase the cost or decrease the efficiency of solar energy systems.

B. The Solar Shade Control Act.

The Solar Shade Control Act, also enacted in 1978, is codified in Division 15 (Energy Conservation and Development), Chapter 12 of the California Public Resources Code, and is comprised of Sections 25980 through 25986. The Solar Shade Control Act provides additional protections to solar energy system owners by restricting persons owning or in control of adjacent properties from planting and/or growing trees and shrubs that cast shade on a neighbor's "solar collector." As amended in 2008, the Solar Shade Act now specifies and limits the Act's protections by prohibiting the planting and growing of trees from casting a shadow on greater than ten percent of the solar collector's absorption area at any time between 10 a.m. and 2 p.m.

C. The California Solar Initiative Program.

The California Solar Initiative (CSI) program is a product of Governor Schwarzenegger's "Million Solar Roofs" vision. Through a number of regulatory decisions in 2005 and 2006 and as expressly authorized by SB 1 (Murray) passed in 2006,[5] the California Public Utilities Commission established the CSI program to provide customers of the state's three investor-owned utilities (Pacific Gas and Electric Company, Southern California Edison and San Diego Gas and Electric) with subsidies to encourage the installation of distributed rooftop solar system installations. According to the CPUC's website, the CSI program has a budget of $2.167 billion over 10 years and a goal to reach 1,940 megawatts of installed solar capacity by the end of 2016.

D. CEQA Solar Energy System Exemption.

One provision of SB 226, passed in 2011, added Section 21080.35 to the Public Resources Code declaring that certain solar energy systems are statutorily exempt from environmental review under the California Environmental Quality Act. For lead agencies, statutory CEQA exemptions are favored because they are absolute, meaning

[5] SB 1 contained numerous provisions, but the Legislature's authorization of and mandates regarding the CSI are contained in Division 15, Chapter 8.8 of the California Public Resources Code, Sections 25780 through 25784

they are not subject to the quagmire associated with the various exceptions that can be asserted to trump any categorical exemption.[6] To qualify under the statutory exemption codified in Section 21080.35, a solar energy project must be proposed to be installed on the roof of either an existing building or at an existing parking lot which has been designated and used for parking vehicles for at least the previous two years and does not involve removal of a required or native tree over 25 years old, and associated equipment meets certain size, location and other conditions.

III. UNDERSTANDING THE SOLAR RIGHTS ACT AS RECENTLY AMENDED BY REVIEWING HOW AB 2188'S AMENDMENTS IMPACT EACH STEP OF THE TYPICAL SOLAR ENERGY SYSTEM APPLICATION PROCESS.

As shown in detail in the attached Exhibits A and B, AB 2188 made some subtle, and some significant changes to two of the statutes that comprise the Solar Rights Act - Civil Code Section 714 and Government Code Section 65850.5. Exhibits A and B reproduce those sections in their entirety, showing all of AB 2188's additions or changes to those Code Sections in underlined text, and deletions by ~~strikeout~~. The author suggests you pause here to read Exhibits A and B first, before coming back to this section, which proceeds to collect and summarize the changes as they pertain to development of the required ordinance in the first instance, and then as they pertain to each step of the typical permitting process - from permit application, to the review/approval/denial thereof, and, if approved, to the final inspection.

Before doing so, however, it is important to reiterate that AB 2188's new ordinance and permitting requirements *only* apply to "small residential rooftop solar energy systems." Accordingly, it makes sense to begin with the statutory definition for such a system. Government Code Section 65850.5(j)(3) states:

> (3) "Small residential rooftop solar energy system" means all of the following:
>
> (A) A solar energy system that is no larger than 10 kilowatts alternating current nameplate rating or 30 kilowatts thermal.

[6] Referring to the practice of CEQA categorical exemptions and the exceptions thereto as a "quagmire" might now be a bit inapt given the recent decision and guidance provided by the California Supreme Court's decision in *Berkeley Hillside Preservation v. City of Berkeley* (March 2, 2015) 60 Cal.4th 1086. There, the Court clarified several open questions concerning the application of the unusual circumstances exception to the categorical exemptions that apply to single-family residential and infill development projects, and in doing so, confirmed that local agencies' factual determinations concerning those exemptions/exceptions are entitled to substantial deference.

> (B) A solar energy system that conforms to all applicable state fire, structural, electrical, and other building codes as adopted or amended by the city, county, or city and county and paragraph (3) of subdivision (c) of Section 714 of the Civil Code.
>
> (C) A solar energy system that is installed on a single or duplex family dwelling.
>
> (D) A solar panel or module array that does not exceed the maximum legal building height as defined by the authority having jurisdiction.

And, Section 65850(j)(4) adds that "'Solar energy system' has the same meaning set forth in paragraphs (1) and (2) of subdivision (a) of Section 801.5 of the Civil Code." From that key starting point, we proceed with the tour.

A. The Required Ordinance.

As amended, the Solar Rights Act now requires the following:

- Every city, county, or city and county shall, in consultation with the local fire department or district and the utility director, where a city, county, or city and county operate a utility, adopt an ordinance that creates an expedited, streamlined permitting process for small residential rooftop solar energy systems consistent with the goals and intent of Government Code Section 65850.5(a) on or before September 30, 2015 (*see* Gov't Code § 65850.5(g)(1)).

- Every city, county, or city and county shall adopt a checklist of all requirements that an applicant must comply with for a small residential rooftop solar energy system to be eligible for expedited review (*see* Gov't Code § 65850.5(g)(1)).

- The expedited, streamlined permitting process and checklist created must substantially conform to the recommendations for expedited permitting, including the checklist and standard plan contained in the most current version of the *California Solar Permitting Guidebook* ("*Guidebook"*) adopted by the Governor's Office of Planning and Research (OPR) (*see* Gov't Code § 65850.5(g)(2)).

The most current version of the *Guidebook* was adopted and published by the Governor's Office of Planning and Research ("OPR") in the Fall of 2014. Because of its

length (84 pages), it is not feasible to attach the entire *Guidebook* as an exhibit to this paper, but the *Guidebook* can be easily accessed via OPR's website at the following link:

http://www.opr.ca.gov/docs/California_Solar_Permitting_Guidebook_2014.pdf

Important to these first steps, the *Guidebook* not only provides extensive recommendations but includes various sample forms (in various "toolkit" documents), including a template MOU agreement that can be used to facilitate compliance with AB 2188's requirement that local agencies consult and coordinate with local fire departments regarding the required ordinance and related solar energy system permit review, approval and inspection duties and tasks. (*See* the *Guidebook*'s "Toolkit Document #6" at p. 55.)

A model ordinance, addressing these requirements as well as AB 2188's other requirements discussed below, is provided in Exhibit C for your review, consideration and use.[7] The City of San Luis Obispo recently adopted a new ordinance to comply with AB 2188, which is also attached hereto as Exhibit D as a reference.

Finally, it is important to note that the requirement that the streamlined permitting process "substantially conform" to the recommendations in the *Guidebook* does provide local jurisdictions with a fair amount of discretion to modify the checklist, standards and other recommendations found in the *Guidebook*. The *Guidebook* notes that according to AB 2188's author:

> The term 'substantially conform' is intended to allow local governments enough flexibility to address potential changes that they believe are necessary while still meeting the goal of streamlining and standardizing solar permitting. Further, AB 2188 states that local governments may modify the Guidebook, if necessary, due to "unique climatic, geological, seismological or topographical conditions." These modifiers are intended to provide additional flexibility for local governments and are not intended to limit how the cities and counties "substantially conform" to the Guidebook.

[7] The model ordinance in Exhibit C is slightly modified from the one included within the AB 2188 Implementation Guide prepared by the Energy Policy Initiatives Center at the University of San Diego School of Law for the Center for Sustainable Energy, which was consulted and used to assist in the preparation of this paper. (*See* Kaatz, J. Anders, S. (2014) AB 2188: Implementation of the Solar Rights Act at the Local Level [which is available online at http://www.sandiego.edu/law/centers/epic/reports-papers/reports.php].)

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B. Standardization of Application Requirements, Forms and Related Plans.

Simply put, at its core the Solar Rights Act as amended by AB 2188 seeks to reduce the costs and delays associated with the local solar permitting process. According to AB 2188's author, the amendments were necessary because:

> [c]urrently, California's solar permitting structure is a patch work of various regulations and requirements that vary from city to city and county to county . . . [which] results in a lack of certainty and hinders the ability of companies to scale and reduce costs. Requirements in one city can differ drastically from a neighboring city even though the same solar system is being installed on a similar home.[8]

By requiring an expedited, streamlined permitting process and checklist that substantially conforms to the recommendations, checklist and standard plan contained in the *Guidebook*, AB 2188 aims to standardize the application requirements, forms and process to achieve the desired reductions in costs and delay. Specifically, the Solar Rights Act now:

- Requires adoption of a checklist clearly listing all of the requirements that must be met by an applicant to be eligible for an expedited review of and completeness determination regarding an application for a small rooftop solar energy system (*see* Gov't Code § 65850.5(g)(1)).

- Requires that the checklist and other required permit application forms and documents be published on a publicly accessible Internet Website, if one is available (*see* Gov't Code § 65850.5(g)(2)).

Again, the *Guidebook* provides a handy, ready-made checklist and other application forms and documents to assist local agencies in complying with this critical step in the AB 2188 implementation process. (*See* the *Guidebook*'s "Toolkit Document #1" at pp. 22-24 [Submittal Requirements Bulletin]; "Toolkit Document #2" at p. 25 [Eligibility Checklist for Expedited Solar Photovoltaic Permitting for One- and Two-Family Dwellings]; "Toolkit Document #3 and #4" at pp. 26-38 and 39-44, respectively [Solar PV Standard Plans]; and "Toolkit Document #5" at pp. 45-54 [Structural Criteria].)

[8] Legislative history of AB 2188 (*see, e.g.*, May 22, 2014 Assembly Floor Analysis).

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And, to make compliance with and implementation of AB 2188 as easy as possible, templates of all of the *Guidebook*'s Toolkit Documents that local governments can edit and customize are available in Microsoft Word and PDF formats at:

http://energycenter.org/permitting/guidebook/toolkit?utm_source=guidebook&utm_medium=mixed&utm_campaign=sunshot

Finally, the *Guidebook* also recommends that local jurisdictions accept online solar permit fee payments where the capability exists. It is important to note that current law mandates that permit processing and inspection fees charged by a local enforcing agency cannot exceed the reasonable cost of providing the service for which the fee is charged. (*See* Gov't Code §§ 65850.55 and 66016; Health and Safety Code § 17951.) Current law *also* sets specific limits on the amount that can be charged by solar PV permit fees, which cannot be exceeded unless the reasons for the higher permit fee is explicitly justified and the applicable jurisdiction determines that it has already adopted a streamlined permit approval process. Pursuant to Government Code Section 66015, those permit fee limits are as follows: Residential - $500 for systems of 15 kilowatts or less, and $500 + $15/kilowatt for systems above 15 kilowatts; Commercial - $1,000 for systems of 50 kilowatts or less, $1,000 + $7/kilowatt for systems above 50 kilowatts, and $2,500 + $5/kilowatt for systems above 250 kilowatts. The *Guidebook* notes that some local governments have yet to comply with these permit fee laws, so doing so in conjunction with the adoption of an AB 2188 ordinance is recommended as needed.

C. Review, Approval/Denial of the Application.

While AB 2188's new requirements (*e.g.*, mandatory ordinance, provision of online permit application forms and acceptance of online fee payments, electronic signatures, etc.) are certainly part of the new process, several significant requirements applicable to this stage existed prior to AB 2188's amendments to the Solar Rights Act. Accordingly, the following comprehensive list contains all of the amended Solar Rights Act's requirements associated with the review and approval or denial of an application for a small residential rooftop solar energy system to provide complete guidance. As amended by AB 2188, the Act now requires or permits all of the following:

- Approval of all necessary permits or authorization for small solar systems must be made by a non-discretionary administrative review process consistent with both Government Code Section 65850.5(b) and the adopted ordinance upon confirmation that an application is complete and meets the requirements of the checklist (*see* Gov't Code § 65850.5(g)(1));

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- Review of the application shall be limited to the building official's review of whether the application meets local, state, and federal health and safety requirements (*see* Gov't Code § 65850.5(f)(1));
- Issuance of a written correction notice detailing all deficiencies in the application and any additional information required to be eligible for the expedited permit issuance must be provided if an application is deemed incomplete (*see* Gov't Code § 65850.5(g)(1));
- Permits building officials to require an applicant to apply for a use permit only if the official finds, based on substantial evidence, that the solar energy system could have specific, adverse impact upon the public health and safety (*see* Gov't Code § 65850.5(b));
- If a building official does require a use permit, the official may only deny an application for the use permit if the official makes written findings based upon substantive evidence in the record that the proposed installation would have a specific, adverse impact upon public health or safety and there is no feasible method to satisfactorily mitigate or avoid, the adverse impact. Such findings shall include the basis for the rejection of the potential feasible alternative for preventing the adverse impact (*see* Gov't Code § 65850.5(c));
- An appeal of a building official's denial of a use permit to the Planning Commission must be allowed (*see* Gov't Code § 65850.5(d));
- Any condition imposed on a permit must only be designed to mitigate the specific, adverse impact upon health and safety that prompted the requirement for a use permit, at the lowest possible cost (*see* Gov't Code § 65850.5(e));
- That the phrase "a feasible method to satisfactorily mitigate or avoid the specific, adverse impact" is defined to include, but is not limited to, any cost-effective method, condition, or mitigation imposed by the local jurisdiction on another similarly situated application in a prior successful application for a permit (*see* Gov't Code § 65850.5(j)(1)); and
- That no local jurisdiction shall condition approval of an application on the approval of an association (such as an HOA), as defined in Section 4080 of the Civil Code (*see* Gov't Code § 65850.5(i)).

In addition, the *Guidebook* recommends that local jurisdictions facilitate "over-the-counter" or same day plan review and permit issuance, or automatic approval through online software, and that the application review and permit approval or denial process be completed in between one and three days where such "over-the-counter" approval is not authorized or feasible. The model ordinance provided in Exhibit C incorporates all of these requirements and recommendations.

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D. Solar System Inspection.

As noted in the *Guidebook*, after an expedited application is granted, a permit issued and a solar energy system installed on a small residential rooftop, the local jurisdiction must inspect the solar energy system before final approval can be granted. AB 2188 also significantly amended the Solar Rights Act with respect to the final inspection phase, by requiring/permitting the following:

- That only one inspection shall be required, that the inspection must be performed in a timely manner and may include a consolidated inspection (*see* Gov't Code § 65850.5(h)); and

- A subsequent inspection is allowed if a solar energy system fails inspection, and any such subsequent inspection need not conform to the requirements made applicable to the first inspection (*see* Gov't Code § 65850.5(h)).

Notably, where an MOU or other agreement with a local fire department (that is separate from the permitting agency) is not reached, a separate fire safety inspection may be performed by that local fire department. However, the *Guidebook* recommends that a single, final inspection be coordinated among the controlling building department and local fire authority (or at least conducted at the same time), and as noted above, provides a template MOU in Toolkit Document #6 to facilitate an agreement for such coordination. Additionally, the *Guidebook* recommends that local jurisdictions: use and provide permit applicants with a concise inspection checklist so homeowners and their contractors will have a clear understanding of the final inspection process and criteria; permit the submittal of inspection requests online or electronically; and conduct the final inspection within one to two business days after receipt of an inspection request and provide the permitee by phone or email with an inspection time window of no more than two hours.

Again, the model ordinance provided in Exhibit C incorporates all of these requirements and recommendations, and the *Guidebook* provides a model inspection checklist in Toolkit Document #7.

IV. CONCLUSION.

As demonstrated above, AB 2188's amendments to the Solar Rights Act require local jurisdictions to comply with numerous significant mandates very quickly. Thankfully, OPR has made that task much simpler through the guidance and "plug-and-play" forms and documents offered in the *Guidebook*.

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EXHIBIT A

(CA Civil Code § 714, as amended by AB 2188, showing all of AB 2188's additions or changes in underlined text, and deletions by ~~strikeout~~.)

714. (a) Any covenant, restriction, or condition contained in any deed, contract, security instrument, or other instrument affecting the transfer or sale of, or any interest in, real property, and any provision of a governing document, as defined in Section 4150 or 6552, that effectively prohibits or restricts the installation or use of a solar energy system is void and unenforceable.

(b) This section does not apply to provisions that impose reasonable restrictions on solar energy systems. However, it is the policy of the state to promote and encourage the use of solar energy systems and to remove obstacles thereto. Accordingly, reasonable restrictions on a solar energy system are those restrictions that do not significantly increase the cost of the system or significantly decrease its efficiency or specified performance, or that allow for an alternative system of comparable cost, efficiency, and energy conservation benefits.

(c) (1) A solar energy system shall meet applicable health and safety standards and requirements imposed by state and local permitting authorities, consistent with Section 65850.5 of the Government Code.

(2) ~~A~~ Solar energy systems used for heating water ~~shall be certified by the Solar Rating Certification Corporation (SRCC) or other nationally recognized certification agencies. SRCC is a nonprofit third party supported by the United States Department of Energy. The Certification shall be for the entire solar energy system~~ in single family residences and solar collectors used for heating water in commercial or swimming pool applications shall be certified by an accredited listing agency as defined in the Plumbing and ~~installation~~ Mechanical Codes.

(3) A solar energy system for producing electricity shall also meet all applicable safety and performance standards established by the California Electrical Code, the Institute of Electrical and Electronics Engineers, and accredited testing laboratories such as Underwriters Laboratories and, where applicable, rules of the Public Utilities Commission regarding safety and reliability.

(d) For the purposes of this section:

(1) (A) For solar domestic water heating systems or solar swimming pool heating systems that comply with state and federal law, "significantly" means an amount exceeding 10 percent of the cost of the system, but in no case more than one

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thousand dollars ($1,000), or decreasing the efficiency of the solar energy system by an amount exceeding 10 percent, as originally specified and proposed.

(B) For photovoltaic systems that comply with state and federal law, "significantly" means an amount not to exceed one thousand dollars ($1,000) over the system cost as originally specified and proposed, or a decrease in system efficiency of an amount exceeding 10 percent as originally specified and proposed.

(2) "Solar energy system" has the same meaning as defined in paragraphs (1) and (2) of subdivision (a) of Section 801.5.

(e) (1) Whenever approval is required for the installation or use of a solar energy system, the application for approval shall be processed and approved by the appropriate approving entity in the same manner as an application for approval of an architectural modification to the property, and shall not be willfully avoided or delayed.

(2) For an approving entity that is an association, as defined in Section 4080 or 6528, and that is not a public entity, both of the following shall apply:

(A) The approval or denial of an application shall be in writing.

(B) If an application is not denied in writing within 45 days from the date of receipt of the application, the application shall be deemed approved, unless that delay is the result of a reasonable request for additional information.

(f) Any entity, other than a public entity, that willfully violates this section shall be liable to the applicant or other party for actual damages occasioned thereby, and shall pay a civil penalty to the applicant or other party in an amount not to exceed one thousand dollars ($1,000).

(g) In any action to enforce compliance with this section, the prevailing party shall be awarded reasonable attorney's fees.

(h) (1) A public entity that fails to comply with this section may not receive funds from a state-sponsored grant or loan program for solar energy. A public entity shall certify its compliance with the requirements of this section when applying for funds from a state-sponsored grant or loan program.

(2) A local public entity may not exempt residents in its jurisdiction from the requirements of this section.

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EXHIBIT B

(CA Gov't Code § 65850.5, as amended by AB 2188, showing all of AB 2188's additions or changes in underlined text, and deletions by ~~strikeout~~.)

65850.5. (a) The implementation of consistent statewide standards to achieve the timely and cost-effective installation of solar energy systems is not a municipal affair, as that term is used in Section 5 of Article XI of the California Constitution, but is instead a matter of statewide concern. It is the intent of the Legislature that local agencies not adopt ordinances that create unreasonable barriers to the installation of solar energy systems, including, but not limited to, design review for aesthetic purposes, and not unreasonably restrict the ability of homeowners and agricultural and business concerns to install solar energy systems. It is the policy of the state to promote and encourage the use of solar energy systems and to limit obstacles to their use. It is the intent of the Legislature that local agencies comply not only with the language of this section, but also the legislative intent to encourage the installation of solar energy systems by removing obstacles to, and minimizing costs of, permitting for such systems.

(b) A city or county shall administratively approve applications to install solar energy systems through the issuance of a building permit or similar nondiscretionary permit. Review of the application to install a solar energy system shall be limited to the building official's review of whether it meets all health and safety requirements of local, state, and federal law. The requirements of local law shall be limited to those standards and regulations necessary to ensure that the solar energy system will not have a specific, adverse impact upon the public health or safety. However, if the building official of the city or county makes a ~~good faith belief~~ finding, based on substantial evidence, that the solar energy system could have a specific, adverse impact upon the public health and safety, the city or county may require the applicant to apply for a use permit.

(c) A city, county, or city and county may not deny an application for a use permit to install a solar energy system unless it makes written findings based upon substantial evidence in the record that the proposed installation would have a specific, adverse impact upon the public health or safety, and there is no feasible method to satisfactorily mitigate or avoid the specific, adverse impact. The findings shall include the basis for the rejection of potential feasible alternatives of preventing the adverse impact.

(d) The decision of the building official pursuant to subdivisions (b) and (c) may be appealed to the planning commission of the city, county, or city and county.

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(e) Any conditions imposed on an application to install a solar energy system shall be designed to mitigate the specific, adverse impact upon the public health and safety at the lowest cost possible.

(f)(1) A solar energy system shall meet applicable health and safety standards and requirements imposed by state and local permitting authorities.

(2) ~~A~~ Solar energy systems for heating water in single family residences and solar collectors used for heating water in commercial or swimming pool applications shall be certified by ~~the Solar Rating Certification Corporation (SRCC) or other nationally recognized certification agency. SRCC is a nonprofit third party supported by the Unites States Department of Energy. The certification shall be for the entire solar energy system~~ an accredited listing agency as defined in the California Plumbing and installation Mechanical Codes.

(3) A solar energy system for producing electricity shall meet all applicable safety and performance standards established by the California Electrical Code, the Institute of Electrical and Electronics Engineers, and accredited testing laboratories such as Underwriters Laboratories and, where applicable, rules of the Public Utilities Commission regarding safety and reliability.

(g) (1) On or before September 30, 2015, every city, county, or city and county, in consultation with the local fire department or district and the utility director, if the city, county, or city and county operates a utility, shall adopt an ordinance, consistent with the goals and intent of subdivision (a), that creates an expedited, streamlined permitting process for small residential rooftop solar energy systems. In developing an expedited permitting process, the city, county, or city and county shall adopt a checklist of all requirements with which small rooftop solar energy systems shall comply to be eligible for expedited review. An application that satisfies the information requirements in the checklist, as determined by the city, county, and city and county, shall be deemed complete. Upon confirmation by the city, county, or city and county of the application and supporting documents being complete and meeting the requirements of the checklist, and consistent with the ordinance, a city, county, or city and county shall, consistent with subdivision (b), approve the application and issue all required permits or authorizations. Upon receipt of an incomplete application, a city, county, or city and county shall issue a written correction notice detailing all deficiencies in the application and any additional information required to be eligible for expedited permit issuance.

(2) The checklist and required permitting documentation shall be published on a publically accessible Internet Web site, if the city, county, or city and county has an Internet Web site, and the city, county, or city and county shall allow for electronic

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submittal of a permit application and associated documentation, and shall authorize the electronic signature on all forms, applications, and other documentation in lieu of a wet signature by an applicant. In developing the ordinance, the city, county, or city and county shall substantially conform its expedited, streamlined permitting process with the recommendations for expedited permitting, including the checklists and standard plans contained in the most current version of the California Solar Permitting Guidebook and adopted by the Governor's Office of Planning and Research. A city, county, or city and county may adopt an ordinance that modifies the checklists and standards found in the guidebook due to unique climactic, geological, seismological, or topographical conditions. If a city, county, or city and county determines that it is unable to authorize the acceptance of an electronic signature on all forms, applications, and other documents in lieu of a wet signature by an applicant, the city, county, or city and county shall state, in the ordinance required under this subdivision, the reasons for its inability to accept electronic signatures and acceptance of an electronic signature shall not be required.

(h) For a small residential rooftop solar energy system eligible for expedited review, only one inspection shall be required, which shall be done in a timely manner and may include a consolidated inspection, except that a separate fire safety inspection may be performed in a city, county, or city and county that does not have an agreement with a local fire authority to conduct a fire safety inspection on behalf of the fire authority. If a small residential rooftop solar energy system fails inspection, a subsequent inspection is authorized, however the subsequent inspection need not conform to the requirements of this subdivision.

(i) A city, county, or city and county shall not condition approval for any solar energy system permit on the approval of a solar energy system by an association, as that term is defined in Section 4080 of the Civil Code.

(j) The following definitions apply to this section:

(1) "A feasible method to satisfactorily mitigate or avoid the specific, adverse impact" includes, but is not limited to, any cost-effective method, condition, or mitigation imposed by a city, county, or city and county on another similarly situated application in a prior successful application for a permit. A city, county, or city and county shall use its best efforts to ensure that the selected method, condition, or mitigation meets the conditions of subparagraphs (A) and (B) of paragraph (1) of subdivision (d) of Section 714 of the Civil Code.

(2) "Electronic submittal" means the utilization of one or more of the following:
(A) Email.
(B) The Internet.

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(C) Facsimile.

(3) "Small residential rooftop solar energy system" means all of the following:
(A) A solar energy system that is no larger than 10 kilowatts alternating current nameplate rating or 30 kilowatts thermal.
(B) A solar energy system that conforms to all applicable state fire, structural, electrical, and other building codes as adopted or amended by the city, county, or city and county and paragraph (3) of subdivision (c) of Section 714 of the Civil Code.
(C) A solar energy system that is installed on a single or duplex family dwelling.
(D) A solar panel or module array that does not exceed the maximum legal building height as defined by the authority having jurisdiction.

(4) "Solar energy system" has the same meaning set forth in paragraphs (1) and (2) of subdivision (a) of Section 801.5 of the Civil Code.

(5) ~~A~~ "Specific, adverse impact" means a significant, quantifiable, direct, and unavoidable impact, based on objective, identified, and written public health or safety standards, policies, or conditions as they existed on the date the application was deemed complete.

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Exhibit C

(Model AB 2188 Ordinance)

AN ORDINANCE [AMENDING or ADDING] ORDINANCE NO. _____ TO THE [CITY OR MUNICPAL] CODE TO PROVIDE AN EXPEDITED, STREAMLINED PERMITTING PROCESS FOR SMALL RESIDENTIAL ROOFTOP SOLAR SYSTEMS

WHEREAS, the City Council of [_____] seeks to implement AB 2188 (Chapter 521, Statutes 2014) through the creation of an expedited, streamlined permitting process for small residential rooftop solar energy systems; and

WHEREAS, the City Council wishes to advance the use of solar energy by all of its citizens, businesses and industries; and

WHEREAS, the City Council seeks to meet the climate action goals set by the [City or County] and the State; and

WHEREAS, solar energy creates local jobs and economic opportunity; and

WHEREAS, the City Council recognizes that rooftop solar energy provides reliable energy and pricing for its residents and businesses; and

WHEREAS, it is in the interest of the health, welfare and safety of the people of the City of [_____] to provide an expedited permitting process to assure the effective deployment of solar technology.

NOW, THEREFORE,

THE PEOPLE OF THE OF _____

DO ORDAIN AS FOLLOWS

1. DEFINITIONS

a. A "Solar Energy System" means either of the following:

i. Any solar collector or other solar energy device whose primary purpose is to provide for the collection, storage, and distribution of solar energy for space heating, space cooling, electric generation, or water heating.

ii. Any structural design feature of a building, whose primary purpose is to provide for the collection, storage, and distribution of solar energy for electricity generation, space heating or cooling, or for water heating.

b. A "small residential rooftop solar energy system" means all of the following:

i. A solar energy system that is no larger than 10 kilowatts alternating current nameplate rating or 30 kilowatts thermal.

ii. A solar energy system that conforms to all applicable state fire, structural, electrical, and other building codes as adopted or amended by the City and all state and City health and safety standards.

iii. A solar energy system that is installed on a single or duplex family dwelling.

iv. A solar panel or module array that does not exceed the maximum legal building height as defined by the City [indicate where building height limits are generally contained].

c. "Electronic submittal" means the utilization of one or more of the following:

i. Email;
ii. The Internet;
iii. Facsimile.

d. An "association" means a nonprofit corporation or unincorporated association created for the purpose of managing a common interest development.

e. A "common interest development" means any of the following:

i. A community apartment project.
ii. A condominium project.
iii. A planned development.
iv. A stock cooperative.

f. "Specific, adverse impact" means a significant, quantifiable, direct, and unavoidable impact, based on objective, identified, and written public health or safety standards, policies, or conditions as they existed on the date the application was deemed complete.

g. "Reasonable restrictions" on a solar energy system are those restrictions that do not significantly increase the cost of the system or significantly decrease its efficiency or specified performance, or that allow for an alternative system of comparable cost, efficiency, and energy conservation benefits.

h. "Restrictions that do not significantly increase the cost of the system or decrease its efficiency or specified performance" means:

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i. For Water Heater Systems or Solar Swimming Pool Heating Systems: an amount exceeding 10 percent of the cost of the system, but in no case more than one thousand dollars ($1,000), or decreasing the efficiency of the solar energy system by an amount exceeding 10 percent, as originally specified and proposed.

ii. For Photovoltaic Systems: an amount not to exceed one thousand dollars ($1,000) over the system cost as originally specified and proposed, or a decrease in system efficiency of an amount exceeding 10 percent as originally specified and proposed.

2. PURPOSE

The purpose of the Ordinance is to adopt an expedited, streamlined solar permitting process that complies with the Solar Rights Act and AB 2188 (Chapter 521, Statutes 2014) to achieve timely and cost-effective installations of small residential rooftop solar energy systems. The Ordinance encourages the use of solar systems by removing unreasonable barriers, minimizing costs to property owners and the [City, County, or City and County], and expanding the ability of property owners to install solar energy systems. The Ordinance allows the City to achieve these goals while protecting the public health and safety.

3. APPLICABILITY

a. This Ordinance applies to the permitting of all small residential rooftop solar energy systems in the [City, County, or City and County].

b. Small residential rooftop solar energy systems legally established or permitted prior to the effective date of this Ordinance are not subject to the requirements of this Ordinance unless physical modifications or alterations are undertaken that materially change the size, type, or components of a small rooftop energy system in such a way as to require new permitting. Routine operation and maintenance or like-kind replacements shall not require a permit.

4. SOLAR ENERGY SYSTEM REQUIREMENTS

a. All solar energy systems shall meet applicable health and safety standards and requirements imposed by the state and the [City, County, or City and County], local fire department or district [and utility director, if applicable].

b. Solar energy systems for heating water in single-family residences and for heating water in commercial or swimming pool applications shall be certified by an accredited listing agency as defined by the California Plumbing and Mechanical Code.

c. Solar energy systems for producing electricity shall meet all applicable safety and performance standards established by the California Electrical Code, the Institute of Electrical and Electronics Engineers, and accredited testing laboratories such as Underwriters Laboratories and, where applicable, rules of the Public Utilities Commission regarding safety and reliability.

5. DUTIES OF [BUILDING DEPARTMENT] AND [BUILDING] OFFICIAL

a. All documents required for the submission of an expedited solar energy system application shall be made available on the publicly accessible City Website.

b. Electronic submittal of the required permit application and documents by [email, the Internet, or facsimile] shall be made available to all small residential rooftop solar energy system permit applicants.

c. An applicant's electronic signature shall be accepted on all forms, applications, and other documents in lieu of a wet signature. [Note: If a city, county, or city and county is unable to authorize the acceptance of electronic signatures in lieu of wet signatures, it must specify the reasons for its inability to do so in the ordinance in order to omit this provision].

d. The City's [Building Department] shall adopt a standard plan and checklist of all requirements with which small residential rooftop solar energy systems shall comply to be eligible for expedited review.

e. The small residential rooftop solar system permit process, standard plan(s), and checklist(s) shall substantially conform to recommendations for expedited permitting, including the checklist and standard plans contained in the most current version of the *California Solar Permitting Guidebook* adopted by the Governor's Office of Planning and Research.

f. All fees prescribed for the permitting of small residential rooftop solar energy system must comply with Government Code Section 65850.55, Government Code Section 66015, Government Code Section 66016, and State Health and Safety Code Section 17951.

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6. PERMIT REVIEW AND INSPECTION REQUIREMENTS

a. The City [Building Department] shall adopt an administrative, nondiscretionary review process to expedite approval of small residential rooftop solar energy systems within [30 days] of the adoption on this Ordinance. [Note: A jurisdiction must create their permitting process on or before September 30, 2015.] The [Building Department] shall issue a building permit or other nondiscretionary permit [the same day for over-the-counter applications or within [1-3] business days for electronic applications] of receipt of a complete application that meets the requirements of the approved checklist and standard plan. A building official may require an applicant to apply for a use permit if the official finds, based on substantial evidence, that the solar energy system could have a specific, adverse impact upon the public health and safety. Such decisions may be appealed to the City Planning Commission.

b. Review of the application shall be limited to the building official's review of whether the application meets local, state, and federal health and safety requirements.

c. If a use permit is required, a building official may deny an application for the use permit if the official makes written findings based upon substantive evidence in the record that the proposed installation would have a specific, adverse impact upon public health or safety and there is no feasible method to satisfactorily mitigate or avoid, as defined, the adverse impact. Such findings shall include the basis for the rejection of the potential feasible alternative for preventing the adverse impact. Such decisions may be appealed to the City Planning Commission.

d. Any condition imposed on an application shall be designed to mitigate the specific, adverse impact upon health and safety at the lowest possible cost.

e. "A feasible method to satisfactorily mitigate or avoid the specific, adverse impact" includes, but is not limited to, any cost-effective method, condition, or mitigation imposed by the City on another similarly situated application in a prior successful application for a permit. The City shall use its best efforts to ensure that the selected method, condition, or mitigation meets the conditions of subparagraphs (A) and (B) of paragraph (1) of subdivision (d) of Section 714 of the Civil Code defining restrictions that do not significantly increase the cost of the system or decrease its efficiency or specified performance.

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f. The City shall not condition approval of an application on the approval of an association, as defined in Section 4080 of the Civil Code.

g. If an application is deemed incomplete, a written correction notice detailing all deficiencies in the application and any additional information or documentation required to be eligible for expedited permit issuance shall be sent to the applicant for resubmission.

h. Only one inspection shall be required and performed by the [Building Department] for small residential rooftop solar energy systems eligible for expedited review. [A separate fire inspection may be performed if an agreement with the local fire authority does not exist to perform safety inspections on behalf of the fire authority.]

i. The inspection shall be done in a timely manner and should include consolidated inspections. An inspection will be scheduled within two [2] business days of a request and provide a two- [2-] hour inspection window.

j. If a small residential rooftop solar energy system fails inspection, a subsequent inspection is authorized but need not conform to the requirements of this Ordinance.

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Exhibit D

(Excerpt of recent SLO ordinance adopted February 17, 2015 to comply with AB 2188)

ORDINANCE NO. 1612 (2015 Series)

AN ORDINANCE OF THE CITY OF SAN LUIS OBISPO AMENDING TITLE 15 OF THE MUNICIPAL CODE BY ADDING CHAPTER 15.14 TO PROVIDE AN EXPEDITED, STREAMLINED PERMITTING PROCESS FOR SMALL RESIDENTIAL ROOFTOP SOLAR SYSTEMS; AMENDING TITLE 15 OF THE MUNICIPAL CODE BY AMENDING CHAPTER 15.04 TO EXEMPT CERTAIN RAINWATER CATCHMENT SYSTEMS FROM PERMITS.

WHEREAS, the City Council of the City of San Luis Obispo recognizes the importance of green technology" and by this Ordinance, seeks to (1) implement Assembly Bill 2188 (by creating an expedited, streamlined permitting process for small residential rooftop solar energy systems); and (2) promote water conservation by exempting certain rainwater catchment systems from building permit requirements.

NOW, THEREFORE, BE IT ORDAINED by the Council of the City of San Luis Obispo as follows:

SECTION 1. Environmental Determination. The project is exempt from environmental review per CEQA Guidelines under the General Rule (Section 15061(b)(3)). The project involves updates and revisions to existing regulations. The proposed code amendments are consistent with California Law, specifically Government Code section 65850.5 and Civil Code section 714. It can be seen with certainty that the proposed Municipal Code text amendments will have no significant negative effect on the environment.

SECTION 2. Chapter 15.14, of the City of San Luis Obispo's Municipal Code, establishing an expedited, streamlined permitting process for Small Residential Rooftop Solar Systems, is hereby added to read as follows:

Chapter 15.14 EXPEDITED PERMIT PROCESS FOR SMALL RESIDENTIAL ROOFTOP SOLAR SYSTEMS

15.14.010 – Purpose and Intent.

The purpose of the chapter is to provide an expedited, streamlined solar permitting

process that complies with the Solar Rights Act and AB 2188 (Chapter 521, Statutes 2014, CA Govt Code Section 65850.5) in order to achieve timely and cost-effective installations of small residential rooftop solar energy systems. This chapter encourages the use of solar systems by removing unreasonable barriers, minimizing costs to property owners and the city and expanding the ability of property owners to install solar energy systems. This chapter allows the city to achieve these goals while protecting the public health and safety.

15.14.020 – Definitions

As used in this chapter:

A. “Solar Energy System” means either of the following:

1. Any solar collector or other solar energy device whose primary purpose is to provide for the collection, storage, and distribution of solar energy for space heating, space cooling, electric generation, or water heating.

2. Any structural design feature of a building, whose primary purpose is to provide for the collection, storage, and distribution of solar energy for electricity generation, space heating or cooling, or for water heating.

B. “Small residential rooftop solar energy system” means all of the following:

1. A solar energy system that is no larger than 10 kilowatts alternating current nameplate rating or 30 kilowatts thermal.

2. A solar energy system that conforms to all applicable state fire, structural, electrical, and other building codes as adopted or amended by the City, and all state and City health and safety standards.

3. A solar energy system that is installed on a single or two family dwelling.

4. A solar panel or module array that does not exceed the maximum legal building height as defined by the City.

C. “Electronic submittal” means the utilization of electronic e-mail or submittal via the internet.

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D. "Specific, adverse impact" means a significant, quantifiable, direct, unavoidable impact, based on objective, identified, and written public health or safety standards, policies, or conditions as they existed on the date the application was deemed complete.

E. "Reasonable restrictions" on a solar energy system are those restrictions that do not significantly increase the cost of the system or significantly decrease its efficiency or specified performance, or that allow for an alternative system of comparable cost, efficiency, and energy conservation benefits.

F. "Restrictions that do not significantly increase the cost of the system or decrease its efficiency or specified performance" means:

1. For Water Heater Systems or Solar Swimming Pool Heating Systems: an amount exceeding 10 percent of the cost of the system, but in no case more than one thousand dollars ($1,000), or decreasing the efficiency of the solar energy system by an amount exceeding 10 percent, as originally specified and proposed.

2. For Photovoltaic Systems: an amount not to exceed one thousand dollars ($1,000) over the system cost as originally specified and proposed, or a decrease in system efficiency of an amount exceeding 10 percent as originally specified and proposed.

15.14.030-Applicability

A. This chapter applies to the permitting of all small residential rooftop solar energy systems in the city.

B. Small residential rooftop solar energy systems legally established or permitted prior to the effective date of the ordinance codified in this chapter are not subject to the requirements of this chapter unless physical modifications or alterations are undertaken that materially change the size, type, or components of a small rooftop energy system in such a way as to require new permitting. Routine operation and maintenance or like-kind replacements shall not require a permit.

C. A use permit and/or architectural review may be required for properties on the City's list of historic resources as deemed necessary by the Community Development Director.

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15.14.040-Solar Energy System Requirements

A. All solar energy systems shall meet applicable health and safety standards and requirements imposed by the state and the City.

B. Solar energy systems for heating water in single-family residences and for heating water in commercial or swimming pool applications shall be certified by an accredited listing agency as defined by the California Plumbing and Mechanical Code.

C. Solar energy systems for producing electricity shall meet all applicable safety and performance standards established by the California Electrical Code, the Institute of Electrical and Electronics Engineers, and accredited testing laboratories such as Underwriters Laboratories and, where applicable, rules of the Public Utilities Commission regarding safety and reliability.

15.14.050-Applications and Documents

A. All documents required for the submission of an expedited solar energy system application shall be made available on the City website.

B. Electronic submittal of the required permit application and documents by email, or the Internet shall be made available to all small residential rooftop solar energy system permit applicants.

C. The city's Building and Safety Division shall adopt a standard plan and checklist of all requirements with which small residential rooftop solar energy systems shall comply to be eligible for expedited review.

D. The small residential rooftop solar system permit process, standard plan(s), and checklist(s) shall substantially conform to recommendations for expedited permitting, including the checklist and standard plans contained in the most current version of the *California Solar Permitting Guidebook* adopted by the Governor' s Office of Planning and Research.

15.14.060-Permit Review and Inspection Requirements

A. The Community Development Director shall implement an administrative, nondiscretionary review process to expedite approval of small residential rooftop solar energy systems. The Building and Safety Division shall issue a building

permit, the issuance of which is nondiscretionary, on the same day for over-the-counter applications or within 1-3 business days for electronic applications upon receipt of a complete application that meets the requirements of the approved checklist and standard plan. The Chief Building Official may require an applicant to apply for an Administrative Use Permit if the official finds, based on substantial evidence, that the solar energy system could have a specific, adverse impact upon the public health and safety. Such decisions may be appealed to the city Planning Commission.

B. Review of the application shall be limited to the Chief Building Official's review of whether the application meets local, State, and Federal health and safety requirements.

C. If an Administrative Use Permit is required, the city may deny such application if it makes written findings based upon substantive evidence in the record that the proposed installation would have a specific, adverse impact upon public health or safety and there is no feasible method to satisfactorily mitigate or avoid, as defined, the adverse impact. Such findings shall include the basis for the rejection of the potential feasible alternative for preventing the adverse impact. Such decisions may be appealed to the city Planning Commission.

D. Any condition imposed on an application shall be designed to mitigate the specific, adverse impact upon health and safety at the lowest possible cost.

E. "A feasible method to satisfactorily mitigate or avoid the specific, adverse impact" includes, but is not limited to, any cost-effective method, condition, or mitigation imposed by the City on another similarly situated application in a prior successful application for a permit. The City shall use its best efforts to ensure that the selected method, condition, or mitigation meets the conditions of subparagraphs (A) and (B) of paragraph (1) of subdivision (d) of Section 714 of the Civil Code defining restrictions that do not significantly increase the cost of the system or decrease its efficiency or specified performance.

F. If an application is deemed incomplete, a written correction notice detailing all deficiencies in the application and any additional information or documentation required to be eligible for expedited permit issuance shall be sent to the applicant for resubmission.

G. Only one inspection shall be required and performed by the Building and Safety Division for small residential rooftop solar energy systems eligible for expedited review.

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H. The inspection shall be done in a timely manner and should include consolidated inspections.

I. If a small residential rooftop solar energy system fails inspection, a subsequent inspection is authorized.

[Remainder of Ordinance No. 1612 omitted]

Navigating RLUIPA: Recent Developments In Religious Land Use Litigation

Wednesday, May 6, 2015 Opening General Session; 1:00 – 3:00 p.m.

Lauren B. Langer, Assistant City Attorney, Lomita and Hermosa Beach

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Navigating RLUIPA:
Recent Developments In Religious Land Use Litigation

League of California Cities
2015 City Attorneys' Spring Conference

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I. INTRODUCTION

The Religious Land Use and Institutionalized Persons Act (RLUIPA) was intended to protect religious institutions against unduly burdensome and discriminatory land use regulations; however, it has significantly changed the parameters under which cities process applications for new or expanded religious facilities. This new tension exists because in some situations a city may be forced to relinquish its land use control—one of its primary police powers utilized for the protection of the public health, safety and welfare. When it comes to RLUIPA, knowledge is the best defense. It is imperative that cities proactively review their own local zoning regulations governing religious land uses and understand RLUIPA's complex framework.

To provide some context for the concepts in this paper, it is useful to consider one recent example of how RLUIPA has been used in land use development.

> *Islamic Center operated in the City for 25 years and had outgrown its current facilities. The existing Center consisted of four parcels straddling two zoning districts resulting in an irregularly shaped parcel sandwiched among single-family, multi-family and commercial uses. The parcels were developed with several structures and together functioned as a single campus with a mosque, classroom facilities, a library, eating area and other uses. The facility was nonconforming to the applicable zoning standards.*
>
> *In 2008, the Center applied to the City's planning department for the approvals necessary to demolish the existing structures and construct a new prayer hall and related facilities. The proposed project required the following deviations and legislative changes from the City's zoning standards: (1) rezoning a portion of the commercial property to Residential (religious facilities are permitted in the Residential zone); (2) amending the General Plan designation from Commercial to Residential; (3) amending the Zoning Ordinance to allow parking lots in the commercial zone to accommodate that portion of the property proposed to remain zoned Commercial; (4) granting a variance from the height limit to accommodate the minaret; (5) reducing the required rear yard setback separating the property from the adjacent residential uses; and (6) reducing the required side yard setback separating the property from the adjacent residential uses.*
>
> *After a public hearing, the City Council voted to deny the application, without prejudice to the Center to reapply for a project more closely aligned with the City's zoning regulations. In addition to deviating too far from the City's development standards, the project was denied due to traffic, parking concerns, loss of commercial land, and other land use impacts associated with the development on the irregularly-shaped parcel. The Center did not challenge the City's land use decision by way of writ of mandate and*

never reapplied.[1] *Instead, more than two years later, it filed a lawsuit under RLUIPA (among other claims).*

The basis of the legal dispute between the Center and the City was whether the City's denial of the project violated RLUIPA by substantially burdening the Center's religious exercise due to the fact that the current facilities were inadequate for their intended purposes.

The City contended that RLUIPA does <u>*not*</u> *exempt religious institutions from local zoning regulations. As a general matter, religious institutions must apply for the same permits, follow the same requirements, and go through the same land-use processes as other developers. So long as the City applies its codes uniformly and does not impose an unjustified substantial burden on religious exercise, the City should be able to apply traditional zoning limitations to religious uses similar to any other proposed land use, including regulations related to traffic, hours of use, parking, maximum capacities, intensity of use, setbacks, and frontage. The parcel on which it operated, however, was not well-suited to accommodate the precise expansion that it proposed and the City Council denied this project because the proposal deviated too far from the generally applicable standards.*

Unfortunately, the Center felt that the City's denial of its development application stemmed from a perceived animus on the part of the City. This led to the Civil Rights Division of the U.S. Department of Justice conducting an investigation into whether, in the Department's opinion, the City's denial complied with RLUIPA. Ultimately the DOJ concluded that, while there was no evidence that the City Council intended to discriminate against the Center on basis of religion, the denial had the effect of creating a substantial burden on the exercise of religion in violation of federal law. The City disagreed, contending that federal law does not excuse religious land uses from the same setback and parking requirements as other uses without establishing the nexus between the religious practice and the requested variance.

So if the DOJ did not find any discrimination and RLUIPA's stated purpose is to protect religious groups from discrimination, why was RLUIPA even relevant? It is because this federal

[1] This fact is legally relevant as calling into question whether the case was ripe for judicial review based on lack of a final decision. The final decision rule states that a case is not ripe until the government entity charged with implementing the regulations has reached a final decision regarding the application of the regulations to the property at issue. *Williamson County Regional Planning Commission v. Hamilton Bank of Johnson City* (1985) 473 U.S. 172. The *Williamson County* final decision requirement applies to RLUIPA claims. *Guatay Christian Fellowship v. Cnty. of San Diego* (9th Cir. 2011) 670 F.3d 957, 981.

law can have an impact far beyond its stated purpose and force certain land use decisions, which are typically governed by state law and implemented through local decision-makers.

II. BACKGROUND

RLUIPA's guidelines are best understood by examining its legislative history. The Religious Land Use and Institutionalized Persons Act of 2000[2] is the result of a long-standing disagreement between Congress and the United States Supreme Court.

The Free Exercise Clause of the First Amendment, which has been applied to the states through the Fourteenth Amendment, provides that Congress shall make no law respecting the establishment of religion, or prohibiting the free exercise thereof…"[3] Starting in 1963, the Supreme Court determined that strict scrutiny was the appropriate legal standard for laws that burden the free exercise of religion.[4]

In 1990, the Supreme Court in *Employment Division v. Smith* clarified that strict scrutiny was not the appropriate test for determining the constitutionality of neutral laws of general applicability that incidentally burden religion.[5] Justice Scalia stated, "We have never held that an individual's religious beliefs excuse him from compliance with an otherwise valid law prohibiting conduct that the State is free to regulate."[6] The effect of this decision was clear—neutral laws of general applicability must only pass a rational basis test to survive constitutional scrutiny, regardless of any burden upon religion. Rational basis means that the government need only show that the law bears a reasonable relationship to the attainment of some legitimate governmental objective. The decision greatly tipped the scales back in favor of the government by significantly lowering the standard needed to justify these laws. After *Smith*, citizens could no longer rely on the Free Exercise clause to challenge neutral laws, such as zoning ordinances.

Congress' first attempt at restoring the strict scrutiny standard was a failure. The Religious Freedom Restoration Act of 1993[7] (RFRA) prohibited governments from substantially burdening one's free exercise of religion, even if the burden results from a neutral rule of general applicability unless the government can demonstrate that the burden is (1) in furtherance of a

[2] 42 U.S.C. 2000cc- 2000cc-5
[3] *Church of the Lukumi Bablu Aye, Inc. v. City of Hialeah* (1993) 508 U.S. 520, 531.
[4] *Sherbert v. Verner* (1963) 374 U.S. 398 (Plaintiff had been denied unemployment benefits because she refused to work on Saturdays, which as a member of the Seventh Day Adventist Church, was her day of Sabbath. In ruling that the state's denial of benefits was a violation of her Free Exercise rights, the court applied strict scrutiny).
[5] 494 U.S. 885 (1990) (plaintiff was challenging an Oregon law which criminalized the use of peyote. The Native American plaintiff claimed that the law burdened his Free Exercise of religion because his religious beliefs required that he use this hallucinogenic plant in ceremonial rituals).
[6] 494 U.S. at 885.
[7] 42 U.S.C. §2000bb.

compelling governmental interest, and (2) is the least restrictive means of furthering that compelling interest.

Just four years after its adoption, the Supreme Court found RFRA unconstitutional (as applied to state and local governments) because it exceeded Congress' enforcement powers.[8] In this arena, Congress' powers are limited to enacting legislation that is "remedial" in nature. Such powers are limited to correcting documented constitutional violations; there must be "congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end."[9] In most cases, the state laws to which RFRA applies are not ones which will have been motivated by religious bigotry. It is a reality that numerous state laws, such as zoning regulations, impose a substantial burden on a large class of individuals. When the exercise of religion has been burdened in an incidental way by a law of general application, it does not follow that the persons affected have been burdened any more than other citizens, let alone burdened because of their religious beliefs.[10] Thus, the RFRA was struck down as applied to states and local governments.

Congress' second attempt at restoring strict scrutiny, RLUIPA, was a direct result of this tug-of-war between Congress and the Supreme Court. To avoid RFRA's fate, Congress wrote RLUIPA so that it only applied to regulations regarding land use and prison conditions, in response to a demonstrated record of discrimination in these areas. [11] Thus, RLUIPA provides "remedies aimed at areas where ... discrimination has been most flagrant;" an area where RFRA was lacking.[12] RLUIPA's constitutionality has been upheld by the Second, Ninth and Eleventh Circuits.[13]

As for enforcement and remedies under RLUIPA, the United States may bring an action for injunctive or declaratory relief to enforce RLUIPA, while *any* person may assert a violation and obtain "appropriate relief" against a government.[14] Appropriate relief means that civil damages could be available against the City for RLUIPA violations. The Ninth Circuit has not yet decided whether damages are available against *individuals* for violations of RLUIPA.[15] Nevertheless,

[8] *City of Boerne v. Flores* (1997) 521 U.S. 507, 536.
[9] *Id*. at 520. .
[10] *Id*. at 534-35.
[11] *Guru Nanak Sikh Soc. of Yuba City* (9th Cir. 2006) 456 F.3d 978, 986, 994 (citing H.R. Rep. No. 106–219, at 18–24 (1999) (summarizing the evidence from these hearings)); *see also California-Nevada Annual Conference of the Methodist Church v. City & Cnty. of San Francisco* (N.D. Cal. Nov. 24, 2014) No. 11-CV-02338-YGR, 2014 WL 6665915; *see also* 146 Cong. Rec. E1564-01, 146 Cong. Rec. E1564-01, 2000 WL 1369379.
[12] *See Guru Nanak* 456 F.3d at 994, citing *South Carolina v. Katzenbach* (1966) 383 U.S. 301, 315.
[13] 456 F.3d at 994–95; *Westchester Day School v. Village of Mamroneck* (2nd Cir. 2007) 504 F.3d 338; *Midrash Sephardi, Inc. v. Town of Surfside* (11th Cir. 2004) 366 F.3d 1214.
[14] 42 U.S.C. § 2000cc-2(a), (f).
[15] *Anselmo v. Cnty. of Shasta, Cal*. (E.D. Cal. 2012) 873 F. Supp. 2d 1247, 1261; *citing Shilling v. Crawford* (9th Cir.2010) 377 Fed.Appx. 702, 705.

qualified immunity from civil damages is available for individual government officials for RLUIPA claims. Qualified immunity would have no place in the RLUIPA context if damages are not available.[16] A RLUIPA claim must also be ripe for judicial review, meaning that the city must have reached a final decision regarding the application of the regulations to the property.[17]

III. ROADMAP TO RLUIPA AND RECENT DEVELOPMENTS IN THE LAW

RLUIPA's first general rule prohibits a government from implementing a land use regulation that imposes a "substantial burden" on religious exercise, including a religious assembly or institution, unless the government demonstrates that it furthers a "compelling government interest" by the "least restrictive means." [18] Note the strict scrutiny standard.

RLUIPA contains three other rules related to discrimination and exclusion:

(1) Equal terms. No government shall impose or implement a land use regulation in a manner that treats a religious assembly or institution on less than equal terms with a nonreligious assembly or institution.

(2) Nondiscrimination. No government shall impose or implement a land use regulation that discriminates against any assembly or institution on the basis of religion or religious denomination.

(3) Exclusions and limits. No government shall impose or implement a land use regulation that--

> (A) totally excludes religious assemblies from a jurisdiction; or
>
> (B) unreasonably limits religious assemblies, institutions, or structures within a jurisdiction.[19]

The "equal terms" and "substantial burden" provisions have been the most litigated provisions concerning local land use regulation and are the focus of this paper.

A. Equal Terms

The most significant RLUIPA development in recent years is that the Ninth Circuit Court of Appeals provided an interpretation of the "equal terms" provision for the first time in *Centro Familiar Cristiano Buenas Nuevas v. City of Yuma*.[20] This case involved a church that purchased a vacant J.C. Penny building in the Old Town District of Yuma, Arizona. The City

[16] *Id.* at 1261, fn 11.
[17] *Guatay Christian Fellowship* 670 F.3d at 981.
[18] 42 U.S.C. §2000cc(a)(1) (emphasis added)
[19] 42 U.S.C. § 2000cc(b).
[20] (9th Cir. 2011) 651 F.3d 1163.

tried to revive the Old Town tourist district by zoning it for a "mixture of commercial, cultural, governmental and residential uses that will help ensure a lively, pedestrian-oriented district." The City Code required a conditional use permit (CUP) for religious organizations in the Old Town District, although numerous other uses were permitted by right, including for example correctional centers, multi-family dwellings and membership organizations.[21]

Arizona law prohibited new bars, nightclubs or liquor stores within 300 feet of a church.[22] Neighboring properties objected to the Church's CUP application on the grounds that a church would prevent the issuance of liquor licenses. The City Planning and Zoning Commission denied the CUP because the City wanted the three-block Main Street where J.C. Penny was located to be an entertainment and nightlife district. The Commission determined that the state prohibition would blight a whole block for purposes of creating the nightlife district. The court aptly defined this case as a reverse urban blight case, where instead of the bars and nightclubs blighting the area, the church was seen as blighting the bar and nightclub district. [23]

Of course, had the church been a secular organization, it could have opened by right at this location. Other permitted uses included auditoriums, performing arts centers, museums, galleries, botanical gardens, and as well as the membership organizations, multi-family housing and jails noted above. [24]

The church sued for a declaratory relief to invalidate the CUP requirement for churches, an injunction to require issuance of the permit and damages for the financial costs to the church of the denial. The district court found in favor of the city and the appeal followed. The Ninth Circuit dismissed the declaratory judgment and injunction claims as moot because while the appeal was pending the church lost the property to foreclosure and Arizona authorized waivers from the prohibition on new liquor licenses within 300 feet of a church. [25] So the only question before the court was whether the City of Yuma was liable for damages for a RLUIPA violation.

There are four elements to an "equal terms" claim: (1) an imposition or implementation of a land use regulation; (2) by a government; (3) on a religious assembly or institution; and (4) that the imposition be "on less than equal terms with a nonreligious assembly or institution."[26] If the plaintiff religious institution establishes a prima facie case, the burden of persuasion shifts to the government on all elements.[27]

[21] *Centro Familiar* 651 F.3d at 1171.
[22] *Id*. at 1166.
[23] *Id*. at 1165.
[24] *Id*. at 1166-67.
[25] *Id*. at 1167-68.
[26] *Id*. at 1170-71.
[27] 42 U.S.C. § 2000cc-2(b).

The Yuma ordinance allowed by right, without a CUP, "membership organizations (except religious organizations (SIC 86))." The Court found that the express exclusion of religious organizations from uses permitted as of right by other membership organizations was enough to establish a prima facie case for unequal treatment.

The Ninth Circuit's "equal terms" rule is as follows:

> A city violates the equal terms provision only when a church is treated on less than equal terms *with a secular comparator, similarly situated with respect to accepted zoning criteria*. Further, the burden is not on the church to show a similarly situated secular assembly, but on the city to show that the treatment received by the church should not be deemed unequal, where it appears unequal on the face of the ordinance.[28]

Note the absence of a strict scrutiny standard. Not surprisingly, the various Circuit Courts disagree over whether strict scrutiny applies to the "equal terms" provision. The Ninth Circuit actually rejected the Eleventh Circuit's opinion that an equal terms violation can be excused by strict scrutiny of a compelling government interest.[29] Since RLUIPA is to be construed in the broadest terms possible to protect religious exercise and the "equal terms" provision does not provide for it, the Ninth Circuit found that a compelling government interest is not an exception to the equal terms provision.[30]

Rather, the Ninth Circuit adopted the Third and Seventh Circuits' tests by finding that the city may be able to justify distinctions drawn with respect to churches if it can demonstrate that the less than equal terms are on account of a legitimate regulatory purpose, not the fact that the institution is religious in nature. This means that the court will look to see if the church is similarly situated as to the regulatory purpose. The Seventh Circuit refined this test, and the Ninth Circuit agreed, by requiring equality with respect to accepted zoning criteria, such as parking, vehicular traffic, and generation of tax revenue. [31] This would prevent inappropriate subjectivity.[32] For example, a neutral restriction on the size of an assembly use may be justified by a parking concern.[33]

In *Centro Familiar*, there were no accepted zoning criteria that justified excluding religious organizations from the Old Town District. The ordinance did not address traffic or parking needs or even generation of tax revenue, as it allowed non-tax payers to operate by right. The church

[28] 651 F.3d at 1173 (emphasis added).
[29] *Id*. at 1172-73; see *Midrash Sephardi, Inc. v. Town of Surfside* (11th Cir. 2004) 366 F.3d 1214, 1232.
[30] *Id*. at 1172.
[31] *Id*. at 1172-3.
[32] *Corp. of the Catholic Archbishop of Seattle v. City of Seattle* (W.D. Washington 2014) 28 F.Supp.3d 1136..
[33] 651 F.3d at 1172.

exclusion did not address city's criteria for creating a "street of fun" because jails, post offices and apartment buildings were allowed to operate on that street. The damper on liquor licenses was also not an adequate reason to require a CUP for religious institutions because only churches trigger the 300-foot liquor license rule. All other religious institutions do not. Thus, the overt exclusion of religious organizations was not excused by the zoning criteria it purported to serve.[34] By requiring religious assemblies to obtain a CUP and not requiring the same of similarly situated secular assemblies, the ordinance violated RLUIPA's "equal terms" provision. The district court was directed to adjudicate the damages.

The only decision so far to apply the Ninth Circuit's rule is *Corp. of the Catholic Archbishop of Seattle v. City of Seattle*.[35] Here, the City of Seattle required a Catholic High School to apply for a variance and Administrative Conditional Use for four, seventy-foot-tall light poles to illuminate the athletic field. The height limit in the applicable residential zone was 30- feet, hence the need for the variance. The RLUIPA issue arose because under Seattle law, public schools are exempt from the height limit that would otherwise apply to athletic field lighting. Two public schools had installed light poles on athletic poles under the exemption.[36]

The district court's application of the rule is simple and instructive: a religious institution cannot be treated less than equally with a non-religious institution if the two institutions cannot be distinguished on the basis of accepted zoning criteria that define the zone.[37] Accepted zoning criteria are the objective characteristics of a particular use that determine whether a use should be excluded from a zone, given the purpose for which the zone was established. The court should ask what characteristics the zone is meant to preserve and what characteristics of the use would justify its exclusion from the zone.[38] RLUIPA requires the court to compare the excluded use with any secular comparator permitted in the zone, not excluded from the zone.[39]

Probably the most important take away from *Centro Familiar* is a reminder to <u>review city zoning codes</u>, preferably before the city receives an application for a religious use. In fact, that is what the City did in the example from the beginning of this paper. Following the DOJ's extensive investigation, City staff also conducted a comprehensive review of the City's Municipal Code to determine whether it could be improved to be more consistent with RLUIPA. The City's zoning provisions related to religious and assembly uses in residential and commercial zones dated back many decades and had not been amended since the early 1990s, before RLUIPA was enacted. The City determined that certain provisions of the Zoning Code

[34] 651 F.3d at 1173-75.
[35] 28 F.Supp.3d 1136.
[36] *Id*. at 1165.
[37] *Id*. at 1167-68.
[38] *Id*. at 1168-69.
[39] *Id*. at 1169.

may be inconsistent with RLUIPA's "equal terms" provisions. While the inconsistent provisions did not appear to influence the City Council's decision regarding the Center, to be fully consistent with RLUIPA, the City amended various Code section to treat religious facilities and other similar uses, such as assembly halls, clubs, and auditoriums, in a similar fashion. This amendment laid to rest any concerns that DOJ may have had about unequal terms in that case.

Things to look for and fix in your codes include:

1. Zones where religious uses are excluded or require a CUP, but similarly situated assembly uses are permitted by right or are subject to less rigorous development standards. Consider not even distinguishing between religious and secular assembly uses. The best way to regulate all assembly uses is by size. This should ensure that any use limitations or standards related to traffic, parking, noise etc. apply to all similarly situated assembly (i.e. uses that create the same types of impacts, regardless of whether the use is religious).
2. Land use standards that apply only to religious uses (or worse a particular religion).

As a practical matter, it is not a violation of RLUIPA to treat religious uses better than secular assembly uses. For example, you can permit religious uses in a residential zone while still prohibiting other assembly type uses that may not be compatible.

B. Substantial Burden

The "substantial burden" provision of RLUIPA has received much more judicial attention in the Ninth Circuit. Here are some of the well settled principles.

The general rule of RLUIPA, the Substantial Burden Rule, is as follows:

> No government shall impose or implement a land use regulation in a manner that imposes a substantial burden on the religious exercise of a person, including a religious assembly or institution, unless the government demonstrates that imposition of the burden on that person, assembly, or institution:
>
> (A) is in furtherance of a compelling governmental interest; and
>
> (B) is the least restrictive means of furthering that compelling governmental interest.[40]

This rule applies if "the substantial burden is imposed in the *implementation of a land use regulation* or system of land use regulations, under which a government makes, or has in place

[40] 42 U.S.C. § 2000cc.

formal or informal procedures or practices that permit the government to make, *individualized assessments* of the proposed uses for the property involved."[41] Simply put, RLUIPA applies when the government may take into account the particular details of an applicant's proposed use of land when deciding to permit or deny that use.[42] The Substantial Burden Rule does not apply directly to land use regulations themselves, which typically are written in general and neutral terms. However, when the land use regulation is applied to grant or deny a certain use to a particular parcel of land, that application is an "implementation" triggering RLUIPA.[43]

Understanding the statutory framework is critical in determining if RLUIPA applies to a project. [44] The burden of persuasion shifts to the city once a plaintiff produces prima facie evidence that the city has substantially burdened the plaintiff's religious exercise.[45] RLUIPA also must "be construed in favor of a broad protection of religious exercise, to the maximum extent permitted by [law]."[46]

i. *Land Use Regulation*

A land use regulation means a "zoning or landmarking law, or the application of such a law, that limits or restricts a claimant's use or development of land (including a structure affixed to land)."[47] "Under this definition, a government agency implements a 'land use regulation' only when it acts pursuant to a 'zoning or landmarking law' that limits the manner in which a claimant may develop or use property in which the claimant has an interest."[48] The Ninth Circuit has found that even if the California Environmental Quality Act (CEQA) was "land use regulation" within meaning of RLUIPA, strict scrutiny requirements of RLUIPA are not triggered by CEQA requirements, where the city merely required applicant to delineate the nature and scope of a proposed development in order to permit the city to assess its environmental effects. Thus, the law did not impose a substantial burden on religious exercise.[49] In *Cottonwood Christian Ctr. v. Cypress Redevelopment Agency*, both zoning and eminent domain laws were held to be subject to RLUIPA.[50] It may also be unexpected to see that

[41] *See* 42 U.S.C. § 2000cc(2)(C); *Guru Nanak* 456 F.3d 978, 986.
[42] *Guru Nanak* 456 F.3d at 986.
[43] *Id*. at. 987.
[44] RLUIPA also applies: (1) if the state "program or activity receives Federal financial assistance,", implicating congressional authority pursuant to the Spending Clause; or (2) if the substantial burden imposed by local law "affects ... [or] would affect, commerce with foreign nations, among the several States, or with Indian tribes," implicating congressional power pursuant to the Commerce Clause. 42 U.S.C. § 2000cc(2)(A)-(B).
[45] 42 U.S.C. § 2000cc-2(b).
[46] 42 U.S.C. § 2000cc–3; *see also California-Nevada Annual Conference of the Methodist Church v. City & Cnty. of San Francisco* (N.D. Cal. Nov. 24, 2014) No. 11-CV-02338-YGR, 2014 WL 6665915.
[47] 42 U.S.C. § 2000cc-5.
[48] *San Jose Christian Coll. v. City of Morgan Hill* (9th Cir. 2004) 360 F.3d 1024, 1036.
[49] 360 F.3d 1024, 1036.
[50] (C.D. Cal. 2002) 218 F. Supp. 2d 1203, 1226.

RLUIPA applies to landmarking laws. The Department of Justice (DOJ), the federal body charged with enforcement of RLUIPA, defines landmark preservation laws as restrictions that municipalities place on specific buildings or site to preserve those deemed significant for historical, architectural, or cultural reasons.[51] From the DOJ's perspective, [52] places of worship may be landmarked. Nevertheless, landmark designations that substantially burden religious exercise must also be justified by a compelling interest and through the least restrictive means. These regulations also must not be applied in a discriminatory manner.[53]

ii. *Religious Exercise of a Person*

RLUIPA defines person to include both individuals and religious assemblies or institutions.[54] Religious exercise means any exercise of religion, whether or not compelled by, or central to, a system of religious belief. Further, the use, building, or conversion of real property for the purpose of religious exercise is religious exercise.[55]

Defining religious exercise is difficult and it is a dangerous exercise for city officials to decide what activities are "religious." RLUIPA has been applied broadly to protect houses of worship, prayer meetings in homes, religiously-affiliated schools, religious retreat centers, faith-based homeless shelters, soup kitchens, non-profit hospitals and faith-based crisis centers.[56] Nevertheless, the Joint Statement of Senators Hatch and Kennedy introduced during the Senate's consideration of RLUIPA provides:

> Not every activity carried out by a religious entity or individual constitutes 'religious exercise.' In many cases, real property is used by religious institutions for purposes that are comparable to those carried out by other institutions. While recognizing that these activities or facilities may be owned, sponsored or operated by a religious institution, or may permit a religious institution to obtain additional funds to further its religious activities, this alone does not automatically bring these activities or facilities within the bill's definition o[f] 'religious exercise.'[57]

[51] Statement of the Department of Justice on the Land-Use Provisions of the Religious Land Use and Institutionalized Persons Act (RLUIPA) dated September 22.2010, available at http://www.justice.gov/crt/rluipa_q_a_9-22-10.pdf) ("DOJ September 22, 2010 Statement").
[52] While the DOJ's opinions do not necessarily hold the same weight as judicial opinions, they are relevant as the rules and tests that the DOJ will use in determining whether RLUIPA has been violated and whether to bring a RLUIPA action against your city clients.
[53] DOJ September 22, 2010 Statement.
[54] 42 U.S.C. § 2000c.
[55] 42 U.S.C. § 2000cc-5.
[56] *See* DOJ September 22, 2010 Statement; *Scottish Rite Cathedral Ass'n of Los Angeles v. City of Los Angeles* (2007) 156 Cal. App. 4th 108, 118 (internal citations omitted).
[57] 146 Cong. Rec. S7774–01 (July 27, 2000) (Joint Statement of Senators Hatch and Kennedy).

For example, it is not a substantial burden on religious exercise if the burden is on a commercial building that is only connected to religious exercise by the fact that the proceeds from the building's operation would be used to support religious exercise.[58] In *Scottish Rite Cathedral Ass'n of Los Angeles v. City of Los Angeles*, the California Court of Appeal held that the commercial use of a religious facility did not constitute religious exercise. The City's restrictions on use of a cathedral, based on insufficient parking facilities, did not place a substantial burden on any "religious exercise" of the fraternal order, where the group had leased the cathedral to a for-profit LLC and the restrictions permitted cathedral to continue to operate within its existing rights.

Most recently, California's Northern federal district held that a religious organization's commercial endeavors, such as the sale of property for a secular use, do not constitute "religious exercise" protected by RLUIPA, even if undertaken in order to fund the organization's religious mission.[59] Here, the organization sought to sell the property for a profit, which was then to be used "to further the Methodist religious mission in San Francisco" and "to develop a new congregation, new ministry initiative or other congregational development in San Francisco.[60] The organization claimed that its ability to sell the property, which required demolition of the church structure, was protected by RLUIPA and that the City's much-delayed issuance of permits to make the sale possible was a burden on its religious exercise.[61] The court disagreed, holding that commercial endeavors such as these—the sale of property for the construction of market rate condominiums—even if undertaken in order to fund its religious mission, do not constitute "religious exercise" protected by RLUIPA.[62]

Sometimes, religious institutions regularly use real property for "purposes that are comparable to those carried out by other institutions." While those facilities may be owned by a religious institution, or may generate funds to further religious activities, this alone does not automatically bring these activities or facilities within the definition of religious exercise.[63]

iii. <u>*Substantial Burden*</u>

As noted above, the plaintiff bears the burden to prove that the City's decision imposed a substantial burden on its religious exercise. [64] A substantial burden "must place more than

[58] *Scottish Rite* 156 Cal. App. 4th at 119-20, citing *Westchester Day School v. Village of Mamaroneck, supra,* 386 F.3d at p. 190, fn. 4.
[59] *California-Nevada Annual Conference* No. 11-CV-02338-YGR, 2014 WL 6665915.
[60] *Id*. At 6.
[61] *Id*.
[62] *Id*. At 7.
[63] *California-Nevada Annual Conference* 2014 WL 6665915 at 9.
[64] *See* § 2000cc–2(b); *Int'l Church of Foursquare Gospel v. City of San Leandro* (9th Cir. 2011) 673 F.3d 1059, 1067.

inconvenience on religious exercise."[65] "[F]or a land use regulation to impose a 'substantial burden,' it must be 'oppressive' to a 'significantly great' extent. That is, a 'substantial burden' on 'religious exercise' must impose a significantly great restriction or onus upon such exercise."[66] This is more than an inconvenience.[67] A substantial burden exists where the governmental authority puts "substantial pressure on an adherent to modify his behavior and to violate his beliefs." [68]

In *Int'l Church of Foursquare Gospel v. City of San Leandro*, the Church brought an action against the City, alleging the denial of its rezoning and conditional use permit applications violated RLUIPA. The district court granted summary judgment for the city. In reversing the district court's grant of summary judgment in favor the city, the Ninth Circuit found many flaws in the lower court's analysis.

First, evidence from the Church's realtor that no other suitable properties existed (i.e. that the 196 properties zoned for assembly use were unsuitable for the needs of the large religious congregation) was more than enough to defeat summary judgment, even if it wasn't necessarily factually conclusive on the point.[69] Second, when the religious institution has no ready alternative locations or where the alternatives require substantial delay, uncertainty or expense, complete denial of the application might be indicative of a substantial burden.[70]

Lastly, dismissal of the Church's assertion that no other property was available to accommodate its religious use was based in part on improper scrutiny of the Church's core religious beliefs. The Church said that its beliefs required it to have one large, Sunday morning service (compared to three smaller services), and to hold its Sunday school and other ministries during Sunday services. While a court can decide the *sincerity* of an individual's religious beliefs, it should not inquire into the *truth or falsity* of stated religious beliefs.[71]

Litigation results in this area have been mixed, making outcomes difficult to predict. There are California cases holding that certain land use decisions did not impose a "substantial burden" on religious exercise.[72] Other cases have found that zoning decisions have imposed a substantial

[65] *Guru Nanak* 456 F.3d at 988 (internal quotations and citation omitted).
[66] *San Jose Christian College* 360 F.3d at 1034 (citation omitted); *see also Guru Nanak* 456 F.3d at 988–89.
[67] *Cnty. of Los Angeles v. Sahag-Mesrob Armenian Christian Sch.* (2010) 188 Cal. App. 4th 851, 863.
[68] *Int'l Church of Foursquare* 673 F.3d at 1067, *citing Guru Nana*k 456 F.3d at 988.
[69] *Id*. at 1068..
[70] *Id*., citing *San Jose Christian College* 360 F.3d at 1035; *Civil Liberties for Urban Believers v. City of Chicago* (7th Cir.2003) 342 F.3d 752, 761–62; *Petra Presbyterian Church v. Vill. of Northbrook* (7th Cir.2007) 489 F.3d 846, 850–5; *Westchester Day Sch. v. Vill. of Mamaroneck* (2d Cir.2007) 504 F.3d 338, 349.
[71] *Int'l Church* 673 F.3d at 1069 (emphasis added), citing *United States v. Ballard* (1944) 322 U.S. 78, 86–87.
[72] *See Sahag-Mesrob* 188 Cal. App. 4th 851; *Scottish Rite Cathedral* 156 Cal. App. 4th 108; *Hillcrest Christian School v. City of Los Angeles* (C.D. Cal. 2007) 2007 WL 4662042; *San Jose Christian* 360 F.3d at 1035.

burden.[73] The substantial burden inquiry is fact-intensive, looking at the degree to which a land use decision is likely to impair the ability of a person or group to engage in religious exercise.

Factors to consider include: [74]

1. The size and resources of the burdened party;
2. The actual religious needs of an individual or religious congregation;
3. The level of current or imminent space constraints;
4. Whether alternative properties are reasonably available;
5. The history of a complainant's efforts to locate within a community; and
6. The absence of good faith by the zoning authorities.

According to the DOJ, when a city takes one of the following actions, it may constitute a substantial burden.

1. effectively barring the use of a particular property for religious activity;
2. imposing a significantly great restriction on religious use of a property; or
3. creating significant delay, uncertainty, or expense in constructing or expanding a place of worship, religious school, or other religious facility.[75]

For example in *Guru Nanak*, *supra*, the Court found that substantial burden came from the combination of two factors: (1) rejecting two separate CUP applications based on inconsistent reasoning, which created uncertainty for any future applications; and (2) the City cited noise and traffic as reasons for denial, even though the group agreed to every proposed mitigation measure. Ultimately, there were only a few parcels in the city theoretically available to the group, which greatly lessened the prospect that the group could build a temple in the future, and that was a substantial burden.[76] While there is no bright line rule, decisions that result in significant delay, uncertainty or expense for religious uses seem to be indicative of a substantial burden on religious exercise.

[73] *See Int'l Church* 673 F.3d 1059; *Grace Church of North County v. City of San Diego* (S.D. Cal. 2008) 555 F. Supp. 2d 1126, 1136–38; *Guru Nanak* 456 F.3d 978.
[74] DOJ September 22, 2010 Statement.
[75] DOJ September 22, 2010 Statement.
[76] *Guru Nanak* 456 F.3d at 989-992.

The availability of alternative properties is one of the more challenging substantial burden factors. Courts have rejected substantial burden claims when the property in question has no religious significance and there are "quick, reliable and financially feasible alternatives" that meet the organization's needs or there is "plenty of land" available for religious uses. [77] But there is no objective standard on which cities can rely. One commenter has recently noted that even if alternate sites are "available," the existence of a discretionary CUP requirement can still create the type of uncertainty that leads to a substantial burden.[78] Nevertheless, the more alternative sites available, the more difficult it will be for a religious organization to demonstrate a substantial burden.[79]

iv. *Compelling Interest*

If the plaintiff establishes a substantial burden, the city must show that the regulations are the least restrictive means of furthering a compelling governmental interest.[80] Compelling state interests are "interests of the highest order."[81] This standard is higher than a "substantial government interest" standard.[82] Compelling interests are "paramount interests." Where a government acts to prevent "a clear and present, grave and immediate danger to the public health, peace and welfare" it has a compelling interest; otherwise it does not. The government's asserted compelling state interest must be real, not hypothetical and it must be serious.[83] There is much case law on what constitutes a compelling interest outside of the RLUIPA context. For example, public safety and crime prevention are compelling state interests.[84] On the other hand, if aesthetics and traffic are not a compelling state interest for content-based sign regulation, it would be difficult to argue that they are compelling interests in a RLUIPA case.[85]

In *Int'l Church of Foursquare*, *supra*, the Ninth Circuit acknowledged two district court decisions rejecting a city's claim of compelling interest. The San Diego district court held that preservation of industrial lands for industrial uses does not by itself constitute a compelling interest under RLUIPA.[86] In the Central District, another court held that wanting to protect commercial property for revenue generation is not a compelling interest sufficient to justify denying a permit to a religious facility when the denial imposes a substantial burden. This is

[77] Douglas Laycock & Luke W. Goodrich, *RLUIPA: Necessary, Modest, and Under-Enforced*, 39 Fordham Urb. L.J. 1021 (2012); *citing Westchester Day School* 504 F.3d at 352, and *Petra Presbyterian* 489 F.3d at 850–5.
[78] *Id*. at 1046-47.
[79] Seeman, Evan, *RLUIPA Defense Tactics; How to Avoid and Defend Against RLUIPA Claims*, Zoning and Planning Law Report, December 2014, Volume 37, Issue 11.
[80] *Int'l Church of Foursquare* 673 F.3d at 1066.
[81] *Id*. at 1071.
[82] *Cottonwood Christian Ctr. v. Cypress Redevelopment Agency* (C.D. Cal. 2002) 218 F. Supp. 2d 1203, 1228.
[83]Federal Land Use Law & Litigation § 7:30 (2014 ed.)
[84] *U.S. v. Salerno* (1987) 481 U.S. 739, 748-50.
[85] See Federal Land Use Law & Litigation § 7:30 (2014 ed.)
[86] *Grace Church v. City of San Diego* (S.D.Cal.2008) 555 F.Supp.2d 1126.

especially so because religious facilities in particular are tax- exempt and to find revenue generation as a compelling interest would allow cities to exclude religious facilities from their cities.[87]

The *Int'l Church of Foursquare* court then disagreed with the district court's ruling in this case that San Leandro had a compelling interest in preserving the Church's property for industrial use. At minimum, this was a genuine issue of material fact that could not be decided on summary judgment. The court noted that the property on which the church sought to build new facilities was on the market because it had been unable to sustain use by a technology company (the City's preferred use). The implication from the court is that the city must be able to show an immediate demand for the land by the type of uses for which the city has zoned it if it intends to set aside land for purposes other than religious institutions. In other words, the demand cannot be hypothetical.[88]

No matter how convincing it sounds, to be "compelling" the interest must be supported by facts in the record. It must also be compelling in the case at hand, and not just an important interest generally.[89] One way to evaluate a claim of compelling interest is to consider whether in the past the city has consistently and vigorously protected that interest.[90]

For example in *Grace Church of North County*, the court rejected San Diego's claim that preservation of the property for industrial uses was a compelling interest because non-industrial uses, including churches, were permitted in the zone.[91] Not only was the parcel in question vacant for several years (i.e. not being used for industrial purposes), but roughly 1/6 of the land in the zone was used for office (i.e. non-industrial) uses. The factual evidence in the record must support the claim that the interest is "compelling."

v. *<u>Least Restrictive Means</u>*

Even if a City can demonstrate that its interest is compelling, it must also prove that it is the least restrictive means of furthering such interest.[92] In essence, the City must show that its interests could not be achieved by narrower action that burdens the Church to a lesser degree.[93] Very few decisions have engaged in detailed analysis of this issue.

[87] *Cottonwood Christian* 218 F. Supp. 2d at 1228.
[88] 673 F.3d 1059.
[89] *Grace Church* 555 F. Supp. 2d at 1140, citing *Westchester Day School* 504 F.3d at 353.
[90] *Id*. at 1140-41, *citing Church of the Lukumi Babalu Aye, Inc*. 508 U.S. at 547.
[91] *Id*. at, 1140..
[92] 42 U.S.C. 2000ccc(a)(1)(B).
[93] *Elsinore Christian Ctr. v. City of Lake Elsinore* (C.D. Cal. 2003) 291 F. Supp. 2d 1083, 1095 rev'd, 197 F. App'x 718 (9th Cir. 2006), *citing Church of the Lukumi Babalu Aye, Inc*, 508 U.S. at 546; *see Sherbert, supra*, 374 U.S. at 408 (test is whether "no alternative forms of regulation" would serve the government's interests).

In *Elsinore Christian Center*, the city denied the church's application for a CUP on property the church had contracted to purchase because it wanted to preserve a food market in the area. For the City to carry its burden, it must have demonstrated that approval of the CUP would necessarily entail dislocation of the "vital" use (market) from the area, and thus that denial of the CUP was the least restrictive means of preventing that dislocation.[94] The City had not identified any evidence on that point and failed as a matter of law to show that the CUP denial is the "least restrictive means" of advancing its interests.[95] Without much judicial guidance, we do know that cities have a heavy evidentiary burden here.

There is a relevant case pending in the Ninth Circuit, which may provide some additional guidance on the "least restrictive means" test. In *Harbor Missionary Church Corp. v. City of San Buenaventura*, the church sought to provide services to the homeless in a residential neighborhood. The church argued that its activities were religious exercise and that that the City's outright denial of the CUP substantially burdened that religious exercise and that the denial was not the least restrictive means of furthering a compelling governmental interest. The City won in the district court and the case is currently on appeal before the Ninth Circuit.

Outside the RLUIPA context, courts have found that the defendant cannot meet its burden to prove least restrictive means unless it demonstrates that it has actually considered and rejected the efficacy of less restrictive measures before adopting the challenged practice.[96] In *Harbor Missionary*, the district court found that before denying the CUP, the City considered less restrictive means, i.e. issuance of the CUP subject to conditions. But based on years of experience with the Church, the City determined that the homeless services program was so incompatible with the neighborhood and so detrimental to health, safety and welfare, that outright denial was the only way to achieve the compelling government interest of protecting the neighbor's health, safety and security.[97]

One of the issues before the Ninth Circuit is whether an outright permit denial can be the "least restrictive means." The appellant Church argues that an outright denial cannot be the least restrictive means where a city can approve a permit with conditions but chooses not to do so.[98] The appellant argues that "homeless" and "criminal" are not synonymous; therefore, the City could take steps to prevent crime without denying the homeless ministry.[99] Under the Church's

[94] *Id*. at 1095.
[95] *Elsinore Christian Ctr. v. City of Lake Elsinore* 291 F. Supp. 2d at 1095.
[96] *Warsoldier v. Woodford* (9th Cir. 2005) 418 F.3d 989, 999, *citing United States v. Playboy Entm't Group, Inc.* (2000) 529 U.S. 803, 824.
[97] *Harbor Missionary Church Corp. v. City of San Buenaventura* Case No. 2:14-cv-03730 R (VBKx); Order Denying Plaintiff's Motion for Preliminary Injunction (DKT. 6).
[98] Harbor Missionary Appellant's Opening Brief at 40, *citing to Westchester Day School* 504 F.3d at 353 and *Jesus* Center v. Famington Hills Zoning Bd. of Appeals (Mich. Ct. App. 1996) 544 N.W. 2d 698, 705.
[99] *Harbor Missionary* Appellant's Opening Brief at 41.

theory, it is the City's burden to show that increased enforcement of criminal laws in the neighborhood would not protect the City's compelling interest. What the Church is really arguing is that there are always less restrictive means, and thus, a denial always violates RLUIPA.

The City argues that it did consider less restrictive means (i.e a CUP with conditions) but that the CUP would not be effective based on years of experience dealing with the homeless program, the program's incompatibility with the neighborhood, the Church's refusal to acknowledge its role in increased levels of crime and the Church's unwillingness to mitigate the problems.[100] Here, the District Court's findings were based on 60 separate declarations and testimony describing assaults, confrontations, theft, vandalism, urination, drug abuse, loitering and camping committed by people using the homeless services. In addition and importantly, the Church objected on the record to conditions being placed on its activities.

Essentially, RLUIPA cannot require the City do the impossible and refute every conceivable alternative. Rather the City argues, the City's burden is to support its decision to deny the application and refute alternatives offered by the applicant. [101]

The League of California Cities' Amicus brief in this case argues that since a city cannot define an applicant's religious exercise, it is incumbent on the applicant to cooperate with the city to reach a compromise that allows for religious exercise in a manner consistent with land use policies and community needs.[102] In objecting to a rule that cities can never deny a religious land use application, the League argues that cities must have the option to deny a land use permit in order to preserve local discretion in making land use decisions, especially when the use is incompatible with the public health and safety of the residents. In other words, the Church's proposed rule would strip cities of their power to determine appropriate land use in the community.[103] Such was the not RLUIPA's stated intent.

The case is briefed and we hope to have a decision later this year.

IV. CONCLUSION

RLUIPA issues are complex and fact specific. So what can cities do to protect themselves from RLUIPA claims? The best strategy to avoid a RLUIPA claim is to plan for religious uses in your

[100] *Harbor Missionary* Appellee's Opening Brief at 28.
[101] *Harbor Missionary* Appellee's Opening Brief at 33.
[102] *Harbor Missionary* Amicus Brief of the League of California Cities at 10.
[103] *Harbor Missionary* Amicus Brief of the League of California Cities at 11.

city and understand both RLUIPA's rules and your local land use regulations.[104] Here are a few pointers:[105]

1. Understand where religious uses are permitted in your city and make sure the locations zoned for the use are not unreasonably limited.
2. Do not distinguish between religious and secular assembly uses in your zoning ordinance. Rather, regulate assembly uses by size, where larger assemblies are permitted in the zones that better accommodate crowds and the impacts associated with crowds. Similarly-sized assembly uses should be subject to the same developments standards, regardless of whether they are religious or secular.
3. Understand any special development standards for assembly of religious uses that in application may also significantly limit locations where religious uses may be established.
4. Continue to train your appointed and elected officials on RLUIPA.[106]
5. Remind your city officials not to make remarks that are discriminatory or could be perceived as being discriminatory.
6. Avoid public discussions over whether a particular activity is religious. Development applications should be focused on land use impacts and issues, not on whether a particular activity is *religious enough* to be covered by RLUIPA.
7. If the City is inclined to deny a particular application, make a good record to support the denial. Verify that the reasons cited by the decision-makers are actually supported by the City's code and past practices. Analyze whether there are quick, reliable and financially feasible alternative sites available, which may require the use of experts. Encourage applicants to redesign or reapply if a development proposal is unsatisfactory to the City.
8. RLUIPA itself provides that local governments may be protected from enforcement actions by taking corrective action, such as changing the policy or practice that results in a substantial burden on religious exercise, retaining the policy or practice and exempting the substantially burdened religious exercise, providing exemptions from the policy or practice for applications that substantially burden religious exercise, or by any other means that eliminates the substantial burden or other violation of RLUIPA.[107]

[104] Seeman, Evan, *RLUIPA Defense Tactics; How to Avoid and Defend Against RLUIPA Claims*, Zoning and Planning Law Report, December 2014, Volume 37, Issue 11.
[105] *See Id*.
[106] In *Grace Church*, the decision-makers'flawed understanding of RLUIPA and ignorance of the law were factors in the courts' finding of a substantial burden. 555 F. Supp. 2d 1126, 1139.
[107] 42 U.S.C. § 2000cc-3(e); *see also* DOJ September 22, 2010 Statement; *Civil Liberties for Urban Believers v. City of Chicago* (7th Cir. 2003) 342 F.3d 752, 762.

9. Should your client be faced with a RLUIPA claim, consider additional defenses such as ripeness and finality of the decision, qualified immunity from damages, and perhaps even res judicata.[108]

This brings us back to our illustrative example from the beginning of this paper.

> *After the City's 2010 denial, the Center acquired a fifth contiguous parcel. As a result of this additional parcel, the property was no longer irregularly shaped and presented the capacity to substantially increase the amount of on-site parking and create an efficient circulation plan. This fact formed the basis for settlements with both the Center and the DOJ.*
>
> *As a result of the settlement, the Center proposed a new project that more closely complied with the City's Zoning Ordinance. The additional parcel provided room for an additional 20 parking spaces and created a more standard, rectangular shape for the overall Project site. Joining the parcels together created a better opportunity to assure adequate parking and efficient traffic circulation.*
>
> *The Center proposed to place a portion of the Project underground, reducing the overall building scale, bulk and footprint in the residential neighborhood. With these modifications, the new project was superior in terms of circulation, parking, and building bulk to the previous submittal. Additionally, the height of the Project was reduced to predominantly 27 feet and the proposed height of the minaret had been reduced. The Project required one deviation—a variance due to the height of the architectural features (minaret and dome), not for the overall size of the structure. The project still required legislative amendments to allow the religious facility and parking. Ultimately, the project was approved after nearly five years of controversy.*

Despite the contentious nature of a RLUIPA lawsuit, this settlement is a great example of how cities can find a compromise that protects their legitimate land use control.

A special thank you to my colleague, Natalie Karpeles, whose research was so helpful in writing this paper.

[108] *See Multi Denominational Ministry of Cannabis & Rastafari, Inc. v. Gonzales* (N.D. Cal. 2007) 474 F. Supp. 2d 1133, 1143, aff'd sub nom. *Multi-Denominational Ministry of Cannabis & Rastafari, Inc. v. Holder* (9th Cir. 2010) 365 F. App'x 817.

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FCC's Wireless Facility Rules Implementing Section 6409(a)

Wednesday, May 6, 2015 Opening General Session; 1:00 – 3:00 p.m.

Harriet A. Steiner, City Attorney, Davis

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Notes:

League of California Cities
City Attorneys' Spring Conference

FCC's Wireless Facility Rules Implementing Section 6409(A)

Wednesday, May 6, 2015

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FCC's Wireless Facility Rules Implementing Section 6409(a)

As the popularity of smartphones, tablets and similar devices increases, wireless carriers continue to upgrade their networks, increasing their footprint and density. Cities play an important role in this deployment of wireless communications facilities with traditional land use regulations, seeking to balance the need for faster, better service and the aesthetic and other impacts these facilities have on localities.

The Federal Communications Commission ("FCC") recently issued regulations that require cities to approve some collocations at previously approved facilities. These collocations are not limited to traditional telecommunications towers but apply to essentially any communications facility. This paper discusses these regulations and their impact on cities' land use authority. To provide context for the new rules, the paper first outlines the various federal and state laws that preempt city authority over wireless communications facilities. It then discusses the federal statute, Section 6409[1] of the Middle Class Tax Relief and Job Creation Act of 2012 (H.R. 3630, P.L. 112-96), that the FCC relied on to adopt the new regulations. Lastly, the paper outlines the FCC regulations and potential city responses.[2]

Background – Existing Federal and State Preemption

California cities are preempted from regulating various aspects of wireless communications facility siting by both state and federal law. Below is a brief overview of the federal and state limitations on local control.

A. <u>Telecommunications Act of 1996 §§ 332(c)(7) and 253</u>

The Telecommunications Act of 1996 ("TCA") both recognized local zoning authority over wireless communications facilities ("WCF") and placed limitations on that authority.

47 U.S.C. section 253 precludes state and local governments from enacting ordinances that prohibit or have the effect of prohibiting the provision of telecommunications services, including wireless services. Such ordinances are expressly preempted by federal law.

47 U.S.C. section 332 preserves local authority over individual zoning decisions regarding the placement, construction and modification of WCFs, subject to the enumerated limitations on that authority set forth in that section. (*Sprint Telephony PCS, L.P. v. County of San Diego* (9th Cir. 2008) 543 F.3d 571, 576 ("*Sprint II*").[3]

The TCA limitations are both procedural and substantive. They are enumerated and explained in more detail below.

1. Decision on Application Must Be Made within Reasonable Period of Time

The City must act on any request for authorization to place, construct, or modify a WCF within a reasonable period of time after the request is filed, taking into account the nature and scope of such request.

[1] Section 6409 is referred to in this paper as Section 6409(a) or simply 6409(a).
[2] A coalition of cities are currently challenging the regulations in federal court. This challenge is beyond the scope of this paper.
[3] Section 332(c)(7)(A) reads: "Except as provided in this paragraph, nothing in this chapter shall limit or affect the authority of a State or local government or instrumentality thereof over decisions regarding the placement, construction, and modification of personal wireless service facilities."

In 2009, the FCC issued a ruling adopting what is referred to as the "Shot Clock", establishing "presumptively reasonable periods" for local action on a WCF siting application.[4] Under the ruling, local governments must review WCF applications for completeness within thirty days from the time the application is submitted by the wireless carrier. Excluding time when the application is incomplete, the agency has ninety days to review and decide on collocation applications and one hundred fifty days to review and decide on all other siting applications.[5]

The FCC's ruling authorizes applicants to file lawsuits if local agencies fail to act within these timelines, and, if sued, the agency must prove that it acted "reasonably" when it failed to act within these time frames. The ruling expressly authorizes these time limitations to be extended by mutual consent of the parties and tolls the thirty-day period while such an agreement is in place. The Shot Clock exists independently of state law so cities must comply with the Shot Clock as well as applicable state requirements like the Permit Streamlining Act.

As part of the Section 6409(a) regulations discussed below, the FCC clarified some factors of the Shot Clock. First, the Shot Clock applies regardless of any local moratoria. Second, the Shot Clock begins to run "when an application is first submitted, not when it is deemed complete."[6] The FCC also clarified that after an applicant responds to an incompleteness notice, a local government may then only toll the Shot Clock if it notifies the applicant within ten days that the request information remains incomplete. The local government must "specify the code provision, ordinance, application instruction, or otherwise publically-stated procedures that require the information to be submitted."[7]

2. <u>Decision to Deny Must be in Writing</u>

Any decision to deny a request to place, construct, or modify personal wireless service facilities must be in writing.

To satisfy the "written ruling" requirement, localities must provide their reasons for denying a siting application. However, they are not required to provide their reasons in the denial notice itself so long as the reasons are sufficiently clear and are provided or made accessible to the applicant essentially contemporaneously with the written denial letter or notice. (*T-Mobile South, LLC v. City of Roswell, GA* (2015) 574 U.S. ____, Slip Op. No. 13-975.). (*Metro PCS, Inc. v. City and County of San Francisco* (9th Cir. 2005) 400 F.3d 715, 723.) Of course, the adoption of a resolution that contains findings in addition to a discussion of the evidence to support the findings will satisfy this requirement.

Note that this requirement is similar to that already generally applicable to quasi-adjudicatory decisions under California law – i.e., such decisions must be based on written findings. (*Topanga v. County of Los Angeles* (1974) 11 Cal.3d 506.)

[4] See *In re Petition for Declaratory Ruling to Clarify Provisions of Section 332(c)(7)(b)*, 25 FCC Rcd 11157 (F.C.C. 2010); *In re Petition for Declaratory Ruling to Clarify Provisions of Section 332(c)(7)(B)*, 24 FCC Rcd 13994 (F.C.C. 2009). See also *City of Arlington v. FCC* (2013) 569 U.S. ___.

[5] As discussed below, the new FCC regulations establish a third category of applications that are entitled to a sixty-day shot clock.

[6] *In the Matter of Acceleration of Broadband Deployment by Improving Wireless Facilities Siting Policies Acceleration of Broadband Deployment: Expanding the Reach and Reducing the Cost of Broadband Deployment by Improving Policies Regarding Public Rights of Way and Wireless Facilities Siting* FCC 14-153 (F.C.C. 2014), ¶ 263.

[7] *Id.*

3. Decision to Deny Must Be Supported by Substantial Evidence

Any decision to deny a request to place, construct, or modify personal wireless service facilities must be supported by substantial evidence contained in a written record.

To satisfy the "substantial evidence" standard, the decision must be (1) authorized by local regulations; and (2) supported by substantial evidence. (*Metro PCS, Inc. v. City and County of San Francisco* (9th Cir. 2005) 400 F.3d at 725.) "Substantial evidence" in the context of WCF applications is the same as that applicable for judicial review of agency decisions generally. It means "such relevant evidence as reasonable minds might accept as adequate to support a conclusion." (*Id.*) It must be more than a "mere scintilla" but not necessarily a preponderance. (*Id.*) While this standard of review is deferential to the local agency, the court will review the record in its entirety, including evidence opposed to the local agency's decision.

Assuming the governing municipal code provisions for the relevant permit application allow or require a city to consider aesthetic factors in making its decision on the permit, evidence regarding aesthetic impacts may be considered and can constitute substantial evidence.[8] The City's constitutionally reserved "police power authority" includes the authority to regulate based on aesthetics. (*T-Mobile USA, Inc. v. City of Anacortes* (9th Cir. 2009) 572 F.3d 987; *Sprint PCS Assets, LLC v. City of Palos Verdes Estates* (9th Cir. 2009) 583 F.3d 716, 722-723.)

In *T-Mobile USA, Inc. v. City of Anacortes*, T-Mobile applied for a special use permit to erect a 116-foot monopole in order to close a service gap and expand its coverage in the city. The city denied the permit on the basis of its municipal code, which authorized it to consider a number of aesthetic factors including the height of the proposed tower, the proximity of the tower to residential structures, the nature of uses on adjacent and nearby properties, the surrounding topography, and the surrounding tree coverage and foliage. (*City of Anacortes*, 572 F.3d at 994.)

The court concluded there was substantial evidence concerning the city's stated aesthetic concerns to justify denial of the application under its municipal code. The evidence that the court pointed to as being "substantial" included: "a number of residents claim[s] that the monopole would have a detrimental impact on the surrounding residential property, that the pole would not be completely screened, and that it would interfere with residents' views of the Cascade Mountains and other scenic views." (*Id.* at 994-995.)

Note that even where substantial evidence exists to support a decision to deny a WCF permit, the denial may still be prohibited by the TCA if it unreasonably discriminates among providers of functionally equivalent services, or effectively prohibits the provision of wireless services (see below).

4. Decision May Not Be Based on or Regulate Radio Frequency Emissions

Cities may not regulate placement, construction of modification of WCFs based on radio frequency ("RF") emissions if the proposed wireless facility complies with FCC RF emissions regulations. Cities may also not attempt to regulate the operation of WCFs based on these

[8] *City of Palos Verdes Estates*, 583 F.3d at 725; *City of Anacortes*, 572 F.3d at 994, *citing*, *Sprint II*, 543 F.3d at 580 [stating that the zoning board may consider "other valid public goals such as safety and aesthetics"]; *T-Mobile Cent., LLC v. Unified Gov't of Wyandotte County* (10th Cir. 2008) 546 F.3d 1299, 1312 [noting that "aesthetics can be a valid ground for local zoning decisions"]; *Cellular Tel. Co. v. Town of Oyster Bay* (2d Cir. 1999) 166 F.3d 490, 494 [recognizing that "aesthetic concerns can be a valid basis for zoning decisions"]; *Voice Stream PCS I, LLC v. City of Hillsboro* (D. Or. 2004) 301 F.Supp.2d 1251, 1255.

concerns, e.g., by conditioning a permit to construct a WCF on a requirement to eliminate RF interference with appliances in a nearby home or a city's public safety system. (*Freeman v. Burlington Broadcasters* (2d Cir. 2000) 204 F.3d 311; *Southwestern Bell Wireless v. Johnson County Bd. of Commissioners* (10th Cir. 1999) 199 F.3d 1185.)

However, cities most likely can impose reasonable requirements on an applicant/operator to demonstrate the WCF complies with FCC RF emission standards. The statute itself appears to allow such requirements in that it only preempts local regulation of RF emissions "to the extent such facilities comply with the [FCC]'s regulations concerning such emissions." (47 U.S.C. § 332(c)(7)(B)(iv).)

The FCC and Local and State Advisory Committee of the FCC published a guide for local officials to help determine whether a facility complies with FCC standards. It can be found online at http://www.fcc.gov/encyclopedia/radio-frequency-safety.

5. Cities May Not Unreasonably Discriminate Among Providers of Functionally Equivalent Services

The regulation of the placement, construction and modification of WCF shall not unreasonably discriminate between providers of functionally equivalent services.

A city unreasonably discriminates if it treats facilities that are "similarly situated" in terms of the "structure, placement or cumulative impact" differently. (*Metro PCS*, 400 F.3d at 727.) This analysis is intensely factual and requires a detailed comparison between the subject project and competitors' projects within the area.

However, courts almost universally consider discrimination based on "traditional bases of zoning regulation" such as "preserving the character of the neighborhood and avoiding aesthetic blight" reasonable and thus permissible. (*Id.*)

The legislative history of the TCA provides that the "reasonableness standard" was intended to provide cities with the flexibility to treat facilities that create different visual, aesthetic, or safety concerns differently to the extent permitted under generally applicable zoning requirements even if those facilities provide functionally equivalent services. For example, the fact that a city grants a permit in a commercial district, does not require it to grant a permit for a competitor's 50-foot tower in a residential district. (*Id. citing* H.R. Conf. Rep. No. 104-458, at 208 (1996).)

6. Decision May Not Prohibit or Have the Effect of Prohibiting the Provision of Personal Wireless Services

A regulation prohibits or has the effect of prohibiting the provision of personal wireless services if it: (1) bans the provision of telecommunication services outright or (2) has actually effectively prohibited the provision of such services, e.g., by imposing restrictions that amount to ban. (*Sprint II*, 543 F.3d at 579; *Metro PCS*, 400 F.3d at 730-31.) The mere fact that the

regulations could potentially allow the locality to prohibit the provision of telecommunications services is insufficient. (*Sprint II*, 543 F.3d at 579.[9])

A regulation results in an "effective prohibition" of personal services if it prevents a wireless services provider from closing a "significant gap" in service coverage. (*Metro PCS*, 400 F.3d at 731.) A significant gap in service exists whenever a provider is prevented from filling a significant gap in <u>its own</u>[10] service coverage. (*Id.* at 733.) There is no bright-line rule regarding when a coverage gap is "significant," the determination is based on a fact specific analysis. (*Id.*; *City of Palos Verdes Estates*, 583 F.3d at 727.) However, the Ninth Circuit has commented that in order for the gap to be "legally significant" its closure needs to be tantamount to a prohibition on telecommunications service. (*Id.*)

Some factors considered by district courts in other circuits in assessing the significance of alleged gaps include: whether the gap affected significant commuter highway or railway; the "nature and character of that area or the number of potential users in that area who may be affected by the alleged lack of service"; whether facilities were needed to improve weak signals or to fill a complete void in coverage; whether the gap covered well-traveled roads on which customers lack roaming capabilities; the results of "drive tests"; whether the gap affects commercial district; and whether the gap poses a public safety risk.[11]

To support the contention that a site is necessary to close a coverage gap, the provider's application should show how the proposed WCF would close the gap, supported by data showing the coverage afforded by other sites. The city can then investigate and determine whether the provider's representations are sound and persuasive. If it concludes they are not, the provider must be given an opportunity to reply to the locality's challenges. (*City of Anacortes*, 572 F.3d at 999.)

Once the provider has demonstrated the requisite gap exists, the provider must show that the manner in which it proposes to fill the significant gap in service is the "least intrusive on the values that the denial sought to serve." (*Metro PCS*, 400 F.3d at 734.) To do so the provider must demonstrate that it has made a good faith effort to identify and evaluate less intrusive alternatives, e.g., its permit application should show that it has considered less sensitive sites, alternative system designs, alternative tower designs, placement of antennae on existing structures, etc. (*City of Anacortes*, 572 F.3d at 996, fn. 10.)

Although the city is not compelled to accept the provider's representations, in order to reject them, it must show that there are some potentially available and technologically feasible alternatives, and the provider must have an opportunity to dispute the availability and feasibility of the alternatives favored by the locality. (*Id.* at 999.)

In *City of Anacortes*, the City of Anacortes denied T-Mobile USA, Inc.'s application to erect a 116-foot monopole antenna on the property of a church located in a residential neighborhood. T-Mobile, cognizant of the "least intrusive means" standard, submitted a detailed

[9] Examples of regulations that "effectively prohibit the provision of service" include, e.g., an ordinance requiring that all facilities be underground when, to operate, wireless facilities must be above ground, or, an ordinance mandating that no wireless facilities be located within one mile of a road, where, because of the number and location of roads, the rule constituted an effective prohibition. (*Sprint II*, 543 F.3d at 580.)

[10] The availability of wireless service from other providers in the area is irrelevant for purposes of this analysis. (*City of Palos Verdes Estates*, 583 F.3d at 726, fn 8.)

[11] *Cellular Tel. Co. v. Zoning Bd. of Adjustment of the Borough of Ho-Ho-Kus* (3d Cir. 1999) 197 F.3d 64, 70 fn.2; *Voice Stream PCS I, LLC v. City of Hillsboro* (D. Or. 2004) 301 F. Supp. 2d 1251, 1261; *Nextel Partners, Inc. v. Town of Amherst* (W.D.N.Y. 2003) 251 F. Supp. 2d 1187, 1196; *Am. Cellular Network Co., LLC v. Upper Dublin Twp.* (E.D. Pa. 2002) 203 F. Supp. 2d 383, 390-391; *Sprint Spectrum, L.P. v. Town of Ogunquit* (D. Me. 2001) 175 F. Supp. 2d 77, 90.

permit application that included an analysis of eighteen alternative sites. The city nonetheless denied the permit, concluding that the "church site" was not the least intrusive means of closing the gap. However, the court disagreed, concluding that the city's alleged "available alternatives" were too speculative to be "potentially available and technically feasible alternatives" within the meaning of the TCA.

The city identified several public school sites as alternatives. Although the school district had already rejected T-Mobile's proposal to locate there, the planning commission argued that these sites were still technically feasible because the school district would likely change its mind if T-Mobile offered additional compensation. The court rejected this contention as too speculative and deferred to T-Mobile's experience in other cities: "T-Mobile presented testimony to the Planning Commission that it had approached thousands of school boards about locating WCFs on their properties, and that where there is opposition in the community to the construction of a WCF, such opposition is likely to be intensified if the proposed location of the WCF is on school property." (*Id.* at 998, fn. 12.)

B. CEQA and NEPA

The construction of WCFs are subject to environmental review under both federal and state law. All antenna structures must comply with NEPA. Smaller WCFs may be categorically exempt from CEQA pursuant to Guidelines § 15303. As explained above, cities may not regulate sitings based on RF emissions to the extent that the facilities comply with FCC standards. However, this does not relieve a city from the obligation to study any significant environmental effects caused by RF emissions.

Note also that larger antenna towers can affect bird flyways and otherwise result in the killing of birds, including endangered species. Accordingly, tower siting may require analysis of federal and state species protection statutes.

C. Government Code Sections 65850.6 and 65964

The state legislature enacted SB 1627 in 2006, which is codified as Government Code Sections 65850.6 and 65964. Section 65850.6 principally deals with collocations. The law removes discretionary authority for wireless telecommunications land use permits - but only over those wireless telecommunications facilities mounted to existing towers or structures (referred to as "collocation facilities" [12]). Section 65850.6 does not remove the City's discretionary authority to review and permit wireless telecommunications towers or structures that will include future collocation facilities (referred to as "wireless telecommunications collocation facilities" [13]). Section 65964 applies more broadly to all wireless telecommunications facilities and limits cities' ability to impose conditions of approval on these projects.

Original Discretionary Permit For Wireless Telecommunication Collocation Facilities: Section 65850.6 permits cities to require a discretionary permit (such as a conditional use permit) for a wireless telecommunication collocation facility if the city holds a public hearing and provides notice pursuant to Government Code Section 65091. In addition to being subject to a

[12] "Collocation facility" means the placement or installation of wireless facilities, including antennas, and related equipment, on, or immediately adjacent to, a wireless telecommunications collocation facility. (Gov. Code, § 65850.6(d).)

[13] "Wireless telecommunications collocation facility" means a wireless telecommunications facility that includes collocation facilities. (Gov. Code, § 65850.6(d).)

discretionary permit, the wireless telecommunication collocation facility would have to comply with all of the following:

- City requirements that specify the types of wireless telecommunications facilities that are allowed to include a collocation facility;

- City requirements that specify the types of wireless telecommunications facilities that are allowed to include certain types of collocation facilities;

- Height, location, bulk, and size of the wireless telecommunication collocation facility;

- Percentage of wireless telecommunications collocation facility that may be occupied by collocation facilities;

- Aesthetic and design requirements for wireless telecommunications collocation facilities.

- City requirements for a proposed collocation facility;

- Compliance with state and local requirements, including the general plan, any applicable community plan or specific plan, and zoning ordinance;

- Compliance with CEQA through certification of an EIR, or adoption of a negative declaration or mitigated negative declaration.

Subsequent Review of Collocation Facilities: Upon approval of a wireless telecommunication collocation facility, cities are precluded from requiring discretionary permits for any subsequent collocation facility on the approved wireless telecommunication collocation facility if the following requirements are met:

- The collocation facility is consistent with the requirements for wireless telecommunications collocation facilities listed above (e.g., proposed collocation facility meets the City's requirements for height, location, bulk, size, etc., the requirements of any proposed collocation facility found in the original approval, the proposed collocation facility is located on the type of wireless telecommunications collocation facilities that is allowed to include a collocation facility.)

- The wireless telecommunications collocation facility on which the collocation facility is proposed was subject to a discretionary permit by the city and an EIR was certified, or a negative declaration or mitigated negative declaration was adopted for the wireless telecommunications collocation facility in compliance with CEQA.

Section 65964: Government Code section 65964 prevents cities from, "as a condition of approval for an application for a permit for construction or reconstruction" of a "wireless telecommunications facility":[14]

- Requiring an escrow deposit for removal of a wireless telecommunications facility or any component. However, a performance bond or other surety or another form of security may be required, so long as the amount of the bond security is rationally related to the cost of

[14] This is defined as "equipment and network components such as towers, utility poles, transmitters, base stations, and emergency power systems that are integral to providing wireless telecommunications services." (Gov. Code, § 65850.6.)

removal. In establishing the amount of the security, the city must take into consideration information provided by the applicant regarding the cost of removal.

- Unreasonably limiting the duration of any permit for a wireless telecommunications facility. Limits of less than ten years are presumed to be unreasonable absent public safety reasons or substantial land use reasons. However, cities may establish a build-out period for a site.

- Requiring that all wireless telecommunications facilities be limited to sites owned by particular parties (i.e., requiring facilities be built on city property).

D. Public Utilities Code Sections 7901 and 7901.1

Given the development of distributed antenna systems ("DAS") and small cells, wireless carriers have sought to increase WCF deployment within the public right-of-way under Public Utilities Code sections 7901 and 7901.1. Section 7901 allows telephone companies to place "poles, posts, piers, or abutments for supporting the insulators, wires, and other necessary fixtures of their lines" in the rights of way. Section 7901.1 provides that "municipalities shall have the right to exercise reasonable control as to the time, place, and manner in which roads, highways, and waterways are accessed, "and provides that, at a minimum, the control shall "be applied to all entities in an equivalent manner." The definition of "telephone company" is very broad, and a mobile telecommunications company that obtains a certificate of public convenience and necessity ("CPCN") from the California Public Utilities Commission ("CPUC") likely has access to the right-of-way subject to section 7901.1. (See *City of Huntington Beach v. Public Utilities Com.* (2013) 214 Cal.App.4th 566.)

Section 6409(a)

Congress, as part of the Middle Class Tax Relief and Job Creation Act of 2012 enacted Section 6409(a),[15] which states as follows:

> (1) IN GENERAL.—Notwithstanding section 704 of the Telecommunications Act of 1996 (Public Law 104–104) or any other provision of law, a State or local government may not deny, and shall approve, any eligible facilities request for a modification of an existing wireless tower or base station that does not substantially change the physical dimensions of such tower or base station.
>
> (2) ELIGIBLE FACILITIES REQUEST.—For purposes of this subsection, the term ''eligible facilities request'' means any request for modification of an existing wireless tower or base station that involves—(A) collocation of new transmission equipment; (B) removal of transmission equipment; or (C) replacement of transmission equipment.

"Wireless tower," "base station," "modification," and "substantially change" are not defined in Section 6409(a).

[15] This is now codified at 47 U.S.C. § 1455(a).

In light of the statutory silence, the FCC first released non-binding guidance in 2013 to help define these terms.[16] This guidance took a very broad view of what types of collocations and other modifications qualified, including allowing towers to increase by at least twenty feet. In September 2013, the FCC moved to adopt binding rules interpreting Section 6409(a). These proposed rules were very similar to the non-binding guidance.

FCC Regulations Implementing Section 6409(a)

In a Report and Order ("Wireless Infrastructure Order" or "Order") released October 21, 2014, FCC 14-153, the FCC interpreted and implemented the "collocation" provisions of Section 6409(a) of the Middle Class Tax Relief and Job Creation Act of 2012.[17] An explanation of the Order is below.[18]

A. Definition of Terms in Section 6409(a)

Given the lack of statutory definitions or guidance in Section 6409(a), the FCC first determined how broadly Section 6409(a) applied and then provided definitions for many of the statutory terms.[19]

1. Scope of Covered Services

The FCC determined that Section 6409(a) applies to facilities used in connection with "any Commission-authorized wireless communications service." [20] This includes broadcast facilities. The Commission rejected local governments' view that the statute is best read to apply only to personal wireless service and public-safety communications.[21]

The FCC's determination will ensure that Section 6409(a) and the Commission's rules apply broadly. Providers will be able to use Section 6409(a) to modify a facility regardless of the service it provides. This differs from 47 U.S.C. § 332(c)(7), which applies only to "personal wireless service" facilities.

2. Transmission Equipment

The FCC defines "transmission equipment" broadly as equipment that facilitates transmission of any Commission-authorized wireless service. [22] It includes, but is not limited to, radio transceivers, antennas, coaxial or fiber-optic cable, and regular and backup power supply.

3. Existing Wireless Tower or Base Station

The FCC defines "tower" narrowly as "[a]ny structure built for the sole or primary purpose" of supporting any Commission-licensed or authorized antennas and their associated

[16] *Wireless Telecommunications Bureau Offers Guidance on Interpretation of Section 6409(a) of the Middle Class Tax Relief and Job Creation Act of 2012*, DA 12-2047 (Jan. 25, 2013).
[17] The Order also adopted new or modified rules for environmental and historic preservation review of small wireless facilities, including DAS and codified an exception to advance notice of the placement of temporary towers under the Antenna Structure Regulation ("ASR") requirements. These changes are outside the scope of this paper. As discussed above, the Order also clarified some provisions of the Shot Clock.
[18] The Order is available at http://www.fcc.gov/document/wireless-infrastructure-report-and-order. The regulations are located at 47 C.F.R. § 1.40001. The bulk of the regulations became effective on April 8th. However, §§ 1.40001(c)(3)(i), 1.40001(c)(3)(iii), 1.140001(c)(4) and 17.4(c)(1)(vii) will not be effective until approved by the Office of Management and Budget (OMB).
[19] Order ¶145.
[20] Order ¶146.
[21] Order ¶¶148-154.
[22] Order ¶160.

facilities.[23] It defines "base station" broadly to include not only the equipment that communicates with user equipment (regardless of the technological configuration, and encompassing DAS and small cells), but also the "structure" that supports or houses that equipment.[24] The FCC clarified, however, that a structure would qualify as an existing "base station" only if at the time of the application, the structure already supports or houses communications equipment.[25] Other structures that do not host communications equipment are not "base stations." The FCC also clarified that to qualify as a "base station," the facility must have been "approved under the applicable zoning or siting process" or have "received another form of affirmative State or local regulatory approval," such as an authorization from the CPUC.[26] This is a very broad definition and would include the light pole, building or other structure that currently houses communications equipment as long as it received the applicable regulatory approvals, even if those approvals did not anticipate future collocation.

4. Collocation, Replacement, Removal, Modification

The FCC then addressed what modifications Section 6409(a) permits a provider to make to a "wireless tower" or "base station."[27] The Commission ruled that "collocation" includes the *first* placement of transmission equipment on a "wireless tower" or "base station."[28] This differs from local governments' view that "collocation" occurs only if the tower or base station already hosts other equipment with which the new equipment would be *co*-located.[29] (This is effectively the result of modifications to "base stations," but that is not because of the "collocation" definition but because the FCC defined "base station" to include only those structures that already host wireless equipment.) The FCC also found that if the collocation, replacement, or removal of transmission equipment makes structural enhancements to (i.e., "hardening" of) the wireless tower or base station "necessary," Section 6409(a) applies to that hardening activity.[30] The Commission ruled that Section 6409(a) does not permit a provider to replace the structure on which the equipment is located.[31]

5. Substantial Change and Other Conditions and Limitations

The FCC then turned to defining "substantially change the physical dimensions" of a tower or base station. [32] The Commission adopted an "objective standard." Under its rule, a modification substantially changes the physical dimensions of a wireless tower or base station if it meets any of the following criteria:[33]

(i) Height

(i) for towers other than towers in the public rights-of-way:

a. it increases the height of the tower by:

i. more than 10% or

[23] Order ¶166.
[24] Order ¶170; 47 C.F.R. § 1.40001(b)(1).
[25] Order ¶¶172-174; 47 C.F.R. § 1.40001(b)(1)(iii).
[26] Order ¶174.
[27] Order ¶176.
[28] Order ¶176; 47 C.F.R. § 1.40001(b)(2).
[29] *Id.*
[30] Order ¶180.
[31] Order ¶181.
[32] Order ¶182.
[33] Order ¶188; 47 C.F.R. § 1.40001(b)(7).

ii. the height of one additional antenna array with separation from the nearest existing antenna not to exceed 20 feet, whichever is greater;

(ii) for other eligible support structures:

a. it increases the height of the structure by:

i. more than 10% or

ii. more than **10 feet**, whichever is greater.[34]

(ii) Width

(i) for towers other than towers in the public rights-of-way:

a. it involves adding an appurtenance to the body of the tower that would protrude from the edge of the tower

i. more than **20 feet**, or

ii. more than the width of the tower structure at the level of the appurtenance, whichever is greater;

(ii) for other eligible support structures:

a. it involves adding an appurtenance to the body of the structure that would protrude from the edge of the structure by more than **6 feet**;

(iii) Equipment Cabinets

(i) for any eligible support structure:

a. it involves installation of more than the standard number of new equipment cabinets for the technology involved, but **not to exceed four cabinets**; or,

(ii) for towers in the public rights-of-way and base stations,

a. it involves installation of **any new equipment cabinets** on the ground if there are no pre-existing ground cabinets associated with the structure, or else involves installation of ground cabinets that are more than 10% larger in height or overall volume than any other ground cabinets associated with the structure;

(iv) Excavation/Deployment Beyond Site

(i) it entails "any excavation or deployment outside the current site."

a. The Commission defines "site" as:

i. For towers other than towers in the public rights-of-way,

[34] Changes in height are measured from the original support structure in cases where deployments are or will be separated horizontally, such as on buildings' rooftops; in other circumstances, changes in height should be measured from the dimensions of the tower or base station, inclusive of originally approved appurtenances and any modifications that were approved prior to the passage of the Spectrum Act.

1. the current boundaries of the leased or owned property surrounding the tower and any access or utility easements currently related to the site, and,

ii. for other eligible support structures,

1. further restricted to that area in proximity to the structure and to other transmission equipment already deployed on the ground.

(v) Concealment Elements

A modification is a substantial change if it would "defeat the concealment elements of" the wireless tower or base station.

(vi) Other Conditions on the Wireless Tower or Base Station

A modification is also a substantial change if it does not comply with conditions—other than those conditions related to height, width, equipment cabinets, excavation/deployment, or concealment elements—associated with the siting approval of the construction or modification of the eligible support structure or base station equipment.

The FCC also ruled that facility modification remains subject to "building codes and other non-discretionary structural and safety codes."[35] Specifically, local governments may require a covered request "to comply with generally applicable building, structural, electrical, and safety codes or with other laws codifying objective standards reasonably related to health and safety."[36]

B. <u>Application Review Process, Including Timeframe for Review</u>

The FCC ruled that a local government may require a party seeking approval under Section 6409(a) to submit an application so that the local government can determine whether its request is covered by the statute. [37] The FCC clarified, however, that a local government may require only that documentation that is reasonably related to determining whether the request falls under the statute. A local government may not require documentation "proving the need for the proposed modification or presenting the business case for it."[38]

The FCC established that a local government must act on a Section 6409(a) request within sixty days.[39] That period may be tolled by the parties' agreement or if the local government notifies the applicant within thirty days that specific information in the application is incomplete.[40] After the applicant makes a supplemental filing, the local government then has an additional ten days to notify the applicant that the application remains incomplete because the specific information that the local government had identified remains incomplete (the local government may not toll the sixty-day clock by notifying the applicant of other missing

[35] Order ¶202.
[36] *Id.*
[37] Order ¶211.
[38] Order ¶214.
[39] Order ¶216; 47 C.F.R. § 1.40001(c)(2).
[40] Order ¶217; 47 C.F.R. § 1.40001(c)(3).

information).[41] The FCC also clarified that its sixty-day clock runs regardless of local moratoria.[42]

C. Remedies

The FCC determined that because Section 6409(a) states that a local government "may not deny, and shall approve" a qualifying request, a local government must act either to approve or deny an application within the sixty-day period.[43] If the local government fails to take any action during that period, the request is deemed granted at the time the applicant notifies the local government of the deemed grant in writing. The FCC explains that a local government may challenge a deemed grant in court "when it believes the underlying application did not meet the criteria in Section 6409(a) for mandatory approval, would not comply with applicable building codes or other non-discretionary structural and safety codes, or for other reasons is not appropriately 'deemed granted.'"[44] The FCC indicates that it will not be involved in adjudicating disputes.[45]

D. Non-Application to States or Municipalities in Their Proprietary Capacities

The FCC explained that Section 6409(a) and its rules do not apply when local governments act in a proprietary capacity, e.g., when they enter into lease and license agreements to allow parties to place antennas and other wireless service facilities on local-government property.[46] The FCC also declined to determine whether ordinances that express a preference for siting facilities on municipal property are invalid.[47]

E. Cities' Responses

Cities should consider how to implement Section 6409(a) within their jurisdictions. In part, this will require reviewing the city's land use and zoning regulations for WCF to ensure that they are consistent with federal law. Similarly, cities should consider how to process Section 6409(a) collocations and applications for new towers and base stations under CEQA. Lastly, because Section 6409(a) did not affect cities' proprietary rights, cities should ensure that they do not unwittingly forfeit any review over Section 6409(a) applications when they own or lease the property.

1. Reviewing and Updating WCF Regulations

The Order substantially interferes with traditional local land use controls, and all cities should consider the effect of the Order on their WCF regulations. For example, if existing zoning ordinances permit telecommunications towers up to one hundred feet in a zone, the Order now allows all existing towers to add an additional ten feet. Similarly, if a city's ordinance allows DAS providers to install ground-based equipment within the right-of-way, the Order allows expansion of those cabinets by up to ten percent in height or overall volume.

[41] Order ¶218; 47 C.F.R. § 1.40001(c)(3).
[42] Order ¶219; 47 C.F.R. § 1.40001(c)(3).
[43] Order ¶227; 47 C.F.R. § 1.40001(c)(4).
[44] Order ¶231.
[45] Order ¶234; 47 C.F.R. § 1.40001(c)(5).
[46] Order ¶239.
[47] Order ¶244. Of course, these types of ordinances are still subject to California restrictions on preferences under Government Code section 65964.

In addition, the FCC rejected the argument that any modification of an existing wireless tower or base station that has "legal, non-conforming" status should be considered a "substantial change." So, proposed modification of a legal, non-conforming structure is subject to the same "substantial change" analysis as other structures. As such, any existing prohibition on expanding or modifying a non-conforming tower is no longer valid.

Based on this, cities should, at the very least, review their existing ordinance and ensure that they process 6409(a) applications pursuant to the requirements set forth in the Order. In addition, cities may wish to modify their ordinances to incorporate the Order. There are two ways to do this. First, cities can adopt a short section noting that qualifying applications will be processed pursuant to the requirements of Section 6409(a) and the Order. Second, cities can substantively incorporate the Order into their codes. The one issue to note with this approach is that cities should carefully draft their codes to ensure that they are not creating new local rights for carriers in the event that the Order is revised, repealed or invalidated.[48] In addition, drafters should ensure that the burden of asserting rights under Section 6409(a) are on the applicant so that staffers can review the application to ensure it qualifies.

2. CEQA Review Under 6409(a)

Cities should also consider what CEQA review will be required for new towers and base stations and for 6409(a) applications. As CEQA requires agencies to consider the "whole of the action,"[49] environmental review of any new towers or base stations cannot be limited to the proposed proportions of the facility. Rather, agencies should evaluate the facility, assuming it will be increased to the extent permitted by Section 6409(a). Cities that take this approach should ensure that they receive sufficient information from applicants to undertake this review. Under the Shot Clock, cities only have ten days to request additional information.

For Section 6409(a) applications, cities should determine whether and what CEQA review is required. In most cases, 6409(a) applications will not be subject to CEQA as ministerial actions (assuming the local ordinance make permit issuance ministerial) or may be categorically exempt from CEQA.[50] In the event that a 6409(a) application requires CEQA review, cities should be cognizant of the Shot Clock. Unless the applicant agrees to an extension, review must be completed within sixty days or the application will be deemed granted.

3. Utilize Proprietary Rights to the Extent Possible

Lastly, cities should ensure that they retain and utilize their proprietary rights to the extent possible. The Order expressly declined to restrict local agencies' authority over their own property. Based on this, cities are not required to approve modifications subject to Section 6409(a) on towers and base stations located on city property. The one potential exception to this is locations within the right-of-way. As discussed above, carriers with a CPUC-issued CPCN are likely entitled to access the right-of-way under Public Utilities Code sections 7901 and 7901.1.

For locations outside of the right-of-way, cities should review the applicable lease or license when they receive a request for a Section 6409(a) collocation. Unless the requested modification is within the scope of the carrier's rights under the agreement, the city could deny

[48] As noted above, a coalition of cities are currently challenging the Order in federal court.
[49] See 14 CCR § 15378.
[50] See, e.g., 14 CCR § 15301.

the request or condition its approval on the payment of additional rent or other concessions. City attorneys should ensure that staff members that regularly negotiate telecommunications license and similar agreements are aware of the city's proprietary rights and do not agree to a Section 6409(a) modification on the mistaken belief that cities do not have discretion to deny or condition the change.[51]

Conclusion

Section 6409(a) and the Order are the latest federal effort to encourage WCF deployment through restricting land use authority. However, in many ways, the Order is the most substantial interference to date. The Order creates an entire class of WCFs that are largely exempt from local discretionary authority. As such, cities should consider the impact and effect of the Order on their existing and future WCF ordinances.

[51] In the authors' experience, some carriers have been known to overstate the scope of Section 6409(a) and similar restrictions on local authority over WCFs.

FPPC Update

Wednesday, May 6, 2015 General Session; 3:15 – 4:50 p.m.

Shawn M. Mason, City Attorney, San Mateo

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Notes:

FPPC UPDATE- AMENDMENTS TO THE REGULATIONS

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INTRODUCTION

This paper provides an update on significant developments relating to the Political Reform Act of 1974 (California Government Code section 81000 et seq.) and the activities of the Fair Political Practices Commission ("FPPC") in interpreting and applying the Act. This update addresses developments from September 2014 through April 2015.

I. LEGISLATION

There were no amendments to the provisions of the Act concerning conflicts of interest, gifts, or disclosure of financial interests during the period covered by this paper.

II. AMENDMENTS TO THE FPPC REGULATIONS

Regulation 18940.2 Biennial Adjustment to Gift Limit

What has changed?:

The Act limits the value of gifts an official may receive from a single source within a calendar year. This amount is adjusted every two years to account for inflation. For the period of January 1, 2015 through December 31, 2016, the gift limit is $460.

This same figure is used to determine whether an official has an interest in a source of gifts that must be considered as a potential conflict of interest. If the official has received gifts valued at or above $460 during the 12 months preceding the date of the decision, the official will need to determine if it is reasonably foreseeable that the decision will have a material financial effect, distinguishable from the effect on the public generally, on the source of the gifts.

Significance:

City attorneys providing advice on gift questions or conflicts of interest involving financial effects on a source of gifts to an official should be aware that this threshold has been increased.

Regulation 18705 (Now 18702)[1]: Materiality Standards

What has changed:

The Act prohibits an official from participating in decisions that might have a *material* financial effect on their personal finances,[2] or on one or more of the official's defined interests. This regulation serves as the introduction to the series of regulations that set forth the standards for determining materiality for each of the financial interests identified in the Act. The regulation previously contained an exception that notwithstanding the application of the standards described in the regulations in the materiality series, the effects of a particular decision would not be deemed material, if the decision will have "no financial effect" on the official's interests. This was referred to as the "one penny" rule. This regulation has been revised to modify this exception. The regulation now provides that notwithstanding the application of the standards described in the materiality regulations, the effect will not be deemed material if the financial effect of the decision is "nominal, inconsequential, or insignificant."

Significance:

This amendment could have an important impact on conflict of interest analysis. The new rule suggests that a decision could have some financial impact on an official's interests without being considered material. This represents a departure from the strict, one penny rule. However, practitioners should exercise caution in applying this new standard. Until advice letters are issued in this area, it is uncertain the degree of financial effect the FPPC will consider to be "nominal, inconsequential, or insignificant."

Regulation 18705.1 (Now 18702.1): Materiality Standards- Interests in Business Entities

What has changed?:

The Act prohibits an official from participating in decisions that might have a *material* financial effect on their personal finances, or on one or more of the official's defined interests. These interests include business entities for which the official serves as an officer or employee, or

[1] When the amendments to this regulation were adopted, the regulation was placed in the series reflecting the 8-Step analytical approach. In February 2015, the FFPC implemented a new 4-Step approach. The regulations have been renumbered to reflect their placement in the 4-Step process.

[2] The term "personal finances" is used as shorthand in this paper. The Act provides that an official has a financial interest in decisions that affect the official, *or a member of his or her immediate family*.

entities in which the official has an investment worth $2,000 or more. FPPC regulations define those financial effects that are deemed *material.*

In November 2014, the FPPC adopted regulations that substantially amended the standards for determining when the financial effects on an official's business entity interests shall be considered material. Under the previous regulations, this determination involved a two-step process found in two regulations, Regulations 18704.1 and 18705.1. The first step was to determine whether the entity was directly involved in the decision. If it was, the effects of the decision on the entity were deemed material. If the entity was not directly involved in the decision, the regulations contained a sliding scale approach. That is, the scale of the financial effect that would be considered "material" would increase as the gross receipts of the business entity increased.

The new regulation eliminates the first step of determining whether the entity is directly involved in the decision, and eliminates the sliding scale approach. The new regulation imports the standards previously used to determine if the entity was directly involved in the decision, and restates the presumption of materiality if these circumstances are present. The new regulation also replaces the sliding scale approach with a qualitative standard. The new regulation provides that if the business entity is not the subject of the governmental decision or the contracting party, the effect of the decision will be considered 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 price of the business entity's publicly traded stock, or to the value of a privately-held business entity." The regulation goes on to provide examples of effects of decisions that may contribute to a change in the value of the business entity or its stock.

<u>Significance</u>:

While the new regulation will not result in a different conclusion in cases where the business entity in which the official has an interest is the subject of the governmental decision, the approach has substantially changed when this is not the case. City attorneys must now apply a qualitative "prudent person" standard for determining whether impacts of the decision on an official's business entity interests will be material. While, the list of illustrative effects may assist in the application of this standard, practitioners should carefully consider giving advice on this regulation without seeking FPPC advice.

Regulations 18705.3, 18705.4, and 18705.5 (Now 18702.3, 18702.4, and 18702.5): Materiality Standards- Sources of Income, Sources of Gift, and Personal Finances

<u>What has changed</u>?:

The Act prohibits an official from participating in decisions that might have a *material* financial effect on their personal finances, or on one or more of the official's defined interests. These

interests include sources of income to the official, sources of gifts to the official, and the official's personal finances. In January 2015, the FPPC adopted regulations that significantly altered the standards for determining when the effects of decisions on these interests will be considered material.

Determining the materiality of the effects on these interests previously involved a two-step process. The first step was to determine whether the interests were directly involved in the governmental decision. If the interests were directly involved, the financial effects of the decision were deemed material, unless it could be shown the decision would have no financial effect on the interests. The FPPC has repealed regulation 18704, eliminating this first step. The Commission has adopted regulations that establish new materiality standards for financial effects on sources of income to the official, sources of gifts to the official, and on the official's personal finances.

Sources of Income ***Regulation 18705.3 (Now 18702.3)***

The previous regulation contained a three part test for determining whether the effects of a decision on a source of income to the official would be considered "material." The first part applied if the source was the subject of, or a party to, the governmental decision. If it was, the effects of the decision were presumed to be material. This presumption could be rebutted if it could be shown the decision would have no financial effect on the source.

The second part of the test applied if the source was not the subject of, or a party to, the governmental decision. This test contained three subparts tied to the nature of the source. If the source was a business entity, the regulation incorporated the standards for determining materiality when a business entity is indirectly involved in the decision. If the source was a nonprofit entity (including a governmental agency), the regulation set out a sliding scale test for determining materiality that was tied to the gross receipts of the entity. If the source was an individual, the effects of the decision would be deemed material, if the decision would affect the official's income, assets, or liabilities (excluding real property interests) by $1,000 or more. If the decision affected the source's interest in real property, one would apply the real property materiality standard.

The final part of the test involved the "nexus" provision. Under this provision, a financial effect on a source of income to the official is deemed material if "…the public official receives or is promised the income to achieve a goal or purpose which would be achieved, defeated, aided, or hindered by the decision."

The regulation for determining whether effects on a source of income will be considered material has been substantially revised. The initial focus of the new regulation is on the nature of the transaction that gave rise to the income. If the transaction involves the sale of goods or services (including one's labor), one applies the provisions of subdivision (a). If the transaction

involves the sale of the official's own personal or real property, the provisions of subdivision (b) apply.

Subdivision (a) contains four subparts for determining whether the financial effects of a decision on a source of income when the transaction involves the sale of goods or services. First, any effects are presumed material if the source is the subject of, or a party to, the governmental decision. Second, if the source is an individual the personal finances materiality standard is applied to the source. Also, if the official has reason to know that the individual source has an interest in a business entity, or real property that might be affected by the decision, the business entity and/ or real property materiality standard is to be applied to those interests. Third, if the source of income is a nonprofit, any effect on the nonprofit shall be deemed material if the decision could result in a "measureable benefit or loss" to the nonprofit. Also, if the official has reason to know that the nonprofit source has an interest in real property that might be affected by the decision, the real property materiality standard is to be applied to that interest. Finally, if the source of income to the official is a business entity, the business entity materiality standard is to be applied.

Subdivision (b) contains a new test to apply if the source of income is the purchaser of the official's own personal or real property. Under these circumstances, the effects of the decision on the purchaser will be deemed material if the official has reason to know (1) that the purchaser is the subject of, or a party to, the governmental decision, or (2) that the purchaser has an interest in a business entity or real property that could be affected by the decision, and the effect would be deemed material under the business entity or real property materiality standard.

Subdivision (c) restates the nexus provision without change. When staff presented the new materiality standards they expressed an interest in revising and/or eliminating the nexus rule. However, staff deferred any modification to this provision to allow additional study.

Subdivision (d) contains an exception to the materiality standard when the official's income is received from retail sales of a business entity. Government Code section 87103.5 provides an exception to the source of income rule when the source of income is "…a retail customer of a business entity engaged in retail sales of goods or services to the public generally." Under these circumstances, the customer "… is not a source of income to an official who owns a 10-percent or greater interest in the entity if the retail customers of the business entity constitute a significant segment of the public generally, and the amount of income received by the business entity from the customer is not distinguishable from the amount of income received from its other retail customers."

The FPPC had previously adopted a complicated set of rules defining the key terms in this statute that were located in the series of regulations under the "public generally" heading. The Commission approved the relocation of this provision to the regulation on sources of income as it is an exception to that regulation. In addition, the new regulation contains a simplified test.

Under this new provision the retail customers shall be considered a significant segment of the public generally, if "the business is open to the public and the customers comprise a broad base of persons representative of the jurisdiction as a whole and not confined to any specialized occupation, profession, or business." Income from customers shall be considered indistinguishable from income from other customers if "(1) the business is of the type that sales to any one customer will not have a significant impact on the business's annual net sales", or (2) the business has no records (or other information) that distinguish customers by amount of sales.

Sources of Gifts ***Regulation 18705.4 (Regulation 18702.4)***

The previous regulation contained a two part test for determining whether the effects of a decision on a source of gifts to the official would be considered "material." The first part applied if the source was the subject of the governmental decision. If it was, the effects of the decision were presumed to be material. This presumption could be rebutted if it could be shown the decision would have no financial effect on the source.

The second part of the test applied if the source was not the subject of, or a party to, the governmental decision. This test contained three subparts tied to the nature of the source. If the source was a business entity, the regulation incorporated the standards for determining materiality when a business entity is indirectly involved in the decision. If the source was a nonprofit entity (including a governmental agency), the regulation set out a sliding scale test for determining materiality that was tied to the gross receipts of the entity. If the source was an individual, the effects of the decision would be deemed material, if the decision would affect the official's income, assets, or liabilities (excluding real property interests) by $1,000 or more. If the decision affected the source's interest in real property, one would apply the real property materiality standard.

The previous regulation has been replaced by a new one containing four subdivisions. Under subdivision (a) any effects are presumed material if the source is the subject of, or a party to, the governmental decision. Under subdivision (b), if the source is an individual, the personal finances materiality standard is applied. Also, if the official has reason to know that the individual source has an interest in a business entity, or real property that might be affected by the decision, the business entity and/ or real property materiality standard is to be applied to those interests. Under subdivision (c), if the source of income is a nonprofit, any effect on the nonprofit shall be deemed material if the decision could result in a "measureable benefit or loss" to the nonprofit. Also, if the official has reason to know that the nonprofit source has an interest in real property that might be affected by the decision, the real property materiality standard is to be applied to that interest. Finally, under subdivision (d), if the source of income to the official is a business entity, the business entity materiality standard is to be applied.

Personal Finances ***Regulation 18705.5 (Now 18702.5)***

The Act prohibits public officials from participating in decisions that would financially affect them or members of their immediate family. A decision that would financially effect an official, but that would not affect one of the interests described in Government Code Section 87103 (i.e. interest in real property, or a business entity) is referred to in the regulations as an effect on the official's "personal finances."

The previous regulation established a general rule that an effect on an official's personal finances would be considered material, if it would have an effect of $250 or more during any 12 month period. The regulation included an exception that would allow the official to participate in decisions that might affect their (or their immediate family member's) salary or reimbursement they receive from a government agency, so long as the decision did not involve the hiring, firing, or discipline of the official or their family member. The regulation also allowed public officials to participate in decisions to appoint themselves to positions of the body on which they serve (i.e. mayor), or to a joint powers authority board, so long as information about the appointment was posted on the agency's website.

The new regulation eliminates the $250 standard, and replaces it with a qualitative standard. Now, the effects of a decision on an official's personal finances will be deemed material, if "…the official or the official's immediate family member will receive a measureable financial benefit or loss from the decision." The new regulation has carried over the exceptions allowing officials to participating in decisions affecting salary and reimbursements, and in decisions to appoint themselves to certain public positions. The regulation has clarified that decisions to use city vehicles, cellphones, or other equipment to perform public duties will not be deemed to affect the official's personal finances. In addition, the regulation provides that an official may accept membership rewards when the official uses their personal charge card as long as the rewards are provided to the public on the same terms, and the charges are for the official's approved travel expenses. Finally, the new regulation makes clear that if a decision affects an official's interest in a business entity or real property, those standards are applied to determine whether the decision will have a material effect on the official. The official need not also apply the personal finances test to determine whether the decision will have a material financial effect on the official.

<u>Significance</u>:

The materiality standards that apply to financial impacts on sources of income, sources of gifts, and the official's personal finances have been revised in the same manner as the standards applicable to impacts on real property and business entities. The prior regulations' attempt to set objective, quantitative standards have been replaced by qualitative, "you know it when you see it" standards. For city attorneys seeking to advise their city official clients this can be unsettling, especially considering there is little guidance on how these standards will be applied. It is recommended that city attorneys pay close attention to FPPC advice letters

(searchable on the FPPC's website, www.fppc.ca.gov) on the application of these new standards.

Regulations 18700 et seq.: The New 4-Step Process for Analyzing Conflict of Interest Questions

What has changed?:

In April 2013, the Commission approved a revised 4-step analytical process to replace the longstanding 8- Step approach. However, the regulations codifying this new approach were delayed to allow time for the development of revised regulations to clarify the standards to be described in the new steps. The Commission has approved a revised definition of "reasonably foreseeable," and in January 2015, approved the last regulations defining "materiality" for the various interests identified in the Act. In February 2015, staff notified the Commission that the new 4-step approach will be implemented, and the new approach is now in effect.

Significance:

The 8-step process for analyzing conflict of interest questions so familiar to practitioners in this area has been repealed. In its place the FPPC has adopted a 4-Step approach. Some of the preliminary steps in the 8-step approach are now matters of definition. The new approach asks:

Step 1: Will the decision result in "reasonably foreseeable" financial effects?

Step 2: If yes, are those effects "material"?

Step 3: If there are reasonably foreseeable, material effects, are they the same as effects on the "public generally"?

Step 4: If the effects are not the same as the effects on the public generally, will the official be "making, participating in the making of, or using their position to influence," the decision that will cause those effects?

City attorneys providing conflict of interest advice to city officials must become familiar with this new approach, and the new standards that are applied to answer these questions.

III. REGULATION CLARIFICATION PROJECT

FPPC staff continues to work on the project to improve and clarify the FPPC regulations. The Commission has adopted regulations replacing the 8-step analytical process with the 4-step process. The Commission has adopted the regulations defining reasonable foreseeability (Step 1) and "materiality" (Step 2). Commission staff intends to present regulations relating to the question of when the effects of a decision on the official's interests are indistinguishable from the effect on the "public generally" in April. The staff's plan is to then propose regulations clarifying when an official is "making, participating in the making of, or using their official position to influence" a government decision, along with some overall clean up items on the conflict of interest regulations.

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City Attorney's Office

memorandum

To: City Council
Boards and Commissions

c. City Manager
City Clerk
Commission Secretaries

From: Scott Rennie, City Attorney

Dated: November 5, 2014

Re: Changes to FPPC Conflict of Interest Rules for Real Property

Earlier this year, the Fair Political Practices Commission (FPPC) adopted amendments to the agency's regulations that significantly change the approach for determining if an official's real property interests disqualify the official from participating in a government decision. Those changes are now in effect. This memo summarizes and explains the changes. Please feel free to call or stop by if you have any questions or need help understanding the conflict of interest rules.

The real property regulations were previously found in California Code of Regulations Title 2, Sections 18704.2 and 18705.2. The new regulations repeal section 18704.2 and consolidate the rules in 18705.2. The regulations can be found on the FPPC website, www.fppc.ca.gov.

The Basic Conflict of Interest Rule is Unchanged

The FPPC regulations implement the Political Reform Act which establishes the basic financial conflict of interest rule for public officials. This basic rule has not changed. What has changed is how the rule is applied to real property interests. Here is the basic rule:

> No public official at any level of state or local government may make, participate in making or in any way use or attempt to use his/her official position to influence a governmental decision in which he/she knows or has reason to know he/she has a disqualifying conflict of interest.
>
> A public official has a conflict of interest if the decision will have a reasonably foreseeable material financial effect on one or more of his/her economic interests, unless the public official can establish either: (1) that the effect is indistinguishable from the effect on the public generally, or (2) a public official's participation is legally required.

The New Real Property Rules

The 500 Foot Rule

The new regulations significantly modify the 500 foot rule. The 500 foot rule is broken into two categories: (1) where the official's property is located *within* 500 feet of property that is the

subject of a governmental decision, and (2) where the official's property is located *more than* 500 feet of property that is the subject of a governmental decision. The changes to the 500 foot rule affect both categories.

"Within 500 Feet"

Old Rule. Under the previous regulations, if the official's property was located within 500 feet of property that was the subject of a governmental decision, the financial impacts of the decision on the official's property were presumed to be material. However, this presumption could be rebutted if facts show that the decision would not have any impact on the value of the official's property. This "any impact on value" test was known as the "one penny rule."

New Rule. The 500 foot presumption and the one penny rule were carried over in the new regulation; however, an important procedural requirement was added. Before, an official who believed a decision would have no impact on the value of their property could simply act on the matter. Now, an official whose property (other than leasehold) is located within 500 feet of property that is the subject of a governmental decision 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.

The Take Away: If you own property within 500 feet of the property that is the subject of a government decision, you must have FPPC clearance before you can participate in the decision.

"More than 500 feet"

Old Rule. Under the previous regulations, if the official's property was located more than 500 feet from property that was the subject of the decision, the financial impacts of the decision on the official's property were presumed to be not material unless special circumstances listed in the regulation applied. In practice this meant that officials generally did not have to be mindful of financial conflicts when their property was located more than 500 feet away.

New Rule. The new regulation adds a significant catch all standard for real property other than leaseholds. Now, even if the official's property is not the subject of the decision, or is located well beyond 500 feet from the subject property, 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."

In addition to the new catch all standard, the regulation incorporates several more specific standards. However, the circumstances that would trigger these specific standards would also trigger the catch-all standard.

The new rule both lowers and obscures the threshold for a material conflict. As a result, officials will need to be more vigilant in considering whether they have a disqualifying conflict, and should anticipate needing to seek advice from the FPPC more frequently. On the bright side, the

new rules did not change the "public generally exception". As a practical matter, officials may find it easier to assume a material conflict exists whenever it is not clear that a conflict does not exist, and focus on whether this exception applies.

The Take Away: You should not assume that you do not have a conflict simply because your property is more than 500 feet away; rather, you must apply the "reasonably prudent person" test before participating in a government decision that could possibly influence the value of your property (other than leaseholds).

Business Properties

Old Rule. Under the previous regulations, if a business entity in which the official had an interest occupied the official's real property, the effects of the governmental decision on the property and the business were both considered.

New Rule. Under the new regulation, the effects of the decision on the official's real property interest are not considered when the decision involves the issuance of a permit or entitlement, or when one is considering the impact of the decision on the income producing potential of the property. When applying those factors, only the impacts on the official's business entity interest are considered.

The Take Away: If you have an interest in both real property and a business entity occupying that real property, in some circumstances you may not have to consider the effect of the decision on the real property.

Leasehold Interests

Old Rule. Under the previous regulations, the 500 foot rule determined whether materiality would be presumed, and then a number of factors specific to leases determined whether the presumption could be rebutted.

New Rule. The new regulations eliminate the 500 foot rule for leases and the presumptions associated with it. Instead, one simply considers the factors, which are whether the 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) Change the official's actual or legally allowable use of the real property;
(5) Impact the official's use and enjoyment of the real property.

The Take Away: You should not assume that you do or do not have a conflict simply because your leasehold is more or less than 500 feet away; instead, you must consider the listed factors to determine if you have a conflict.

Interests in Common Area

Old Rule. Under the previous regulations, no special consideration was given to an official's undivided interest in common area in a common interest development. This had the effect of raising doubts about whether an official could participate in a decision in which common area was located within 500 feet of a subject property, even if the official's unit was located well beyond 500 feet.

New Rule. The new regulation eliminates this problem by redefining the term "real property in which an official has an interest" to exclude an official's undivided interest in common area.

The Take Away: Common areas are not considered your real property for purposes of the conflict of interest rules.

What Public Officials Must Do

Be Proactive

Compliance with the state's conflict of interest rules is the personal responsibility of individual public officials. Unfortunately, the only thing obvious about the rules is that they are not easy to understand or apply. Moreover, a public official's failure to comply with the regulations exposes the official to criminal and civil sanctions. Public officials must therefore be proactive in spotting potential financial conflicts of interest and timely seeking help as needed to determine if a conflict exists.

Contact the City Attorney's Office

As a City of Belmont elected or appointed official, if you think that you may have a conflict, you should contact the City Attorney's office as described in the City's Code of Ethics and Conduct. The City Attorney's office will assist you in analyzing the conflict and determining if you need to seek advice from the FPPC. Please take note that the City Attorney's assistance provides no immunity from civil or criminal liability. Only good faith reliance on FPPC opinions can protect you in that regard (Gov't Code Section 83114) which is why it is so important for you to obtain clearance directly from FPPC that resolves any uncertainty as to whether you may participate in a government decision before participating.

Planning Commissioners and City Councilmembers: If you determine to recuse yourself because you have a conflict without consulting the City Attorney's Office, please remember that you must disclose the conflict, and certain details about it, at the meeting as noted below. The City Attorney's Office can assist you with the details that need to be disclosed.

Disclosure at the Meeting – Only Applies to City Councilmembers and Planning Commissioners

Under the Political Reform Act, City Councilmembers and Planning Commissioners who have a financial conflict of interest that disqualifies them from participating in a matter, must:

- immediately before the matter is considered, publicly disclose the conflict including certain details,
- recuse themselves from discussing and voting on the matter, and
- leave the room until the matter is concluded unless the matter is on consent.

  An exception to this rule allows the official to remain in the room, after disclosing the conflict and recusing him or herself, to speak as a member of the public on a matter which is related to his or her personal interests, as defined by regulation Section 18702.4.

For real property interests, the official must disclose the address or another indication of the location of the property, unless the property is the official's principal or personal residence, in which case, identification that the property is a residence.

* * *

Lastly, please remember that because the City Attorney's client is the City as an entity, and not individual public officials, the City Attorney's assistance to you on conflict of interest matters does <u>not</u> create an attorney-client relationship between you and the City Attorney, and communications between you and the City Attorney on these matters are not privileged or confidential.

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Massage Regulation And Restoration Of Local Land Use Authority Under AB 1147

Wednesday, May 6, 2015 General Session; 3:15 – 4:50 p.m.

Natalie C. Karpeles, Deputy City Attorney, Lomita, Malibu and Palos Verdes Estates
Patrick Q. Sullivan, Assistant City Attorney, Torrance

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Massage Regulation and Restoration of Local Land Use Authority Under AB 1147

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Massage Regulation and Restoration of Local Land Use Authority Under AB 1147

By Natalie C. Karpeles

According to data collected in 2014, massage therapy is an 11.7 billion dollar industry[1] with an estimated 300,000 – 350,000 therapists and massage school students throughout the United States[2]. The number of massage therapists in California alone is estimated to be around 41,645; the highest overall in the country[3]. With the projected number of massage therapists estimated to steadily increase[4], the need for space within which to practice[5] will necessarily increase as well; with this growing realization, many cities are grappling with the decisions surrounding lawful and effective means of regulation, while concerned that certain of these establishments can shelter criminal activity.

Enter AB 1147, a legislative victory on behalf of cities and counties throughout California that restores and reconfirms local land use authority to regulate massage establishments or operations while retaining the State's role in certifying massage professionals and approving massage schools. However, beneath AB 1147's exterior lays an important caveat: "abuse it and you may lose it."

Below is a discussion of recently-enacted AB 1147, as well as suggestions for its implementation.

[1] IBISWorld, *IBISWorld Industry Report OD6028 Massage Services*, January 2014, on the Internet at https://d3qw6hv0dhy8ej.cloudfront.net/public/images/player_swf/player_pr304224_anim.swf (visited March 4, 2015).
[2] IBISWorld, *IBISWorld Industry Report OD6028 Massage Services*, January 2014, on the Internet at https://d3qw6hv0dhy8ej.cloudfront.net/public/images/player_swf/player_pr304224_anim.swf (visited March 4, 2015).
[3] Associated Bodywork & Massage Professionals, *AMBP Releases New Data on Massage Therapist Population*, Posted on April 23, 2010, on the Internet at http://www.abmp.com/news/abmp-releases-new-data-on-massage-therapist-population/ (visited March 4, 2015).
[4] As reported by the U.S. Department of Labor in 2012, employment of massage therapists is expected to increase 23 percent from 2012 to 2022, faster than average for all occupations. Bureau of Labor Statistics, U.S. Department of Labor, *Occupational Outlook Handbook, 2014-15 Edition*, Massage Therapists, on the Internet at http://www.bls.gov/ooh/healthcare/massage-therapists.htm (visited March 4, 2015).
[5] While massage therapists work in a variety of environments, 36 percent of all massage therapists work at their office, 25 percent in a health care setting, and 28 percent in a spa setting. American Massage Therapy Association, *Massage Profession Research Report 2014*, on the Internet at http://www.amtamassage.org/uploads/cms/documents/2014_mprr_schools_version.pdf (visited March 4, 2015).

I. A Brief History of Massage Regulation.

For years the Legislature has oscillated over how much local regulatory authority local governments should have to combat global issues (such as human trafficking) and more local enforcement issues (such as prostitution, nuisances, and other public safety issues) associated with the proliferation of massage businesses. Prior to 2009, the State of California did not uniformly regulate massage businesses or massage professionals; rather, local jurisdictions combatted illegitimate massage practices through the enactment and enforcement of vastly differing vice ordinances.[6] Proponents of the massage industry felt that these ordinances were unnecessarily harsh, and in an effort to establish uniform state regulation, SB 731 was (eventually) born[7].

SB 731 (Oropeza) (Chapter 384, Statutes of 2008) was the first in a series of enactments aimed at devising uniform state and local regulation of massage businesses and massage professionals. Otherwise known as the Massage Therapy Act, SB 731 created the Massage Therapy Organization[8], and established limitations on the power of cities and counties to regulate massage professionals, such as exempting certified massage therapists from municipal requirements to obtain a license, permit, or authorization prior to practicing within local jurisdictions. Subsequent amendments to SB 731 cemented local inability to effectively regulate these establishments. For instance, in 2011 AB 619 provided that the only manner in which local government could exercise traditional land use restrictions on an individual certified by CAMTC or an establishment certifying CAMTC certified practitioners was if those same regulations were placed upon all other individuals and businesses providing "professional services" (as defined in *California Corporations Code* § 13401(a)).

In 2012, the Legislature passed SB 1238 (Price) (Chapter 655, Statutes of 2012). The new law expanded upon AB 619 by adding additional requirements to school credit hours and the examination and training requirements for purposes of certification; the grounds for suspension, denial or revocation of certification of the certificate holder; the sharing of information between local law enforcement and CAMTC; the responsibility of owner/operators of massage businesses for conduct of employees or their independent contractors and background checks of owner/operators; and the ability of local government to restrict the operation of massage businesses involved in prior criminal activity. Although the enactment of these laws served to achieve consistency in the application of rules and regulations with respect

[6] *See* Cal. Gov't Code Section 51030 *et seq*.

[7] As early as 1991, the California chapter of the American Massage Therapy Association (AMTA-CA) focused its efforts on proposing uniform statewide regulation; these efforts culminated in the proposition of AB 421 in 2005-2006. Despite the failure of SB 421, the AMTA-CA renewed its efforts by subsequently sponsoring AB 731 in 2008.

[8] In 2011, AB 619 (Halderman) (Chapter 162, Statutes of 2011) renamed the Massage Therapy Organization the California Massage Therapy Council (CAMTC).

to businesses and individuals involved in the massage therapy field, they also served to help shield the illegitimate manipulation of this industry from local regulation and control.

As early as 2010, many cities and counties throughout the State reported a substantial increase in the number of massage establishments within their respective jurisdictions, while law enforcement agencies reported increased complaints concerning prostitution and human trafficking. Incidentally, local communities reported other problems, such as:

- Reports of incomplete and inaccurate employee databases;
- Establishments that untruthfully promoted themselves as only hiring certified practitioners in an attempt to forestall local regulation;
- Establishments that hid behind their certified employees' indiscretions[9] (thereby continuing to operate while the individual masseur or masseuse may or may not have been reprimanded);
- Communication issues between the CAMTC and local law enforcement;
- Complaints that the CAMTC appeared to be more focused on protecting the interests of the industry than on proper regulation of the massage industry[10]; and
- Impediments to local enforcement since cities and counties were compelled to treat massage businesses and professionals the same as every other professional business, regardless of fact that most professional businesses are significantly dissimilar to the massage industry.

In anticipation of the sunset of SB 731, the Senate Business, Professions and Economic Development Committee, along with the Assembly Business, Professions and Consumer Protection Committees, documented the problems and recommendations associated with the regulation of the massage industry; these were discussed at a joint oversight hearing in March of 2014. This report and hearing led to the introduction of AB 1147.

II. AB 1147 – Back to the Future?

AB 1147 went into effect on January 1, 2015. Generally, by dividing responsibility for massage regulation between the State (regulating the certification of massage professionals[11]

[9] Sting operations cost law enforcement overtime and yield little benefit; after following cases through the legal system most arrests for prostitution were plead down to minor misdemeanor offenses such as disorderly conduct (a conviction for which CAMTC will not revoke a practitioner's license).
[10] At the time, the CAMTC board consisted almost entirely of massage practitioners, massage association representatives, and representatives from massage schools.
[11] Note that pre and post-AB 1147 there is no distinction in the rights and privileges afforded to Certified Massage Technicians, Certified Massage Practitioners or Conditionally Certified Massage Practitioners; all are certificate holders and subject to protections in *California Business & Professions Code* §§ 460, and 4600-4621, and *California Government Code* § 51034.

though the CAMTC) and local governments (regulating massage businesses through their regulatory and land-use authority), AB 1147 closed the gap in existing law.

In essence AB 1147:

- Reconstitutes the CAMTC board of directors with a broader representation of stakeholders; including adding a representative from the California Police Chiefs Association, a member from an anti-human trafficking organization, a city attorney, and a public health official (*see California Business and Professions Code* § 4602). The new board will become effective on September 15, 2015;
- Discontinues the issuance of new massage practitioner certificates after January 1, 2015, except as provided, but authorizes the renewal of massage practitioner certificates issued prior to January 1, 2015 (*see Bus. & Prof. Code* § 4604.1); said certificates will be renewable every 2 years (*see Bus. & Prof. Code* § 4605);
- Sets new education requirements in order to obtain CAMTC certification (*see Bus. & Prof. Code* §§ 4604 and 4604.2) and permits CAMTC to investigate schools offering massage degrees (*see Bus. & Prof. Code* § 4615);
- Allows CAMTC to regulate individuals within the massage industry by performing background checks on applicants (*see Bus. & Prof. Code* § 4606) and disciplining an owner of a business for the unlawful conduct of his or her employees (*see Bus. & Prof. Code* § 4607);
- Returns local land use authority to cities and counties by authorizing local governments to require conditional use permits, regulate hours of operation and more; cities and counties may now adopt or enforce local ordinances that govern zoning, business licensing, or reasonable health and safety requirements for establishments or businesses (*see Bus. & Prof. Code* §§ 460, 4600.5, & 4612[12]);
- Requires the revocation of certificates for registered sex offenders and the denial of a certificate for registered sex offenders or persons who engage in unprofessional conduct, including, but not limited to "engaging in sexually suggestive advertising related to massage services and engaging in sexual activity while providing massage services for compensation" (*see Bus. & Prof. Code* §§ 4603, 4609, and 4610); and
- Allows the court to issue an injunction or provide any other relief it deems appropriate for a violation of the provisions outlined in Business and Professions Code sections 4600, et seq. (*see Bus. & Prof. Code* § 4617).

[12] However, see also Government Code § 51034, which recognizes the following grants of authority to cities and counties: (a) Land use and business regulations adopted pursuant to "police power" (Article XI, section 7 of Constitution); (b) Local business regulations (*Gov. Code* § 37100); (c) Local business regulations (*Bus. & Prof. Code* §§ 16000 & 16100); and (d) Land use and business regulations (*Bus. & Prof. Code* § 460(b)).

The following table should help demonstrate some of the benefits cities can now expect to take advantage of under AB 1147:

AB 1147
Cities may now require a business owner (including independent contractors and sole providers) to submit a list of all employees and independent contractors, their certification status, and to notify the local government if and when this information changes.
Cities may set a reasonable cap on establishments and may also use zoning regulations to restrict the location of massage businesses; these regulations may include the prohibition of a massage business from opening in the same location as a previous massage business with illegal activity (so long as there is a reasonable basis for this regulation), and prohibition of a massage business from transferring owners without notice and consent from the local government.[13]
In order to regulate businesses that provide massage services, cities may require owners (including independent contractors and sole providers) to provide a current listing of their employees, their CAMTC certification, and other relevant information; note that AB 1147 does not affect the authority of a city to regulate massage therapists who do not have CAMTC certificates, or massage businesses that employ therapists who do not have CAMTC certificates.
Cities may impose land use regulations on massage businesses that are different than those imposed on other professional services; this includes, but is not limited to, regulating hours of operation, prohibiting contraceptives on the premises, and holding inspections.
Establishes a new CAMTC board of directors so that it more fairly represents stakeholders; including adding a representative from the California Police Chiefs Association and a representative from an anti-human trafficking organization, a city attorney, and a public health official (*see* B & P 4602).

[13] See generally the FAQs on AB 1147 Implementation, League of California Cities, available at http://www.cacities.org/Policy-Advocacy/Hot-Issues/Massage-Regulation.

As earlier indicated, a city's local land-use authority under AB 1147 is not without limitation. Specifically, local governments may not:

- Prohibit a person of one sex from engaging in the massage of a person of the other sex (*see California Government Code* § 51034(c)(1));
- Define a massage establishment as an adult entertainment business, or otherwise regulate a massage establishment as adult entertainment (*see Gov. Code* § 51034(c)(2));
- Require a massage establishment to have windows or walls that do not extend from floor to ceiling or have other internal physical structures (such as windows) that interfere with a client's privacy (*see Gov. Code* § 51034(c)(3))[14] ;
- Impose client draping requirements or otherwise require clients to wear special clothing (*see Gov. Code* § 51034(c)(4));
- Prohibit a massage establishment from locking its external doors if the business is owned by one individual ***with one or no employees*** (*see Gov. Code* § 51034(c)(5), emphasis added)[15] ;
- Require a massage establishment to post any notice in an area that may be viewed by clients that contains explicit sexual language (*see Gov. Code* § 51034(c)(6));
- Require a person certified by the CAMTC to take any test, medical examination or background check (*see Gov. Code* § 51034(c)(7))[16];
- Require a person certified by the CAMTC to get a license, permit, or other authorization to provide massage, ***unless that person is a business owner*** (*see Gov. Code* § 51034(c)(8), emphasis added)[17];

[14] Note, however, that local governments may require these establishments to maintain certain physical improvements, such as transparent exterior windows. A complete list of physical improvements that may not be required are specified in *Gov. Code* § 51034.

[15] What this means is that a massage establishment with more than one employee can be prohibited from locking their doors during business hours; the thought process behind this provision is that the business should be able to protect itself from crime or unwanted activity when only one masseur is on the premises and otherwise engaged in performing massage therapy.

[16] This provision requires some clarification; when read in conjunction with *Gov. Code* § 51034(c)(8), these provisions indicate that a city may require a massage business owner, including a sole provider or independent contractor, who is certified by the CAMTC to undergo a background check in order to obtain a business license, permit, or other authorization to provide massage. Said another way, business owners must comply with the local business and land use requirements of the jurisdiction where they choose to operate. These requirements may include providing fingerprints and submitting to a background check, regardless of certification with the CAMTC. Understandably, the CAMTC takes issue with this interpretation. Bear in mind that in order to obtain certification with the CAMTC an applicant's fingerprints are submitted to the Department of Justice and the Federal Bureau of Investigation; this information is then cross-referenced against the organizations' database and notification related to any state and federal criminal offenses is provided to the CAMTC. (*See Bus. & Prof. Code* § 4606.) For this reason, rather than attempting to duplicate this stringent process, it may be more economical to simply require every practitioner certified by the CAMTC to provide proof of certification and proof that a CAMTC background check has been completed in order to obtain a local business license.

[17] *See* footnote 16.

- Impose a dress code ***stricter*** than that imposed by AB 1147 (*see Gov. Code* § 51034(c)(9), emphasis added); or
- Prohibit massage techniques permitted by the CAMTC (*see Gov. Code* § 51034(c)(10)).

III. An Examination of the Practical Applications of AB 1147.

In the wake of AB 1147, local governments have begun to evaluate and consider clear, legally consistent, and uniform regulations pertaining to the establishment, operation, and location of massage businesses. For instance, many cities and counties have adopted urgency ordinances enacting moratoriums[18] on massage establishments in order to provide local governments with enough time to evaluate local enforcement concerns with AB 1147's newly conferred authority. Of these municipalities, a small number of cities have actually refined and updated their existing massage ordinances; an examination of some practical applications of AB 1147 is provided below, with particular attention paid to the City of Lomita's recently amended massage ordinance[19].

A. Proposed Business License Restrictions:

In general, Lomita's ordinance focuses on expanding and clarifying the procedural, operating, inspection and interest requirements for new and existing massage businesses under its business license ordinance.

i. Procedural Requirements:

First and foremost, massage establishments cannot operate within Lomita without a "City Registration Certificate" and proof that employees are state-certified massage practitioners. Like other cities, Lomita has included a stringent application process that requires, among other things, a business owner's contact information; massage license, registration and employment history; proof of certification with the CAMTC or, if uncertified, a fingerprint sample; and a current list of employees, their contact information, and proof of certification with the CAMTC. Specifically, Lomita also requires the applicant to provide proof of current and valid Workers' Compensation insurance. Cities such as Pleasant Hill and Escondido have included within their application process a requirement that applicants register with local law enforcement[20] and even place the final decision on whether a permit should be issued in the hands of the Police Chief[21].

[18] *See* Cal. Government Code Section 65858.
[19] The complete text of Title VI, Chapter 8, of the City of Lomita's Municipal Code dealing with Massage Businesses and Practitioners, which can be found under the Ordinances tab on the League's website at http://www.cacities.org/Policy-Advocacy/Hot-Issues/Massage-Regulation.
[20] *See* Ordinance number 885 of the City of Pleasant Hill amending Pleasant Hill Municipal Code Chapter 6.30, Massage Establishments and Therapists, which can be found under the Ordinances tab on the League's website at http://www.cacities.org/Policy-Advocacy/Hot-Issues/Massage-Regulation. *Also see* Ordinance number 2015-01R of

These requirements are meant to facilitate complete and accurate employee databases; they also create a mechanism for Lomita to ensure that only individuals certified with the CAMTC are practicing within the City. Lastly, the requirement that business owners maintain Workers' Compensation insurance serves a dual purpose. For one thing, it ensures that employees are property cared for; for another, the high cost of obtaining and maintaining valid Workers' Compensation is costly and therefore may help to discourage illegitimate establishments from incorporating within the City.

In addition to other cities, Lomita has shortened the duration within which a City Registration Certificate is valid (one year), and has set specific circumstances under which an application may be denied, such as the existence of outstanding fines or citations; if the applicant makes misrepresentations on the application; engages in disqualifying criminal conduct; or has had a massage license revoked in the past. Specifically, if Lomita denies or revokes a City Registration Certificate, the businesses shall immediately cease operation and the City's community development director may order that no other massage business operate at that same location for one year. Likewise, if an application is denied due to criminal activity, the City will not accept reapplication for a massage business at the same location for one year.

ii. Operating Requirements:

Lomita has, among other things, established acceptable operating hours for massage businesses; mandated that the owner shall be responsible for violations committed by employees, including independent contractors; reaffirmed employee dress-code and client-draping requirements; prohibited establishments from both locking their external doors during hours of operation (subject to exception), and blocking or shading external windows; and has prescribed strict record-keeping requirements related to services provided to patrons of the business as well as employee shift information. These requirements are similar to the requirements adopted by other cities in light of AB 1147.

iii. Inspection Requirements:

The City of Lomita requires that an inspection of the premises be conducted before the City Registration Certificate is issued; this is meant to ensure that the business meets all operating, facility and existing zoning requirements prior to certification. Additionally, establishments within the City are required to provide notice to consumers that City-inspections may be conducted at any time in order to ensure compliance.

the City of Escondido repealing and replacing, among other things, Escondido Municipal Code Chapter 16A, which can be found under the Ordinances tab on the League's website at http://www.cacities.org/Policy-Advocacy/Hot-Issues/Massage-Regulation.

[21] *See* Pleasant Hill's ordinance.

iv. Ownership Requirements:

The massage business must operate under the name listed on the registration certificate; if a massage business changes its name, ownership or location, the owner must report such changes to the City and in some instances, apply for a new City Registration Certificate. Additionally, the City of Lomita requires investigation and approval of any new owner receiving an interest in a massage establishment as a result of sale or transfer before either may be effectuated.

B. Proposed Land-Use Restrictions[22]:

To further combat the issue of proliferation of massage establishments, a number of cities have subjected new or existing massage establishments to Conditional Use Permit (CUP) requirements, distance requirements, and boundary requirements. For instance, in the Cities of Stanton and Escondido, massage establishments are limited to operating within the General Commercial zone and are prohibited from operating in every other zone[23]. Further, Stanton requires existing, nonconforming massage establishments within other zones to be subjected to an amortization period of two years, upon the conclusion of which, the nonconforming establishment must cease all business operations[24].

These requirements are meant to preserve the character of surrounding neighborhoods, to ensure that the proposed use is in context with surrounding areas, to ensure any known or anticipated impacts caused by the land use would be appropriately conditioned, and to prevent the increase or overconcentration of these establishments within certain specified areas of the city.

Finally, cities should consider the proper response to lawful non-conforming uses that were established during the period in which cities did not have the authority to regulate massage businesses.

[22] The City of Lomita's existing zoning code only permits massage establishments within the Light-Manufacturing-Commercial zone and located no closer than 1,000 feet between each other; meaning that all establishments which do not meet these location requirements are considered legal non-conforming, thereby slowing the proliferation of new establishments throughout the City. As this provision existed in the City's zoning ordinance prior to any modifications made related to massage, the City was not required to change the language of its zoning ordinance.
[23] *See* Urgency Ordinance number 1031 of the City of Stanton amending Chapter 5.16 of the Stanton Municipal Code, which can be found under the Ordinances tab on the League's website at http://www.cacities.org/Policy-Advocacy/Hot-Issues/Massage-Regulation. *Also see* Escondido's ordinance.
[24] *See* Stanton's ordinance.

C. Proposed Reasonable Health and Safety Requirements:

Unsanitary facilities, illegal and unpermitted building modifications, and use of the establishment as a residence are some of the health and safety issues cities and local law enforcement have uncovered while conducting stings and inspections of illegitimate massage businesses. In order to address these issues, a number of cities, including Lomita, have adopted certain health and safety requirements, some of which are related to where massage services are to be provided; minimum lighting requirements; proper sanitation and disposal requirements; and adequate shower, dressing, locker and toilet facilities.

IV. Remember, "If You Abuse It, you will Lose It."

As of January 1, 2017, AB 1147 will sunset; as nightfall sets, local governments may have to defend the regulatory decisions they have made following enactment of the statute. Cities and counties should therefore choose their enforcement mechanisms wisely. Blanket moratoriums and low caps without proper findings, or unsupported business license requirements, should be avoided. In other words, local regulation should be judiciously applied and mindful of legitimate massage businesses. For more information on this issue, see the League's "Hot Issues" webpage on massage regulation (including the League's FAQs on AB 1147 implementation and recently adopted city ordinances that are posted there) at: http://www.cacities.org/Policy-Advocacy/Hot-Issues/Massage-Regulation.

If a city wishes to inform the CAMTC that a certified massage therapist is in violation of state or local law the city should report that information to the CAMTC by going to: www.camtc.org and clicking on the link for "File a Complaint Against a CAMTC Certificate Holder." Any alleged violations of state law or the California Business and Professions Code by CAMTC applicants or certificate holders should be reported to CAMTC in addition to the city taking any administrative, criminal or civil action under its municipal code. To this end, the CAMTC will provide information upon request about applicants and certificate holders, including current status of an application or certificate; history of disciplinary actions; home and work addresses; length of suspension; and any other information needed to verify facts relevant to administering a local ordinance.

Take note that a complaint alone, without evidence supporting an alleged violation of the law (i.e. certified evidence of administrative decisions; civil orders or decisions related to violations of municipal code sections; administrative citations; declarations from law enforcement) is not sufficient for CAMTC to take action.

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Bid Protests: Minimizing And Managing Liability

Wednesday, May 6, 2015 General Session; 3:15 – 4:50 p.m.

Clare M. Gibson, Assistant City Attorney, Hercules

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BID PROTESTS:
MINIMIZING AND MANAGING LIABILITY

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City Attorneys' Department Spring Conference
Monterey, California
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BID PROTESTS:
MINIMIZING AND MANAGING LIABILITY

I. INTRODUCTION

When public bidding is required, bid protests are inevitable. Not every public bid draws a protest, but enough do to make protests an ongoing problem for cities awarding public works contracts. At best, bid protests can require some extra staff and legal time. At worst, they can result in litigation, project delay, and even loss of project funding. The objective of this paper is to provide practical recommendations for avoiding bid protests—or at least those that can be avoided—and recommendations for managing bid protests and minimizing their impact when they do arise. This paper will focus on bid protests in the context of competitive bidding for municipal public works projects.

There is reason to expect an uptick in those protests in the near future, based on alleged (or actual) non-compliance with the new contractor and subcontractor registration requirements.[1] In addition, a recent appellate opinion held that a losing bidder may state a cause of action against a winning bidder for tortious intentional interference with prospective economic advantage. This decision could invite more bid protest litigation, with awarding agencies caught in the crossfire.[2] In light of these recent developments, this is a very good time for cities to take a considered, planned approach to avoiding the avoidable bid protests and managing the unavoidable ones.

Most public contract bid protests are not particularly complex from a legal perspective, and there is a well-developed body of law in California governing bidding and award of public contracts.[3] However, even a routine bid protest takes time and money to address and many of those can be avoided by following some—or all—of the recommendations in Part II on Avoiding Bid Protests. As for the bid protests that cannot be (or are not)

[1] Labor Code § 1725.5, enacted by SB 854 (Stat. 2014), provides that a public agency may not accept a bid from or enter into a contract with a contractor that is not registered with the California Department of Industrial Relations.
[2] *Roy Allen Slurry Seal, Inc. v. American Asphalt South, Inc.* (2015) 234 Cal.App.4th 748 [holding that a second-place bidder stated a cause of action for intentional interference with prospective economic advantage where the winner's bid was lower due to its failure to pay prevailing wages]. This case has troubling implications for awarding agencies because of its reasoning that an economic relationship exists between a bidder and an awarding agency, as discussed in the dissenting opinion.
[3] *See, e.g., Great West Contractors, Inc. v. Irvine Unif. Sch. Dist.* (2010) 187 Cal.App.4th 1425, 1428, fn 1 ("*Great West*") [noting the extensive body of law and listing a bibliography of California state court published decisions on public contract cases from 1916 through 2010].

avoided, Part III on Managing Bid Protests provides recommendations for managing liability and avoiding delay.

A. The Economics of Bid Protests.

It is useful to begin by considering the economic context for bid protests. Some practitioners expected that bid protest litigation would become a rarity after 2000, when the California Supreme Court held that a wrongfully rejected low bidder could not recover prospective lost profits, and that damages were limited to the cost of preparing its bid.[4]

However, even without the possibility of recovering lost profits, the possibility of securing a plum public contract at a premium price is ample motivation for many contractors. A contractor must keep work coming in just to stay in business and maintain its workforce, so even work with a low profit margin can provide motivation to aggressively pursue a public contract that offers just enough profit to keep the doors open. When a contractor has an opportunity to win a public contract with a high profit margin, the incentive to aggressively pursue that contract ratchets up to another level.

For example, if Contractor A submits the lowest bid for $10 million for a city contract and Contractor B submits the next lowest bid for $10.5 million, Contractor B has $500,000 worth of incentive to get Contractor A's bid disqualified for a bidding error, so that Contractor B can get the contract for its higher price. Even if it costs Contractor B $100,000 in legal costs to challenge the low bid, if a successful protest or lawsuit results in award of contract to Contractor B, that means a net gain of $400,000 for Contractor B—for performing the same work that Contractor A would have done.

Given the economic incentive, it is no surprise that disappointed bidders continue to file bid protests or even lawsuits in order to secure the same contract for a premium price. Meanwhile, cities have to absorb the costs of the protests, the litigation, and sometimes a more costly contract.

B. The Legal Framework for Bid Protests.

An understanding of the economic context helps to understand why contractors are motivated to invest in legal costs to challenge a low bid and why there is commensurate economic incentive for a city to take affirmative steps to avoid bid protests. Understanding the legal context is also important, not simply to evaluate the merits of a bid protest, but also to inform an overall strategy to avoid and manage protests.

[4] *Kajima/Ray Wilson v. Los Angeles Metropolitan Transportation Authority* (2000) 23 Cal.4th 305 [holding that a wrongfully rejected low bidder could recover bid preparation costs, but not lost profit, under a theory of promissory estoppel].

1. Responsiveness vs. Responsibility.

While some bid protests are based solely on objections to the manner in which the city is conducting the bid, most involve a higher bidder seeking to invalidate the bid of the low bidder in order to secure the contract—at a higher price—as in the example above. These bidder-against-bidder protests are based either on allegations that the low bid was "nonresponsive" or that the low bidder is not "responsible" (or both). Since different legal standards apply to issues of responsiveness and issues of responsibility, it is important to understand the meaning of each.

Responsiveness refers to the *bid* itself, which encompasses all of the documents that must be submitted by each bidder within its sealed bid envelope. That includes the bid proposal form, bid security, the subcontractor list form, the non-collusion declaration, and any other documents that the bidders are required to submit for a particular bid. A bid is responsive if it promises to do what the bidding instructions require.[5] Responsiveness is generally determined from the face of the bid, without outside investigation or information.[6]

A determination of responsiveness boils down to a simple binary analysis: whether or not the bidder complied with the bidding instructions.[7] If a city determines that a bid deviates from the bidding instructions, a secondary binary analysis applies: whether or not the deviation is material or immaterial. If it is material, the city must reject the bid. If the deviation is not material, the city has the option—though not the requirement—to waive the deviation and accept the bid. [8]

Responsibility refers to the *bidder*. Public Contract Code section 1103 defines "responsible bidder" to mean "a bidder who has demonstrated the attributes of trustworthiness, as well as quality, fitness, capacity, and experience to satisfactorily perform the public works contract." Thus, determinations of responsibility are based on the "personal quality of the bidder."[9]

[5] *Bay Cities Paving & Grading, Inc. v. City of San Leandro* (2014) 223 Cal.App.4th 1181, 1187 (*"Bay Cities"*).
[6] *Great West, supra,* at 1453-1454.
[7] For example: "There was a question [in the bidding instructions]. Great West answered it. Period." (*Great West, supra*, at 1457 [holding that Great West's bid was responsive because it answered the question as instructed].
[8] *MCM Construction, Inc. v. City and County of San Francisco* (1998) 66 Cal.App.4th 359, 374 ["The point of discretion is that the agency may properly act in either direction. It may waive or refuse to waive such deviation."].
[9] *Great West, supra,* at 1451.

Determinations of responsibility are more complex, since they require investigation into the bidder's history, experience, and "trustworthiness." Therefore, before a bidder can be disqualified as non-responsible, it is entitled to basic due process:

> "[T]he public body must (1) notify that bidder of any evidence reflecting upon the bidder's responsibility received from others or adduced as a result of independent investigation, (2) afford the bidder an opportunity to rebut such adverse evidence, and (3) permit the bidder to present evidence of qualification."[10]

Disqualification based on a finding that a bidder is not responsible is often vigorously contested since it may adversely affect the bidder's reputation and even its bonding capacity.

Fortunately, most bid protests are based on issues of responsiveness, which is not surprising given that public bids are usually completed and packaged for submission on a very last-minute basis. Typically, a bid runner will be parked outside city hall waiting for subcontractor quotes, which are called in at the last minute to avoid bid shopping. The runner has to complete the subcontractor list form, complete the bid schedule, enter the final bid amount on the bid proposal form, and seal the bid and all of the required attachments in an envelope before dashing into the city clerk's office to meet the bid submission deadline. Imagine finishing a brief and assembling multiple exhibits while parked outside the courthouse, minutes before a filing deadline. Small wonder that bidding errors arise on such a routine basis.

2. The City Attorney's Role.

Responsibility and responsiveness are *legal* issues. As such, bid protests raising these issues should be evaluated by the city attorney's office, and the city attorney's office should provide a legal opinion on the merits of the protest to the city council.[11] While this may appear to state the obvious, sometimes public works or engineering staff will take unilateral action on a protest, without first consulting the city attorney's office (e.g., by rejecting the protest or submitting a recommendation for action in a staff report to the city council). Public works or engineering staff may view bid protests as public works matters rather than legal matters. And sometimes, staff may believe that

[10] *Boydston v. Napa Sanitation Dist.* (1990) 222 Cal.App.3d 1362, 1369 [holding that a public agency must afford a bidder the opportunity to rebut and present evidence before it can be disqualified as not responsible].

[11] In the interest of simplicity, this paper assumes that the city council will take final action on a protest at the same time that it takes action on awarding the contract. If the council has delegated its authority to award a contract and to act on bid protests, the city attorney's office should advise the council's authorized delegee on the legal merits of a protest.

involving the city attorney's office will result in delay to a critical project schedule. However, because they do raise legal issues, bid protests should always be referred to the city attorney's office regardless of perceptions.

Indeed, as discussed in Part II, below, the city attorney's office should be involved in implementing preventive measures even before a project goes to bid, including drafting and review of the bid and contract documents. The city attorney's office should also play a central role in managing and responding to bid protests when they do arise. That includes legal analysis of each bid protest and either drafting or reviewing the staff report containing the options and recommendations for council action, as discussed in Part III.

II. AVOIDING BID PROTESTS

Most of the recommendations that follow in this Part are intended to limit opportunities for error, both in the bid documents and in the bidding process. By planning ahead and implementing some (or all) of the following recommendations, a city can minimize the impact of or even avoid many bid protests.

A. Time for Legal Review of Bid Documents.

Avoiding bid protests can start during the early planning stages for a project. Many avoidable bidding errors arise because of problems with the bid documents[12] themselves, sometimes due to unclear or inconsistent bidding instructions, or because the plans and specifications were published before they were properly completed. Often these problems can be avoided simply by ensuring time for legal review before the bid documents are released to bidders. Since the bid documents for significant public works projects are frequently provided or prepared by outside design professionals (architects or engineers), including specific requirements for pre-publication legal review can set the stage for better quality control—provided, of course, that the legal review takes place as planned.[13]

The professional services agreement should require the design professional to complete the bid documents in time for legal review and approval before publishing the notice inviting bids. This may apply either to bid documents provided by the design professional or to the design professional's use of the city's bid forms.

To schedule the time for legal review of the bid documents, it is important to identify any "drop dead" dates for awarding the contract and starting the work. That might

[12] The "bid documents" include the notice inviting bids, the instructions to bidders, the bid proposal form, the subcontractor list form and any other form or document that applies to *bidding* for the contract as distinct from *constructing* the project.
[13] *See* Section III.D, below, on pre-publication review of bid documents.

require working back from the date by which the project must be completed or might depend on state or federal funding that is contingent upon award of contract by a specific date. Ideally, the city attorney's office and public works or engineering department will work together at a very early stage in project development to work out a realistic schedule and to identify critical deadline dates.

The resulting schedule may be used as the basis for the relevant milestone dates included in the design professional services agreement. For example:

> *The bid documents must be completed and submitted to the City Attorney's office for legal review no later than _____.*

The project schedule may even be included as an attachment to the professional services agreement so that the design professional's performance is closely tethered to the city's scheduling requirements. For example:

> *Time is of the essence for completing the services required under this Agreement. A copy of the City's Planned Schedule for design, bidding and construction of the Project is attached as Exhibit __. Design Professional must ensure that it meets all submittal deadlines included in this Agreement to avoid causing delay to the Planned Schedule. The Design Professional will be responsible for any delay costs incurred by the City which are caused solely by Design Professional's failure to comply with the submittal deadlines in this Agreement.*

By making the design professional responsible for timely completion and delivery of bid documents for legal review, a city can reduce the likelihood of bid protests arising from poorly drafted and unreviewed bid documents.

B. Clear and Consistent Bid Documents.

Generally speaking, the easier it is for the bidder to understand and follow the bid instructions, the less likely it is that bidders will make mistakes in the rush to complete the bid. By reducing opportunities for error, a city can reduce opportunities for bid protests. The following recommendations apply specifically to the bid documents.

1. Limit bid submittals to essential documents.

Limiting the number of documents that must be submitted with the bid is one of the best ways to avoid bidder errors at bid time. Many such errors involve the bidder's inadvertent failure to include a separate document or to properly sign or complete each

separate document.[14] Requiring numerous attachments with each bid increases opportunities for error, and often there are more efficient ways to obtain the relevant information.

Under state law, certain documents *must* be submitted with a public works bid, e.g., bid security,[15] the subcontractor list form (for most projects),[16] and a non-collusion declaration.[17] Additional submittals may be mandatory, depending on funding requirements. Some public agencies will require many additional documents to be submitted with each bid, documents that are not required by law and not required as a condition for funding. That means more moving parts at bid time—and more opportunities for that runner parked outside city hall to overlook a page or two.

Some of these non-essential attachments are intended to obtain information or certifications that are irrelevant to determining the low bid, or are only important with respect to the selected bidder, or which can be obtained without separate attachment.

For example, some public agencies still require submission of a separate "Workers' Compensation Certificate" with each bid, just to provide the one-sentence certification required under Labor Code section 1861. Protests based on a bidder's failure to include the separate certification are not uncommon, but are completely avoidable. Section 1861 does not require that the certification be submitted as a separate document. It doesn't even require it from every bidder. It is only necessary to obtain it from the Contractor "prior to performing the work of the contract." Rather than requiring a separate document that could be inadvertently omitted or left unsigned, the certification requirement may be incorporated directly into the contract form:

> *Under Labor Code Section 1861, by signing this Contract, Contractor certifies as follows: "I am aware of the provisions of Labor Code Section 3700 which require every employer to be insured against liability for workers' compensation or to undertake self-insurance in accordance with the provisions of that code, and I will comply with such provisions before commencing the performance of the Work on this Contract."*

In general it is advisable to consider which documents are truly needed from *each* bidder or are only needed from the apparent *low* bidder. For example, instead of requiring each bidder to submit information on past projects, the bidding instructions can require submission of the information from the low bidder *after* the bid, upon request by the city. That ensures that the city can quickly get specific information about

[14] *See, e.g., Bay Cities, supra,* [arising from the low bidder's omission of the first page of the bid bond form].
[15] Public Contract Code § 20170.
[16] Public Contract Code § 4104.
[17] Public Contract Code § 7106.

the lowest bidder's experience, but avoids the problem of higher bidders using past project lists as the basis for alleging that a bid is nonresponsive. This is not a theoretical problem. It arises with disappointing regularity.[18]

2. Include an "order of precedence" provision.

Protests sometimes arise from conflicting instructions in the bid documents, particularly when the bid documents have been copied and pasted together from various sources. In a perfect world, such conflicts would be caught and corrected before the bid opening. This is not a perfect world, so including an "order of precedence" provision in the contract documents is essential to govern internal conflicts and inconsistencies among the various contract documents, including the bid documents.

For example, if the notice inviting bids requires each bidder to submit references with its bid, but the instructions to bidders requires only the apparent low bidder to submit references within a specified time after the bid, an order of precedence provision can resolve the conflict by stating which document controls in the event of such a conflict.

3. Control information.

Some bid protests are based on allegations of disparate information when one bidder is provided information that was not made equally available to other bidders—usually because a well-intended city employee or consultant answered a direct question from a bidder. The bid documents should provide a single point of contact for questions regarding the project or the bid documents, and require that *all* questions be submitted in writing (usually email) to that contact person. It is equally important to make sure that staff and consultants know to avoid any off-the-record responses to bidders.

Answers to written questions should be provided in written addenda issued to all known plan-holders. Make sure the bid proposal form requires each bidder to confirm receipt of each addendum. Controlling supplemental information in this manner will help avoid protests based on disparate information.

4. Do not limit the city's discretion.

Some bid documents are riddled with repeated admonitions that a non-compliant bid "will be rejected" if the bidder fails to comply with various provisions. When there is a bidder error involving a provision containing such an admonition, a protesting bidder will latch on to the admonition to insist that the error cannot be waived and that rejection is mandatory. It's a fair argument. But it is an avoidable argument.

[18] The sample bid protest opinion letter, provided as Attachment B to this paper, includes a fairly typical protest based, in part, on the contents of the low bidder's list of past projects.

Such admonitions are neither necessary nor helpful. If a bid is nonresponsive it may be rejected as a matter of law. Bidders already know this. They do not need reminders. As discussed above, if the deviation is material, the bid *must* be rejected. However, if the deviation is not material, the city may exercise its discretion to waive the deviation.[19] Statements that a bid *will* be rejected for a particular error may operate to deprive the city of its discretion to waive an immaterial error, thereby forcing the city to award to a higher bidder, even for a trivial deviation.

5. Reserve the right to reject bids.

While it is clear under California law that a city has the right to reject all bids,[20] it may still be useful to say so in the bid documents. For example:

> *City reserves the right, acting in its sole discretion, to waive immaterial bid irregularities, to accept or reject any and all bids, or to abandon the Project entirely.*

In the *Bay Cities* decision, the appellate court took particular note of the fact that the City of San Leandro had expressly reserved its rights in this regard in both the bid documents and in its municipal code, even quoting the provisions of each.[21] Did that make a difference? Hard to know, but it couldn't hurt and it might just help to include an express reservation of rights if it might give a court another reason to uphold a city's exercise of discretion, or even if it just reminds bidders that the city is under no obligation to award the contract at all.

C. Consider Prequalification.

Although protests based on non-responsibility occur less frequently than protests based on nonresponsiveness, they do arise from time to time. As discussed above, a protest based on responsibility will require more time and legal process than one based on responsiveness, especially if it results in disqualifying a low bidder on grounds it is not responsible.

Although many cities now use prequalification[22] as a matter of routine, particularly for larger projects, some public works and engineering departments remain reluctant to even try prequalification, based on the belief that it will take too much time. A prequalification procedure will indeed require some additional time, but one of the

[19] *Bay Cities, supra,* 223 Cal.App.4th 1181, 1188.
[20] *See, e.g.,* Public Contract Code § 20166 ("In its discretion, the legislative body may reject any bids presented and readvertise.")
[21] *Bay Cities, supra,* at 1188 and fn. 3.
[22] *See* Public Contract Code § 20101, authorizing prequalification by local agencies.

potential benefits of prequalification is that it should eliminate any basis for submitting a protest based on responsibility. After all, a bidder that has been prequalified by the city has effectively been pre-determined to be a responsible bidder. Moreover, it is generally easier to eliminate a non-responsible bidder through prequalification instead of rejecting a low bidder as non-responsible after the bid.

Compared to the time and cost required to disqualify a low bidder as non-responsible—particularly if the bidder files a legal action to challenge the disqualification—a prequalification process might look like a more attractive option. Limiting bidding to prequalified bidders is unlikely to make any difference in terms of avoiding protests based on nonresponsiveness, but for larger projects, the extra time may be worthwhile to avoid protests based on non-responsibility.

D. Legal Review of Bid Documents.

As discussed in Section II.A, above, legal review of the bid documents can avoid bid protests by identifying and correcting any inconsistencies, conflicts or ambiguities before the bid documents are released to the bidders. City attorneys who have limited experience with public contract law may feel daunted by the prospect of such review, especially when a two-volume draft project manual is dropped off for review. Fortunately, no one expects the city attorney to review the specifications for sheet rock installation or HVAC commissioning. The city attorney's review is limited to the "legal stuff" at the beginning, including the bid documents. And for the most part, that requires the same skill set that applies to review of other contract documents.

With respect to the bid documents, the reviewing attorney should consider whether, as a practical matter, the bidder is provided with clear and unambiguous directions for preparing and submitting its bid, including all required supporting documents, e.g., the subcontractor list form, the non-collusion declaration, an itemized bid schedule, etc. It helps to think like a bidder, but one with a law degree.

If the bid documents are based on a front end template that has already been approved by the city attorney's office, the reviewing attorney should confirm that the required template has in fact been used and with no unauthorized modifications. Sometimes—well, fairly often—non-attorneys such as design professionals, city engineers and even clerical staff, acting with the very best of intentions, will tinker with the city's template bid documents, and do so without consulting the city attorney's office. Use of a "compare documents" feature in word processing software can provide an easy way to electronically check the draft against the approved template and identify any unauthorized modifications.

The reviewing attorney should also consider whether the bid documents are generally structured to avoid bid protests, as discussed in section II.B, above. Likewise, the

reviewer should consider whether the bid documents include provisions that will help the city to manage bid protests, as discussed in greater detail in Part III, below.

Finally, it's obviously a good idea to make sure the bid documents comply with current law. *The California Municipal Law Handbook* can be a useful resource for a reviewing attorney with limited familiarity with public works contracts.[23]

III. MANAGING BID PROTESTS

A city can control what it includes in its bid documents and how it manages its bid procedures. But a city cannot entirely prevent bidders from making errors and, unless it has prequalified bidders, it cannot prevent unqualified bidders from submitting bids. Some protests are simply unavoidable. This part will focus on managing bid protests in order to limit risk exposure, cost and delay.

A. Bid Protest Procedures.

Comprehensive bid protest procedures are essential for timely, fair and efficient handling of bid protests. A lack of bid protest procedures can hamstring a city's efforts to manage a bid protest because there simply are no limits on when a protest must be submitted, what it must contain, and how it must be submitted. Protesting bidders are quick to take advantage of an open-ended opportunity to pursue their own agendas.

The Public Contract Code does not provide any bid protest rules or requirements for cities, so it is up to cities to adopt their own. Some cities enact bid protest procedures as part of their municipal code. Others include bid protest procedures in the bid documents, typically in the instructions to bidders.

Good bid protest procedures should ensure that all of the information needed to evaluate the protest is provided promptly and with finality. This is not litigation: the protester should not be granted the right to amend its protest, to add new grounds for protest, or to otherwise needlessly drag out the proceeding. The protest procedures should require that the protest be specific, complete and include all supporting evidence. Likewise the protested bidder should be given the opportunity to provide a complete response within a similarly limited amount of time.

The procedures should enable the city attorney's office to obtain all information necessary for legal analysis of the protest in order to advise the city council on the merits of the protest and the lawful actions the council may take in response.

[23] *See* City Attorneys' Department, League of California Cities, *The California Municipal Law Handbook* (Cont. Ed. Bar 2014 ed.), Chapter 7, Part 1E, "The Contract Documents and Contract Provisions" (§ 7.36 *et seq.*).

Depending on the merits of the protest (as determined by legal review), those actions may include: 1) rejecting the protest as lacking legal merit; 2) finding that the protest has merit (in whole or in part), but that the bidding error may be waived as immaterial;[24] or 3) finding that the protest has merit and the bidding error is material, such that the protested bid must be rejected as a matter of law.

A sample bid protest provision excerpted from an "Instructions to Bidders" form is provided as Attachment A. The following are specific suggestions and options for drafting fair and efficient bid protest procedures.

1. Limit eligibility to protest.

A city should limit eligibility to submit a protest to a general contractor who has actually submitted a timely bid, and specifically exclude subcontractors or others with a secondary interest. Eligibility can be further limited to the bidder that may be awarded the contract if its protest is successful. Generally, however, a bidder will only submit a protest if it seems to have a realistic opportunity to win the bid.

2. Limit time to file and respond.

Protest procedures should be structured to avoid delaying contract award, and that means short timeframes for submission and resolution. There should be a deadline for submitting a protest, the timing of which can vary depending on the scope and complexity of the bid. For routine public works bids two or three working days is generally adequate time for a bidder to submit a protest—as long as the city makes the bids available for review immediately after the bid opening (more on that in Section III.B, below). An additional two or three days is sufficient for the protested bidder to submit a response, plus a couple more days for analysis and preparing a short opinion letter. There is no need for a city to delay project award by providing protest deadlines that are longer than what is truly required under the circumstances.

3. Do not require a public hearing for all protests.

Some public agencies operate under the mistaken belief that a public hearing is required for any bid protest. Good news: that is incorrect. As discussed in Section I.B, above, a bidder whose bid is challenged on grounds of responsiveness is not entitled to a hearing; review is limited to the face of the bid. A bidder who is alleged to be non-responsible is entitled to a hearing, but as a practical matter, that's only necessary if the city intends to reject the bidder as non-responsible. While this does occur from time to time, it is not necessary to include a special procedure for responsibility hearings, particularly if the city has already adopted general hearing procedures. Therefore there is no need to require hearings on bid protests as a matter of routine and a mandatory

[24] *See* Section I.A, above, on discretion to waive immaterial errors.

hearing procedure may needlessly delay resolution of the protest, award of contract and even work on the project.

4. Consider a non-refundable fee.

Some cities now require submission of a non-refundable fee to cover the administrative cost of processing the protest. Obviously, in order to pass constitutional muster, any such fee must be based on the city's estimated reasonable costs to process bid protests.[25] The potential benefits of a reasonable bid protest fee are two-fold. First and foremost, it will help defray the city's costs to process bid protests. Second, a fee requirement may help to discourage frivolous protests. Admittedly, this secondary benefit depends on bidders behaving as rational economic actors who can fairly assess the legal merit of a potential protest.

To date, there are no published opinions in California addressing the legality or limits of requiring a bid protest fee. Cities that handle a high volume of bid protests may wish to consider implementing such a fee—being mindful of constitutional limitations—even if there is no case law guidance yet.

B. Administer Protests Promptly, Fairly and Transparently.

1. Release bid documents immediately upon request.

The best bid procedures will be of limited benefit if the bidders are denied access to the bids or to any other relevant information. Many bidders (especially the second and third lowest bidders) will ask to review the low bid immediately after the opening to see if there is any ground for disqualifying the low bidder. Staff should make the bids available for inspection and copying as soon as possible after the bids are opened. In addition, to avoid any appearance of favoritism, it is imperative that all bidders have equal access to the bids.[26]

It is true that under the Public Records Act, the City has up to ten days to respond to a records request.[27] However, waiting for ten days will only delay resolution of any possible protest, foster ill-will and mistrust, and can potentially operate to prejudice a bidder's ability to file a timely protest. Staff should be prepared to copy (or scan) each bid packet immediately after the bid opening, and to make the copies available immediately to each requesting bidder.

[25] Cal. Const. XIIIC § 1e.
[26] In *Great West*, the defendant school district permitted some bidders immediate access to copies of bids, but stonewalled requests from the plaintiff contractor, creating a disparity of information and further evidence of "favoritism most foul." (*Great West, supra,* at 1429.)
[27] Govt. Code § 6253(c).

2. Maintain fairness and transparency.

While most bid protests are resolved without litigation, some are ultimately litigated, at which point it is especially important to have a well-documented record of the city's handling of the bid protest. That record should reflect fair and balanced treatment of the bidders, and should also include a detailed explanation of why the protest was either rejected or accepted based on the evidence and applicable law. An open and transparent process will ensure that all parties have equal access to information and demonstrate that the city maintained a level playing field and did not engage in favoritism.

Ideally, the city attorney's office or outside counsel will promptly review both the bid protest and any response from the protested bidder, then prepare a written legal opinion on the merits of the protest based on the law and evidence. This opinion may be in the form of a letter to the protesting bidder or its legal counsel, or as a memorandum to the city council. A sample legal opinion drafted as a letter to the protesting bidder is provided as Attachment B. An opinion drafted as a letter to the protesting bidder may be attached to the staff report containing the recommendation for council action on the protest and on awarding the contract.

However the legal opinion is addressed, both the protesting bidder and the protested bidder should be provided a copy of the legal opinion, so they are equally informed of the analysis and the basis for the recommendation for council action on the protest. Often, once the protesting bidder or its counsel has the opportunity to review an opinion explaining why a protest should be rejected, the protest will be voluntarily withdrawn and no further action is necessary. If the protest is not withdrawn, it should be submitted to the city council to act on, as discussed in Section III.A, above. Absent a specific threat of litigation, the city council's action should take place in open session, during which the council should take the related and sequential actions of 1) taking action on the protest, then 2) awarding the contract (or rejecting all bids).

C. Rejecting and re-bidding.

Most protests involving minor bidding errors are fairly easy to resolve, especially when the city has excellent bid documents. However, sometimes a protest is more problematic, particularly if the protest arises from problems with the bid documents or the manner in which the city conducted the bid—for example, if there was conflicting information in the bid documents, or if a public works employee passed along significant information to one bidder, but not the others.

If the bid documents or bid process are flawed beyond remedy, in order to avoid litigation, it may be in the city's best interest to reject all bids and re-bid the project, taking corrective measures as needed to avoid the problems that arose with the first

bid.[28] Even for routine protests, unless the council is very experienced with bid protests, it is advisable to remind them that they always have the authority to reject all bids. Of course, if insufficient time has been budgeted for re-bidding the project, this might not be a viable option as a practical matter, so it is important to plan ahead when timing is critical.[29]

D. Indemnification for Bidding Errors.

When a disappointed bidder decides to bring a legal challenge to a city's award to another bidder, even if the city ultimately prevails, it will likely be out of pocket for legal costs. For example, if there was an error in the low bid, but the city waived the error as immaterial, and awarded to the low bidder, the protesting bidder may file a lawsuit alleging that the city improperly waived the error and seek to invalidate the award, so that it is next in line for the contract. That was the fact pattern in the recent *Bay Cities* case.[30] It seems unfair that the city should ultimately pay the price for the low bidder's error.

One possible approach to shifting the cost burden to the bidder responsible for the error is to extend the contractual indemnity to apply to claims or litigation arising from the successful contractor's bidding errors. Expressly extending the contract indemnity provision to encompass bidding errors would not be effective until the parties actually entered into the contract. However, once that bidder enters into the contract it will be bound by the indemnity obligation.

Any indemnity requirement should comply with Civil Code section 2782. That section provides that an indemnity provision in a public agency construction contract is void and unenforceable if it requires the contractor to indemnify the public agency for the agency's sole or active negligence. However, provided an indemnity provision is drafted to comply with Civil Code section 2782, it may be effective to shift the burden of defense to the contractor responsible for the bidding error:

> ***Indemnity.*** *To the fullest extent permitted by law, Contractor must indemnify, defend, and hold harmless Owner, its agents and consultants, Design Professional, and Construction Manager (individually, an "Indemnitee," and collectively the "Indemnitees") from and against any and all liability, loss, damage, claims, expenses (including, without limitation, attorney fees, expert witness fees, paralegal fees, and fees and costs of litigation or arbitration) (collectively, "Liability") of every nature*

[28] *See* Public Contract Code § 20166 for a city's authority to reject and re-bid.
[29] *See* discussion of calculating sufficient time for bidding under Section III.A, above.
[30] *Bay Cities, supra* [holding that the city properly exercised it discretion to waive the low bidder's inadvertent omission of the first page of its form bid bond as an immaterial error].

> *arising out of or in connection with the acts or omissions of Contractor, its employees, Subcontractors, representatives, or agents, in bidding or performing the Work or its failure to comply with any of its obligations under the Contract, except such Liability caused by the active negligence, sole negligence, or willful misconduct of an Indemnitee.* ***This indemnity requirement applies to any Liability arising from alleged defects in the content or manner of submission of the Contractor's bid for the Contract.*** *Contractor's failure or refusal to timely accept a tender of defense pursuant to this provision will be deemed a material breach of this Contract. Owner will timely notify Contractor upon receipt of any third-party claim relating to the Contract, as required by Public Contract Code Section 9201.*

It should be noted that this is a relatively novel approach to shifting the risk for bid protest litigation and has not been addressed in any published decision in California. It is possible that a court might decline to enforce the indemnity obligation against the erring contractor, particularly under circumstances where the awarding city appears to share some responsibility for the bidder error, e.g., ambiguous bid instructions. However, under the right circumstances this could potentially be an effective tool to shift the risk and cost of litigation arising from a bidding error to the bidder that was solely responsible for that error.

E. Public Policy Objectives.

In addition to the many affirmative steps a city may take to avoid or manage liability from bid protests, it is also important to be guided by the public policy objectives underlying public bidding requirements, as expressly stated in the Public Contract Code.

> "The Legislature finds and declares that placing all public contract law in one code will make that law clearer and easier to find. Further, it is the intent of the Legislature in enacting this code to achieve the following objectives:
> (a) To clarify the law with respect to competitive bidding requirements.
> (b) To ensure full compliance with competitive bidding statutes as a means of protecting the public from misuse of public funds.
> (c) To provide all qualified bidders with a fair opportunity to enter the bidding process, thereby stimulating competition in a manner conducive to sound fiscal practices.
> (d) To eliminate favoritism, fraud, and corruption in the awarding of public contracts."[31]

[31] Public Contract Code § 100.

These objectives underpin the statutory requirement that cities award public contracts to the lowest responsible bidder.[32] California courts often reference these objectives when enforcing public bidding laws that require award to the low bidder:

> "[W]here a statute requires a public entity to award a contract to the lowest responsible bidder, the courts have been vigilant in not excusing attempts by public entities to circumvent that requirement."[33]

When addressing a close call on a bid protest, it is worthwhile to bear in mind that, absent fairly egregious circumstances, the courts tend to weigh in favor of the low bidder rather than the protesting bidder, as reflected in the following passage:

> "It certainly would amount to a disservice to the public if a losing bidder were to be permitted to comb through the bid proposal...of the low bidder after the fact, [and] cancel the low bid on minor technicalities, with the hope of securing acceptance of his, a higher bid. Such construction would be adverse to the best interests of the public and contrary to public policy."[34]

Before advising that the city council may reject a low bidder and award to a higher bidder, make sure there are solid grounds for doing so.

IV. CONCLUSION

The practical recommendations in the paper are intended to assist a city attorney's office to play an active role in minimizing and managing liability arising from bid protests, and to do so in a manner that will support timely contract award and project delivery.

There is no surefire method to avoid bid protests or even litigation arising from a protest, particularly when confronted with an aggressive, economically motivated bidder that is willing to sue for a public contract. However, it is possible to minimize and manage the risk posed by protests by implementing affirmative, practical steps to manage public bidding in a manner that is consistent with the underlying policy objectives. When bid documents are clear and consistent, when bidders are assured of a level playing field, and when protests are handled in a fair, efficient and transparent manner, a city is likely to avoid many protests and to minimize the potential cost and delay from protests that it cannot avoid.

[32] Public Contract Code § 20162.
[33] *Great West, supra,* 187 Cal.App.4th at 1448.
[34] *Bay Cities, supra,* 223 Cal.App.4th at 1189.

BID PROTESTS:
MINIMIZING AND MANAGING LIABILITY

ATTACHMENT A

SAMPLE BID PROTEST PROCEDURES

11. Bid Protest. Any bid protest must be in writing and received by City at _____ before 5:00 p.m. no later than two working days following bid opening (the "Bid Protest Deadline") and must comply with the following requirements:

11.1 General. Only a bidder who has actually submitted a Bid Proposal is eligible to submit a bid protest against another bidder. Subcontractors are not eligible to submit bid protests. A bidder may not rely on the bid protest submitted by another bidder, but must timely pursue its own protest. If required by City, the protesting bidder must submit a non-refundable fee in the amount specified by City, based upon City's reasonable costs to administer the bid protest. Any such fee must be submitted to City no later than the Bid Protest Deadline, unless otherwise specified. For purposes of this Section 11, a "working day" means a day that City is open for normal business, and excludes weekends and holidays observed by City.

11.2 Protest Contents. The bid protest must contain a complete statement of the basis for the protest and all supporting documentation. Material submitted after the Bid Protest Deadline will not be considered. The protest must refer to the specific portion or portions of the Contract Documents upon which the protest is based. The protest must include the name, address, email address, and telephone number of the person representing the protesting bidder if different from the protesting bidder.

11.3 Copy to Protested Bidder. A copy of the protest and all supporting documents must be concurrently transmitted by fax or by email, by or before the Bid Protest Deadline, to the protested bidder and any other bidder who has a reasonable prospect of receiving an award depending upon the outcome of the protest.

11.4 Response to Protest. The protested bidder may submit a written response to the protest, provided the response is received by City before 5:00 p.m., within two working days after the Bid Protest Deadline or after actual receipt of the bid protest, whichever is sooner (the "Response Deadline"). The response must include all supporting documentation. Material submitted after the Response Deadline will not be considered. The response must include the name, address, email address, and telephone number of the person representing the protested bidder if different from the protested bidder.

11.5 Copy to Protesting Bidder. A copy of the response and all supporting documents must be concurrently transmitted by fax or by email, by or before the Bid Protest Deadline, to the protesting bidder and any other bidder who has a reasonable prospect of receiving an award depending upon the outcome of the protest.

11.6 Exclusive Remedy. The procedure and time limits set forth in this section are mandatory and are the bidder's sole and exclusive remedy in the event of bid protest. A bidder's failure to comply with these procedures will constitute a waiver of any right to further pursue a bid protest, including filing a Government Code Claim or initiation of legal proceedings.

11.7 Right to Award. The City Council reserves the right to award the Contract to the bidder it has determined to be the responsible bidder submitting the lowest responsive bid, and to issue a notice to proceed with the Work notwithstanding any pending or continuing challenge to its determination.

BID PROTESTS:
MINIMIZING AND MANAGING LIABILITY

ATTACHMENT B

SAMPLE BID PROTEST OPINION LETTER

Author's note: The following sample letter was adapted from an actual opinion letter with the names changed to protect the privacy of the parties involved. The protesting bidder withdrew its protest within an hour after receiving the original letter, so this never had to go to the city council.

John Doe, President
Costly Construction, Inc.
1234 Fictional Street
Fictional City, CA

Re: City of Anytown | Sports Field Project, Contract No. 123
Bid Protest Response

Dear Mr. Doe:

This letter responds to your bid protest, dated July 14, 2014, protesting the bids submitted by Acme Construction, Inc. ("Acme"), the apparent low bidder, and by Basic Construction, Inc. ("Basic"), the next lowest bidder, for the contract to construct the City's Sports Field Project (the "Project"). Following review and analysis of the protest and consultation with legal counsel, I have determined that your protest lacks merit for the reasons stated below. Therefore, I will recommend that the City Council reject Costly Construction's bid protest and award the contract for the Project to Acme as the lowest responsible, responsive bidder.

I. LEGAL STANDARDS

California Public Contract Code section 20162, which governs the City's award of the contract for this Project, requires that the contract be awarded, if at all, to the lowest responsible bidder. In Section 1 of the *Notice to Contractors: Call for Bids* for this Project, the City expressly reserves its rights to evaluate bid compliance and to waive minor bidding errors:

> "The City reserves the right to reject any or all bids and to waive any informality or irregularity in any bid received and to be the sole judge of the merits of the respective bids received. The award, if made will be made to the lowest responsive, responsible bidder."

The City's discretion to waive inconsequential informalities or irregularities is well-established under California law:

> "[I]t is further well-established that a bid which substantially conforms to a call for bids may, though it is not strictly responsive, be accepted if the variance cannot have affected the amount of the bid or given the bidder an advantage or benefit not allowed other bidders or, in other words, if the variance is inconsequential" (*Bay Cities Paving & Grading, Inc. v. City of San Leandro* (2014) 223 Cal.App.4th 1181, 1188 ("*Bay Cities"*).)

In general, issues of responsiveness are determined by looking exclusively at the face of the bid. (*Great West Contractors, Inc. v. Irvine Unif. Sch. Dist.* (2010) 187 Cal.App.4th 1425, 1453.) Therefore, allegations that go beyond the face of the bid are generally not relevant for determining responsiveness.

In addition, allegations of nonresponsiveness must be evaluated from a practical, rather than speculative or hypertechnical perspective, and based on the public interest:

> "They must also be viewed in light of the public interest, rather than the private interest of a disappointed bidder. It certainly would amount to a disservice to the public if a losing bidder were to be permitted to comb through the bid proposal...of the low bidder after the fact, [and] cancel the low bid on minor technicalities, with the hope of securing acceptance of his, a higher bid. Such construction would be adverse to the best interests of the public and contrary to public policy." (*Bay Cities, supra*, at 1189; internal quotation marks omitted.)

From this legal framework, we consider Costly's allegations.

II. ANALYSIS

A. Project References

1. Acme's Exhibit E is responsive on its face.

Costly's bid protest alleges that Acme failed to comply with the instructions for listing certain past project references in Exhibit E to the Bid Form. Bidders were required to list their five most recently completed synthetic turf field projects, with a construction value of at least $1,500,000, and which the bidder completed within three years. Assuming the three-year period is measured from the July 3, 2014 date of the bid, applied strictly, that would mean relevant projects completed since July 2, 2011.

Exhibit E does not require bidders to list the completion date for each listed project, only the date of award. On the face of Exhibit E, Acme has complied by listing five projects and providing the requested information for those projects. However, you urge the City to look beyond the face of the bid by alleging that one of the five past projects listed by Acme, the College Field Project, was completed in March of 2011, and therefore falls outside of the three-year window.

Even if it were appropriate for the City to look beyond the face of the bid in this regard, Costly's factual allegation is evidently incorrect. The detailed response to your bid protest, submitted by Acme on July 15, 2014, a copy of which is attached, asserts, with substantial documentation, that Acme's work on the College Field Project was still ongoing well within the three-year window. Acme has complied with the relevant requirements of Exhibit E and its bid is fully responsive in that regard.

2. Basic's References

Costly's bid protest similarly alleges that the Exhibit E references supplied by Basic are nonresponsive. Basic responded to the requirements of Exhibit E by submitting a list of 35 past field projects, listed by year of completion in chronological order, beginning with the most recent. Of the most recent seven projects listed, i.e., those that were completed in or after 2011, only one falls below the construction value benchmark of $1,500,000. Basic's most recent project, which it identifies as "in progress," is for $11,873,000—approaching ten times the required benchmark amount. You have objected on grounds that of the 35 projects listed by Basic, the most recent is still in progress rather than "completed," and that the listed contract amount for one of the 2012 projects is $1,110,844—just below the benchmark.

The City is satisfied that Basic has complied with the relevant requirements of Exhibit E by providing more relevant references that the minimum required and that its bid is fully responsive in that regard. Even if looking beyond the face of Exhibit E supported a hypertechnical determination that Basic's references did not include five within the three-year period that were all above the $1,500,000 and all "completed" prior to bid time, any such irregularity is immaterial. It does not affect the amount of Basic's bid and there is simply no evidence that this would afford Basic an advantage over other bidders.

However, the City is *not* required to look beyond the face of Basic's bid to determine its responsiveness. Since Basic's bid is responsive on its face, Costly's protest lacks merit.

B. Restroom Building Product Requirements

Next, with respect to both protested bids, you have alleged, based on erroneous assumptions and inferences, that the two lowest bids are nonresponsive because they both list the Public Restroom Company ("PRC") as a subcontractor for "Pre Fab Structures" (Acme) or "Bldg" (Basic). From these entries on the low bidders' respective *List of Subcontractors* (Exhibit A to the Bid Form), you assert: 1) that it is impossible that the low bidders can provide the two of the items listed by model number in Section 10.2.16 of the Specifications, 2) that bidders are required to submit proposed "or equal" substitutions prior to bid time, and 3) that, therefore, the low bidders cannot possibly supply the specified items or timely submit requests for substitutions.

It is not necessary to address all of the erroneous assumptions and inferences on which this argument is based: it is sufficient to note, as Acme has ably done in its attached response, that "or equal" substitutions may be submitted after award of the contract, which, we further note, is entirely consistent with the applicable provisions of Public Contract Code section 3400.

Costly's protest pertaining to the "restroom building product requirements" lacks merit. The *List of Subcontractors* submitted by each of the low bidders is responsive on its face.

III. CONCLUSION

Based upon the foregoing, and based upon City staff's determination that Acme is the lowest responsible bidder and that Acme's bid is responsive on its face, I will recommend that the City Council reject Costly's bid protest in its entirety as lacking merit. City staff intends to recommend that the Council then award the contract for the Project to Acme. The City appreciates your interest in this project and wishes you success with your next project.

Sincerely,

CITY OF ANYTOWN

Mary Smith, City Attorney

Enclosure: Acme letter of July 15, 2014, and attachments

c: Acme Construction, Inc.
Basic Construction, Inc.

Design-Build For Public Works Projects

Wednesday, May 6, 2015 General Session; 3:15 – 4:50 p.m.

David S. Gehrig, Hanson Bridgett

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Notes:

A Step Forward for Public Works Contracting

Design-Build in the Public Sector After the Adoption of SB 785

By David S. Gehrig
April 10, 2015

I. Introduction

Design-build contracts combine professional design services and construction services into a single contract with the owner. This contracting approach provides a number of efficiencies over the traditional approach of awarding separate contracts for design services and construction, commonly known as the design-bid-build approach. These benefits include greater flexibility in awarding a contract, higher quality work, greater cost certainty, fewer claims, and other benefits discussed in more detail later in this paper.

While design-build has been a common delivery method in private sector construction for several decades, it is still relatively new in the public sector. The legislature first approved design-build authority for public agencies in 2001 with the passage of AB 598, which authorized "transit operators" to award contracts for transit projects of at least $10 million on a design-build basis. A variety of other statutes followed authorizing other types of public agencies to utilize design-build, including AB 1329 which authorized cities to utilize design-build in 2006.

Last year, the legislature revamped design-build authority for public agencies pursuant to SB 785. SB 785, which went in to effect January 1, 2015, repealed most of the existing design-build statutes applicable to different types of agencies,[1] and replaced them with a single statute applicable to "local agencies," including cities.

This paper will examine the current landscape for design-build contracting on public works projects, including the requirements of SB 785 and how they differ from the

[1] The following design-build statutes were repealed by SB 785: Public Contract Code sections 20209.5020209.14 (transit operators), 20193 (wastewater, solid waste, recycled water), 20133 (counties), 20175.2 (cities), 20688.6 (redevelopment agencies), and 20301.5 (Santa Clara Valley Transportation Authority); Government Code sections 14661 (California Department of General Services), and 14661.1 (California Department of Corrections); and Health and Safety Code section 32132.5 (Sonoma Valley and Marin Health Care Districts). The following design-build statutes were left in place: Education Code sections 17250.10-17250.50 (school districts), and 81700-81708 (community college districts); and Public Contract Code section 10708 (California State University).

previous design-build statute for cities. This paper will also discuss the benefits of design-build, provide observations regarding the prequalification process and the proposal evaluation process, and offer recommendations for creative contracting approaches to achieve successful outcomes on your design-build projects.

II. Rise of Design-Build in the Public Sector

The legislature is obviously becoming more comfortable with design-build as a contracting approach for public agencies, and with good reason. A report published by the California Legislative Analyst's Office ("LAO") in 2010, summarizing the success of 15 design-build projects awarded by counties, made several interesting observations:

- Of 5 completed projects, 2 were completed below estimated costs (5 and 16 percent), 2 projects were completed at the estimated cost, and 1 project was completed approximately 5 percent over the estimated cost.
- Of the 5 completed projects, all finished close to their targeted completion date. One project scheduled for 18 months was completed in 16 months, while the longest delay was 3 months on a scheduled 16-month project.
- Each of the 15 projects was awarded on a "best value" basis, not lowest bidder.
- Each county that submitted a report "expressed support for the design-build process and was pleased with the project outcomes."
- The LAO concluded that the information provided by the counties "did not provide any evidence that would discourage the Legislature from granting design-build authority on an ongoing basis to local agencies."
- Going forward, the LAO also recommended that a single, uniform statute be adopted for all public agencies to standardize the process, and that cost limitations be eliminated altogether.

While somewhat dated, the LAO's report is indicative of a trend toward increased use of design-build by California public agencies. The successful outcomes on design-build projects reported in the LAO's report mirror our own anecdotal experience with positive outcomes on design-build projects in the public sector. Our clients are increasingly willing to try design-build for individual projects, and those that have done so have generally been very pleased. In general, projects are completed more quickly, for similar costs and greater price certainty, and with greater quality and fewer claims.

One such example occurred on a relatively recent design-build project for a Bay Area transit operator that constructed a new bus fuel and wash facility. This was the transit agency's first design-build project. Despite the effort required to develop new contract documents specific to the project, and the relatively small budget of approximately $5 million, the project was completed on time, on budget, and prompted the General Manager to comment that he does not know why more agencies don't use design-build.

III. Benefits of Design-Build

Those who believe in the value of design-build contracting, including public agencies that have achieved successful project outcomes, tout a variety of benefits over the traditional design-bid-build approach. These benefits include:

- Greater flexibility in the contract award process.
- A single point of accountability (eliminates finger-pointing between designer and contractor).
- Higher quality construction work.
- Fewer change orders.
- Fewer claims.
- Faster project completion.
- Lower project cost.
- Greater cost certainty.
- More opportunity for innovation.

Research has confirmed many of these benefits on private sector projects. According to the seminal study done on this topic in 1998 by Dr. Victor Sanvido and Dr. Mark Konchar[2] on average design-build projects achieve a 6.1% savings over the same project awarded on a design-bid-build basis. Similarly, design-build projects are delivered 33.5% faster than projects awarded on a design-bid-build basis, and the construction work alone was completed 12% faster. Benefits were also measured in the categories of cost growth (5.2% less than design-bid-build) and schedule growth (11.4% less design-bid-build). At least one other study has come to similar conclusions about the benefits of design-build over design-bid-build with regard to achieving project specific sustainability goals.[3]

In light of the empirical support for the benefits of design-build in the private sector, the migration of design-build to the public sector seems both logical and inevitable. Cities should at least consider design-build as a project delivery method for projects exceeding $5 million. Eventually, as in the private sector, design-build could become as common as design-bid-build.

[2] "Comparison of U.S. Project Delivery Systems," Journal of Construction Engineering and Management November/December 1998, Dr. Mark Konchar and Dr. Victor Sanvido, Pennsylvania State University.

[3] See "Influence of Project Delivery Methods on Achieving Sustainable High Performance Buildings: Report on Case Studies," 2010, Commissioned by the Charlies Pankow Foundation and the Design-Build Institute of America.

IV. SB 785: New Design-Build Law for "Local Agencies"

A. Overview of SB 785

The new design-build law adopted pursuant to SB 785 is located in Public Contract Code sections 22160-22169 ("SB 785"). The procedures and substantive provisions are generally similar to the previous design-build statute applicable to cities under now repealed Public Contract Code section 20175.2. For instance, SB 785 requires that local agencies prequalify proposers before inviting those prequalified proposers to submit proposals in response to an RFP. SB 785 also allows local agencies to award a contract on the basis of the "best value" to the agency, which requires the establishment objective criteria including three statutorily mandated criteria.

SB 785 essentially carried over the same restrictions on the types of projects that can be awarded on a design-build basis that were included in Section 20175.2. Specifically, for cities, SB 785 can only be used for the:

> construction of a building or buildings and improvements directly related to the construction of a building or buildings, county sanitation wastewater treatment facilities, and park and recreational facilities, but does not include the construction of other infrastructure, including but not limited to streets and highways, public rail transit, or water resources facilities and infrastructure.

The restrictions are effectively identical to those in Section 20175.2, except that construction of park and recreation facilities is now expressly authorized instead of just tacitly. While the application of SB 785 to "local agencies" gave the initial appearance of a significant broadening of design-build authority, the restrictions on the types of projects still indicates that SB 785 is only an incremental step toward making design-build available for all public works projects. While this is disappointing, the trend is at least continuing in the right direction.

The dollar threshold under SB 785 remains at $1 million, as it was under Section 20175.2. (Public Contract Code section 22162.) There is, however, no cost threshold for contracts for the acquisition and installation of technology applications or surveillance equipment designed to enhance safety, disaster preparedness, and homeland security efforts. (Public Contract Code section 22162(b).)

There are also some important changes to the design-build requirements under SB 785, which are summarized below.

B. Differences Between SB 785 and Public Contract Code section 20175.2

There are several important differences between SB 785 and its predecessor statute under Public Contract Code section 20175.2. First, SB 785 applies more broadly to "local agencies," which are defined in Public Contract Code section 22161(f) as follow:

(1) A city, county, or city and county.
(2) A special district that operates wastewater facilities, solid waste management facilities, water recycling facilities, or fire protection facilities.
(3) Any transit district, included transit district, municipal operator, included municipal operator, any consolidated agency, as described in Section 132353.1 of the Public Utility Code, any joint powers authority formed to provide transit service, any county transportation commission created pursuant to Section 130050 of the Public Utilities Code, or any other local or regional agency, responsible for the construction of transit projects.

The fact that SB 785 applies to this broader range of public agencies, in conjunction with the repeal of most previously adopted design-build statutes, will consolidate statutory authority and eliminate inconsistencies between design-build statutes. It should be beneficial to cities in that statutory interpretation issues and contracting approaches can be shared between a larger group of agencies, enhancing their collective wisdom.

SB 785 now requires public agencies to develop guidelines for a “standard organizational conflict of interest policy.” (Public Contract Code section 22162(c).) The guidelines must be “consistent with applicable law, regarding the ability of a person or entity, that performs services for the local agency relating to the solicitation of a design-build project, to submit a proposal as a design-build entity, or to join a design-build team.” Section 22162(c) does not specify which "applicable law" the guidelines must be consistent with, and there are several laws that should be considered depending on the particular project, origin of funding, and type of public agency making the award. The term "organizational conflict of interest" is not specifically addressed under California statutory laws regarding conflicts of interest, such as Government Code section 1090[4]

[4] Compliance with Government Code section 1090 should always be considered in conjunction with the drafting of the organizational conflict of interest policy, as some contractors who assist with the pre-award development of the contract would “participate in the making of a contract.” (Government Code §1090.) Moreover, appellate cases have held that independent contractors hired by public agencies can be considered public "officers" under the statute under some circumstances. Specifically, "independent contractors whose official capacities carry the potential to exert considerable influence over the contracting decisions of a public agency may not have personal interests in that agency's contracts." (See *Hub City Solid Waste Services, Inc. v. City of Compton* (2010) 186 Cal.App.4th 1114.) Most of these cases address the actions of outside legal counsel advising public agencies, and none address an engineering, architectural or design consultants advising a public agency. In most instances, a design firm providing preliminary design services prior to the issuance of an RFP for a design-build project will not be involved in contract award decisions. Accordingly, such firms would probably not be in a position to exert "considerable influence" over a public agency's contracting decisions such that they would be considered a public "officer" under Government Code section 1090 and trigger those statutory requirements. (See generally *Hub City Solid Waste v. City of Compton* supra, and *California Housing Finance Agency v. Hanover/California Management and*

or the Political Reform Act. However, there is significant guidance regarding organizational conflicts of interest under federal grant law which must be considered for a variety of different federally funded projects, including transit projects funded by the Federal Transit Administration ("FTA").[5] The basic concept is that where a firm or contractor has a role in assisting an agency with planning or developing a project during its initial stages, it is barred from competing for subsequent contracts where the firm has a competitive advantage over other proposers or where its prior involvement would impair its objectivity on the project. This could include a consultant preparing an environmental review where additional work might depend on the clearance of the project, or an engineering consultant who might participate on a design-build team after assisting in the development of the initial design concepts. These guidelines should be drafted carefully, and ideally should include a screening process at the outset of the procurement in conjunction with the prequalification process. The earlier organizational conflicts are identified, the better chance a proposer team has of correcting them before it has expended significant time and resources on a proposal. In most cases, cities should consider notifying firms seeking to assist on the initial design work that they will not be allowed to participate in the design-build phase. The potential disqualification of such professionals may impair the city's ability to attract qualified consultants to assist in the early design phase, particularly for unique projects requiring specialized skills, as they may prefer to compete for the more lucrative design-build work.

SB 785 now expressly prohibits the award of a contract for design-build-operate services, except for operations during a training or transition period. (Public Contract Code section 22164(a)(2).) The predecessor statute was ambiguous on this point, but SB 785 clearly limits contract awards to design-build. As a result, if a city desires to award a contract that includes an operation component after a new facility is constructed, it must seek other contracting authority, such as under the Infrastructure Financing Act applicable to fee producing infrastructure facilities (Government Code section 5956-5956.10) or the Energy Conservation Contract statutes (Government Code section 4217.10-4217.18.)

During the prequalification process, SB 785 now authorizes local agencies to either pre-qualify proposers or shortlist proposers. This provides useful flexibility in that short-listing allows an agency to determine how many proposers will be allowed to participate in the proposal process after the statements of qualification have been submitted and

Accounting Center (2007) 148 Cal.App.4th 682.) Nonetheless, the specific role of the design consultant should be considered carefully in order to confirm that the provisions of Government Code section 1090 are not implicated.

[5] See the Common Grant Rule issued by the Office of Management and Budget, and implemented by 26 federal departments and agencies (see specific CFR sections for the Department of Energy, Department of Education, Department of Health and Human Services, Department of Housing and Urban Development, and Department of Transportation, etc.); FTA Circular 4220.1F; Section 3(a) of the FTA Master Agreement.

reviewed. In other words, the agency has the discretion to create a large or small short-list depending on the quality of the qualification statements submitted. This differs from a true prequalification process where an objective qualification standard is established in the Request for Qualifications document, which must then be applied to advance all proposers that have met that standard even if the number of proposers is larger or smaller than ideal.

SB 785 no longer includes a Labor Compliance Program requirement, in contrast to the predecessor statute. This is not because the legislature is no longer interested in encouraging compliance with Labor Code provisions, but because the enforcement scheme was changed recently pursuant to SB 854. Pursuant to SB 854, all public works contractors performing work on projects over $1000 must now submit electronic certified payroll records to the California Department of Industrial Relations ("DIR") automatically for all public works projects within the state. The DIR will review all certified payroll records and monitor for prevailing wage violations, eliminating the need for local agencies to conduct an in-house Labor Compliance Program. Contractors are also obligated to register with the DIR on an annual basis, and submit a registration fee of $300.

SB 785 includes a new requirement for design-build contractors to provide an "enforceable commitment" to use a "skilled and trained workforce" at the RFQ stage of the process. (Public Contract Code section 22164(c).)

SB 785 only requires that three specific evaluation criteria be considered by an agency in evaluating proposals. (See Public Contract Code section 22164(f).) The following three criteria "shall be weighted as deemed appropriate by the local agency: (A) Price, unless a stipulated sum is specified. (B) Technical design and construction expertise. (C) Life-cycle costs over 15 or more years." This provision provides significantly more flexibility than the five specific criteria in the predecessor statute that were each required to comprise 10% of the evaluation criteria.

SB 785 requires that the payment bond be in an amount not "less than the performance bond." (Public Contract Code section 22165(a).) This language would appear to allow the agency the discretion to require bonds in less than 100% of the total contract amount.

Finally, the agency must issue a written statement in conjunction with the contract award indicating the basis of award. (Public Contract Code section 22164(f)(5).)

V. Greater Flexibility for Charter Cities

Charter cities are exempt from the state statutory requirements established pursuant to SB 785. Depending on the details of their individual City Charters and Ordinances, charter cities may have significantly more flexibility in how to award a design-build project. For instance, a charter city can tailor all of its contract award criteria and need

not consider the three criteria set forth in SB 785, can avoid prequalifying proposers, and could even negotiate directly with a single design-build contractor.

One charter city we worked with recently already had some flexibility for alternate project delivery methods in its charter, but chose to enhance this by revising its contracting ordinance to make it abundantly clear that the particular contracting approach considered (design-build-operate, with the authority to pay proposers a stipend) was authorized. If your charter city is contemplating a design-build award and a revision to the contracting ordinance is required, it may be prudent to consider drafting the ordinance broadly so as to allow for all potentially useful project delivery methods for future projects (design-build, design-build operate, competitive negotiation, construction manager at risk, integrated project delivery), where a deviation from design-bid-build is allowed. Language regarding keeping the award process fair and open, and encouraging creative and innovative solutions is also a good idea.

VI. Prequalification of Proposers

As mentioned above, SB 785 requires that an agency prequalify all proposers before requesting proposals. SB 785 requires that the public agency develop a request for qualifications ("RFQ"). (See Public Contract Code section 20164(b).) The RFQ must include each of the following elements:

- Basic scope of the project
- Expected cost range
- Methodology that will be used to evaluate proposals
- Procedure for final selection
- Significant factors that agency will consider in evaluating proposals
- Standard template for Statement of Qualifications

The easiest place to start for developing an RFQ is the model Prequalification Questionnaire developed by the California Department of Industrial Relations, specifically developed for design-build projects. The DIR's Questionnaire includes a section with mandatory pass/fail requirements, as well as scored questions, and a scoring key. These can all be revised and adapted for a particular project. For instance, it is important for the agency to decide which team members it intends to prequalify. Not all team members and subcontractors need to be prequalified, but certainly those that are most important to the success of the project should be.

Prequalification should not be viewed as a one-size fits all process. Often, the prequalification process must be tailored to the particular project to ensure that the bar is set high enough to create a field of qualified proposers, but not so high as to limit competition. In our experience, the agency may benefit from circulating a draft of the prequalification questionnaire for industry review and comment. If specific requirements are too stringent, comments from potential proposers may bring this to light. In some instances, it may be necessary to revise the RFQ or questionnaire after responses are submitted and are deemed to be inadequate. On one recent project, an agency we

worked with was initially not able to prequalify any of five interested proposers. After revising the requirements for an audited financial statement and overly stringent licensing requirements and re-issuing the prequalification questionnaire, four of five potential proposers were prequalified. On another recent project we were involved in, requirements that all team members needed specific experience in the United States were relaxed to allow foreign experience, given that many engineering consultants on the design-build teams were based in Europe.

VII. Tailoring the Evaluation Process to Your Project

SB 785 includes some requirements with regard to the proposal evaluation process, including:

- Three specific criteria that must be considered in the evaluation process (as discussed above).
- The RFP must include the basic scope and needs of the project, the estimated cost, the methodology to evaluate proposals (best value or low bid, the significant factors considered in evaluating proposals, the relative weight of those factors, and any negotiation procedures after proposal submission. (Public Contract Code section 22164(d).)
- The RFP must specify which specific subcontractors must be included in the proposals. (Public Contract Code section 22166.)

In spite of these requirements, agencies still have significant flexibility to create a process that is suited to their particular project. For instance, since only three evaluation criteria are specified, and the weight of those three criteria can be established by the agency, that allows for wide discretion as to what the remaining criteria and weighting will be. For more technically complex projects, more emphasis should be placed on factors such as technical expertise, experience on comparable projects, team qualifications, and qualifications of key subcontractors. For projects that are not particularly technically complex, greater emphasis can be placed on price. Each agency is free to tailor its evaluation criteria to essentially create its own definition of "best value" for each particular project.[6]

Public agencies also have significant discretion with regard to how the proposals must be submitted and evaluated. Variations can include: 1) a single proposal including both price and technical information which are ranked immediately after submission; 2) a

[6] "Best Value" is defined as "a value determined by evaluation of objective criteria that may include, but not be limited to price, features, functions, life-cycle costs, experience, and past performance. A best value determination may involve the selection of the lowest costs proposal meeting the interests of the local agency and meeting the objectives of the project, selection of the best proposal for a stipulated sum established by the procuring agency, or a tradeoff between price and other specified factors." (Public Contract Code section 22161(a).)

"two envelope" process where price is considered only after technical proposals are ranked and short-listed; and 3) an initial technical submittal, followed by price proposals submitted only by short-listed proposers. Each of these approaches is legally viable under SB 785, and each have their merits depending on the goals of the particular procurement.

Finally, public agencies also have significant discretion with regard to discussions, negotiations and Best and Final Offer ("BAFO") procedures after proposal submission. The most common approach is to enter into negotiations with the highest ranked proposer after the proposal evaluation process has been completed. Negotiations can focus on price aspects, scope of services provided, proposer team details, etc., although it is wise for the agency to provide itself latitude in these negotiations in the language of the RFP. Another approach is for the agency to request BAFOs from all short-listed proposers to induce additional competition on price.

In short, public agencies have significant flexibility to tailor the proposal evaluation process under SB 785, provided the agency follows the procedures that are set forth in the RFP.

VIII. Creative Contracting Approaches

Many creative contracting approaches have been developed on private sector design-build projects, which can be incorporated into a public procurement, including the approaches summarized below (each of which is legally viable under SB 785).

A. Alternative Technical Concepts

Where an owner desires to consider alternatives to its initial conceptual design in an effort to find more innovative and cost effective ways to approach a project, requesting alternative technical concepts ("ATCs") from proposers in conjunction with proposals can be a very useful tool. ATCs have been defined as any concept, submitted by a proposer and accepted by the owner, that differs from the requirements of the RFP and contract documents and results in performance and quality of the end product that is equal to or better than the of the initial conceptual design. Anecdotally, requesting ATCs usually results in at least one improvement over the initial conceptual design, if not several.

There are different ways to approach ATCs in terms of timing of submission, and confidentiality. One approach we have employed on a recent design-build transit project is to require submission of ATCs in advance of proposals. If an ATC is approved by the agency, it may be included with the proposal, with separate pricing for both the initial conceptual design and the ATC design. The approved ATC remains confidential and is not shared with other proposers.

Another approach to ATCs is to invite submission in conjunction with proposals as alternative approaches to the work. This approach saves time in that a separate review

process in advance of proposal submission is not required. In addition, the RFP can specify that all rights to the ATCs are owned by the agency, regardless of whether the proposer that submits the ATC is awarded the contract. This is obviously a more aggressive approach to ATCs that some design-build contractors will object to, particularly if no stipend is offered in conjunction with proposal submission. However, because SB 785 is silent on ATCs, each of these approaches is legal and cities are free to consider how ATCs might benefit their project. The results can be very positive.

On a relatively recent project for the seismic retrofit of a public hospital we assisted with, the public agency was able to realize approximately 35% in savings through the incorporation of ATCs submitted by the proposers. The RFP required each of the proposers to submit a proposal based on the design included in the bridging documents, but also allowed proposers to submit alternative proposals based on their own conceptual design (subject to certain project requirements and design criteria set forth in the bridging documents). Proposers were encouraged to work with their team members to create alternative design solutions. In every case, the alternative conceptual design that the project teams came up with were more economical than the approach in the bridging documents. This resulted in an approximately 23% savings from the design-builder competitors' alternative design solutions. After the best value proposer was selected, the project team (which included the architect, structural engineer, the contractor and the mechanical, electrical and plumbing design-build subcontractors) continued to collaborate with public agency staff to further hone the conceptual design, eventually realizing an additional 12% savings.

B. Bonus for Successful Outcome (the Carrot)

Everyone involved in public works contracting is familiar with liquidated damages, which are ordinarily charged against a contractor on a daily basis in the event that the contractor is late in completing the work. In effect, this provision is a contractual "stick" to motivate the contractor to complete the work on time. Although less common, a contractual "carrot" in the form of a bonus for a successful outcome can also be useful. A bonus can be awarded for just about any achievement on the project that can be measured or confirmed. The most obvious application of a bonus is for early completion of the work, and can be awarded in the form of an amount for each day that the design-build contractor completes work early. Other examples include lump sum bonuses completing a milestone in advance of a specified date, for completing the project with less than a specified number of job related injuries, exceeding specified energy use targets, etc.

Including a bonus for a successful outcome provides an additional benefit in terms of contractor relations. Just adding language to allow for the award of a bonus will demonstrate to the contractor that the agency views the project as a collaborative venture where both parties will ideally succeed, rather than an adversarial "zero sum game" that design-bid-build projects are frequently viewed as. Collaborative contracting principles have expanded significantly over the last ten years in the private sector as owners and contractors realize that the more their respective interests are aligned, the

greater the likelihood of success. These principles are encompassed by broader contracting approaches known as Integrated Project Delivery or Lean construction, elements of which are gradually making their way into public works contracting as well.

C. Stipends

Stipends, paid to proposers to defray the cost of preparing their proposals, are common for large scale design-build projects in the private sector. The stipend can be paid to each proposer that submits a fully responsive proposal, or limited to just the short-listed proposers. Depending on the size of the project, they can be as high as several hundred thousand dollars, or even over $1 million. The reasoning behind paying a stipend is that for large projects, proposers must invest significant time and effort to investigate and evaluate the project, analyze different approaches to performing the work, assembling a team, and pricing their work. This process is significantly more involved than on a design-bid-build project where the design is fully established, and there are fewer variables to consider. Where ATCs are requested, preparation of a proposal for a design-build project is yet more involved. In order to encourage a sufficient number of experienced and high quality design-build teams to propose on a project, it is sometimes necessary to offer a stipend to defray at least some of the cost of preparing a proposal. According to the Design-Build Institute of America, other benefits of paying a stipend include signaling the intent that the owner is serious about going forward with the project, and encouraging proposers to expend the time, money and resources to provide a more creative and comprehensive solution.[7]

Industry surveys indicate that stipends are frequently set between .01 and .25 percent of the project budget, considering what is required to generate sufficient market interest from the most highly qualified design-build teams.[8] Without a stipend, owners run a risk of not getting the highest caliber proposers to participate.

Admittedly, stipends are uncommon in the public sector, and in some ways appear to run against public policy goals of public procurement. Paying for proposals seems contrary to protecting public funds and ensuring that they are spent wisely, given the traditional approach of awarding public works projects to the lowest bidder. However, I am unaware of any legal prohibition against stipends paid on public works projects in California, and they are expressly legal in other states, like Washington. In essence, a public agency is paying for high quality proposals that it would not otherwise receive. The stipend can also be tied expressly to ownership of rights to the ATCs, further justifying the value the agency receives from paying the stipend.

[7] "DBIA Position Statement, Use of Stipends," 2010, Design-Build Institute of America.

[8] "DBIA Position Statement, Use of Stipends," 2010, Design-Build Institute of America.

Ultimately, whether an agency decides to pay a stipend for proposals depends on the competitive dynamics of the particular project. If there is sufficient interest from quality design-build teams without a stipend, it need not be included. On the other hand, if interest is marginal, a stipend may improve the quality of proposals enough to allow for a successful project.

IX. Reality Check: Design-Build is Not Ideal for Every Project

Design-build may not be ideal for every project. Thought should be given at the outset of each project to assess whether design-build is the best project delivery method, or whether the benefits are outweighed by one of the few drawbacks. For instance, where an agency seeks close control over design details, design-bid-build may be a better choice, because the agency will be able to monitor, revise and fine tune the design before the project is put out to bid. Under a design-build project, the agency relinquishes a degree of control over design details in favor of more efficient project delivery and overall quality. Similarly, where an agency wants to keep the initial conceptual designer on board to complete the design, design-build is not an option because organizational conflict of interest rules preclude the initial designer from participating on the final project.

It is also important to note that the prequalification process extends the time to contract award by several months. However, the time spent prequalifying and ranking proposals carefully should be reflected in a higher quality design-build contractor, which should in turn lead to higher quality and more efficient work.

Finally, for those agencies that have not awarded a design-build project in the past, there is obviously a ramp-up required in terms of educating internal staff, management, and council-members as to how the process works. In addition, project team members (owner's representative, project engineer and legal counsel) should be selected carefully to ensure that the project documents are sound. For the agency's first design-build project, additional effort will be required to prepare a new RFQ and RFP that comply with SB 785. Where the size of the project is below a certain dollar threshold ($5 million), or where the design work is relatively simple and design-build would not result in significant efficiencies, the time and effort involved in the ramp-up may not be worth it.

However, for the right project, design-build can be a significant improvement over design-bid-build, and might well change the way your city approaches public works projects going forward.

X. Conclusion

Design-build is becoming a more viable project delivery method for cities and other public agencies in California with each passing year. The number of agencies that have awarded design-build contracts with successful results continues to grow, in conjunction with their collective wisdom. The benefits of design-build for those agencies willing to deviate from the standard design-bid-build approach can be significant: the flexibility of a best value award process, a single point of accountability, higher quality of work, fewer change orders, fewer claims, faster project completion, greater cost certainty, and more innovation. In light of these benefits, and the broader availability of design-build under SB 785, design-build contracting in the public sector should continue to grow.

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Initiatives/Referendums

Thursday, May 7, 2015 General Session; 9:00 – 10:30 a.m.

Craig A. Steele, City Attorney, Highland and Monrovia

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Notes:

Local Initiatives and Referenda: Key Considerations for City Attorneys

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Local Initiatives and Referenda: Key Considerations for City Attorneys

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> *"[Direct democracy] is not intended and will not be a substitute for legislation, but will constitute that safeguard which the people should retain for themselves, to supplement the work of the legislature by initiating those measures which the legislature either viciously or negligently fails or refuses to enact; and to hold the legislature in check, and veto or negate such measures as it may viciously or negligently enact. All objections finally and ultimately center in a distrust of democracy; in a challenge of the power of the people to govern themselves. The voters are to decide by the adoption, or rejection, of this amendment to the constitution, as to whether self-government is a success or failure; as to whether people believe in themselves. It is the step which brings legislation to the threshold of the individual and clothes him with the power to secure good laws by control over legislators and legislatures."* – Ballot Argument in Favor of California Proposition 7, the Initiative and Referendum Amendment, October 10, 1911.[1]

I. Introduction

The people of California have retained the power to use the initiative and referendum processes to assert direct control over the political process as their right under the State Constitution for over 100 years. "Direct democracy" measures were part of a sweeping package of constitutional amendments the voters adopted as reforms at a special election in October of 1911. At the same election, the voters also granted women in California the right to vote.[2] Significantly, the courts recognize Californians' constitutional initiative and referendum power not as rights granted to the people, but as a type of legislative power reserved by the people for themselves.[3]

Statewide, these reform efforts were championed by California's Progressive movement and Governor Hiram Johnson, who had been elected in 1910 as part of a fight to wrest political control away from the Southern Pacific Railroad. California was the 10th state to adopt the initiative and referendum statewide. Although the adoption of Proposition 7 in 1911 reserved the initiative and referendum power in the State Constitution for all California voters, a few California cities had reserved the power of direct democracy to local voters years before. San

Francisco and Vallejo were the first California cities to adopt the initiative and referendum in 1898. Dr. John Randolph Haynes, a founder of the California Direct Legislation League, worked for the inclusion of the initiative and referendum power in 1902, which was ratified by the voters in 1903.[4]

Over the course of 100-plus years, the history of initiatives and referenda statewide has been one of high profile, expensive campaigns for and against a broad variety of subjects, many funded by special interest groups. At the local level, however, initiative and referendum activity has been much more varied. Some city attorneys may never have the opportunity to offer advice regarding a local ballot measure during their entire time in office. Others can tell harrowing "war stories" of hard-pitched battles regarding various ballot measures, including competing measures.

The purpose of this paper is not to provide a step-by-step checklist of the statutory initiative and referendum process. The League of California Cities' Municipal Law Handbook has an excellent section in that regard[5] and the relevant sections of the Elections Code are not difficult to follow. Rather, it is my intent to highlight some of the more prevalent legal issues that can arise in the course of a local ballot measure effort, and that usually require the city attorney's input.

II. Definitions and Legal Authority

A. Definitions

"The initiative is the power of the electors to propose statutes and amendments to the Constitution and to adopt or reject them…."[6]

"The referendum is the power of the electors to approve or reject statutes or parts of statutes except urgency statutes, statutes calling elections, and statutes providing for tax levies or appropriations for the usual current expenses of the State…."[7]

The voters reserved the authority to exercise the power of initiative and referendum at the local level in Article 2, Section 11 of the California Constitution, which provides:

"(a) Initiative and referendum powers may be exercised by the electors of each city or county under procedures that the Legislature shall provide. Except as provided in subdivisions (b) and (c), this section does not affect a city having a charter.

(b) A city or county initiative measure may not include or exclude any part of the city or county from the application or effect of its provisions based upon approval or disapproval of the initiative measure, or based upon the casting of a specified percentage of votes in favor of the measure, by the electors of the city or county or any part thereof.

(c) A city or county initiative measure may not contain alternative or cumulative provisions wherein one or more of those provisions would become law depending upon the casting of a specified percentage of votes for or against the measure."

As required by Article 2, Section 11, the Legislature has adopted an extensive set of statutory procedures to govern the initiative and referendum processes, found at Elections Code Sections 9200, *et seq.* Members of the public frequently use the terms "initiative" and "referendum" interchangeably, the assumption often being that **any** vote of the people on a law may be called a "referendum" on that law. The distinction is more than semantic; each term has separate legal significance. Moreover, the Elections Code provides for two different types of initiative measures.

The most commonly understood definition of an initiative is a legislative measure that is proposed – initiated – by the voters.[8] Under this traditional scenario, initiative proponents draft a measure, give the city notice of their intent to circulate a petition, require the City Attorney to provide a title and summary, collect signatures and, if they collect sufficient valid signatures on the petition, require the city council to either adopt the measure or place it on an upcoming ballot.[9] Alternately, a city council may decide to initiate the process of voter consideration of a measure on its own, without a petition. A city council initiated measure may propose "the repeal, amendment or enactment of any ordinance…."[10] While city council initiated measures sometimes relate to controversial land use or policy issues in the community, or even advisory questions, a number of different types of decisions must be submitted to the voters for approvals. These would include, without limitation, local tax measures and certain kinds of bond measures

and changes to the governing structure of the City, such as district voting proposals, elected mayor proposals or changes to the number of seats on a city council. The two initiative processes may start differently, but both are aimed at soliciting direct voter input on a local legislative proposal. Many of the same statutory processes apply to both of initiatives.

On the other hand, the local referendum power is the means by which the voters can choose to adopt or reject legislation that has already been enacted by the city council.[11] While the initiative gives individual electors, or groups of them, the power to actually propose new laws, the referendum process gives voters the chance to take a look at legislation that has already been passed, if they sign a petition in sufficient numbers before the ordinance takes effect.[12] To protect this authority, the Elections Code provides that most adopted local ordinances do not take effect for 30 days following the date that the adoption of the ordinances is attested by the City Clerk.[13] If ten percent or more of the registered voters of the City sign a valid petition protesting adoption of the ordinance, the effective date of the ordinance is suspended and the legislative body must entirely repeal the ordinance or submit it for voter approval. In that sense, the referendum power is best viewed as a kind of veto authority over the legislative power of local government.

B. The Initiative and Referendum Powers Apply Only to Legislative Acts.

The power of initiative and referenda may only be applied to legislative acts, and the voters' legislative authority is generally viewed to be "co-extensive" with the legislative power of the local governing body.[14] But the initiative and referendum power is limited to actual legislative acts, and does not extend to administrative acts.[15] A legislative act sets policy to be followed in future cases; an administrative or executive act simply applies existing policy decisions to a current set of facts.[16] Although the California Constitution and the Elections Code refer to local legislative acts under the heading of "ordinances," it is well-settled that a legislative act may be enacted by initiative, or subject to rejection by a referendum, regardless of whether it is actually labeled as an ordinance or a resolution.[17] The character of the act determines the applicability of the initiative and referendum process, because the electorate's power is generally the same as that of the legislative body. Given the significance of the initiative and referendum power, if doubts can be reasonably resolved in favor of the people's reserved power, those doubts will be resolved in favor of preserving it.[18]

The legislative/administrative distinction closely mirrors the legislative/quasi-judicial concept in land use law. The voters may adopt, amend or repeal a zoning ordinance by initiative or referendum as legislative acts.[19] However, the granting of a conditional use permit[20] or a variance[21] under a zoning ordinance is not within the voters' power. Generally, after a policy decision has been made, subsequent decisions made to execute that policy will not be considered legislative and not be subject to initiative or referendum. So, for example, when the County of Los Angeles and the State of California adopted the policy decision to build court buildings in Los Angeles County, the subsequent decisions about where to locate those buildings were held to have been administrative in nature.[22] Similarly, a city council's decision to enter into a contract with another party to implement state and federal legal requirements was deemed to be administrative in nature and not subject to referendum.[23]

While the people's ability to exercise the initiative or referendum powers over local legislative acts is quite broad, it is not so broad as to extend beyond the legislative authority of a city council. So, for example, the California Attorney General has opined that a local initiative may not adopt policy positions on issues that are outside the authority of a local legislative body. So a proposed measure that called for an end to the Vietnam War and withdrawal of U.S. troops was not a valid exercise of the local initiative power, even though it purported to state the policy position of the voters of the local entity.[24]

C. Limitations on the Initiative and Referendum Power.

Although the courts generally look to preserve broad rights to use the initiative and referendum powers, over the years a substantial body of law has developed to define a number of specific types of limitations on the use of those powers. Briefly summarized, some of the most frequently relevant limitations are:

1. Limitations on Initiative Power

a. Like any law, an initiative measure must comply with both the California and federal constitutions. So, for example, a proposed initiative that discriminated against homosexuals and people with AIDS was held to be facially invalid and not a valid subject for an initiative because it violated the Equal Protection Clause and anti-discrimination provisions of

the California Constitution. The city properly refused to place it on the ballot.[25] Similarly, a proposed county initiative that purported to distinguish between unincorporated county residents and city residents for the purpose of voting on airport-related land uses was invalidated, among other reasons, because the voting classifications it established were unconstitutional.[26] Initiative measures that clearly violate either the California or federal constitutions, or both, are the most frequent subject of pre-election litigation.

b. An initiative measure may not name an individual to hold office, or name or identify any private corporation to perform a function or have any power or duty.[27] A local initiative measure that named a particular corporation as an "Applicant" and assigned the corporation various duties, powers and functions in relation to the permitting of a solid waste facility was held to violate this provision of the California Constitution.[28] The court also held Article 2, Section 12 of the California Constitution applies to local initiative measures, notwithstanding a lack of specific text to that effect. However, in another case the court held an initiative measure that sought voter approval of a development agreement naming a specific developer as a party was not the kind of measure subject to the prohibition in Article 2, Section 12.[29]

c. An initiative measure must actually execute a legislative act; it may not direct the legislative body to take a subsequent legislative act. In an initiative measure that adopted certain policy statements relating to growth control, the voters directed the city council to amend the city's general plan to conform to the concepts the voters adopted in the measure. In a post-election challenge, the court invalidated the initiative, holding that the direction to take a later legislative act is not a valid use of the initiative power.[30]

d. An initiative measure may not take a legislative action in an area that has been preempted by the State or federal government. Examples of preempted fields where initiative legislation has been disallowed includes solid waste management,[31] airport land use,[32] and public employee retirement[33]. Prior to the dissolution of redevelopment agencies, courts also held that California's redevelopment laws preempted local initiatives related to redevelopment.[34]

e. In the rare cases of authority that is specifically delegated by statute to the city council, rather than just to the city as an entity, courts will presume the Legislature intended to prohibit local voters from exercising the initiative and referendum powers over such actions. So, the California Supreme Court held that a statute that specifically gave city councils and boards of supervisors the authority to adopt certain kinds of development fees precluded the voters from adopting or repealing the same fees by initiative or referendum.[35]

f. Similarly, an initiative measure that is held to impair an "essential government function" will be found to be invalid. This limitation generally protects the most basic management and executive functions of a local government agency from impairment by the voters. Examples include measures that would impair basic fiscal management duties, such as requiring voter approval of **any "**revenue raising device" including fees for service and normal service charges. [36] This limitation has also been held to prohibit an initiative that would have interfered with a city's statutory authority to issue pipeline franchises. [37]

g. Land use initiatives or referenda must be consistent with the local general plan. It is well-settled that initiative measures may take legislative actions relating to land use matters such as adopting or amending general and specific plans and zoning ordinances. Occasionally, an initiative measure will adopt a land use provision that conflicts with an existing general plan. Similarly, a referendum could repeal or amend a land use ordinance in a way that leaves inconsistency with a general plan. This occurs most often when land use project opponents subject one decision in a series of land use actions to a referendum, leaving the other decisions intact. If the opponents choose the wrong decision to make subject to referendum, the referendum may be invalid because it results in an inconsistency with the general plan.[38]

h. The Elections Code prohibits more than one election on the same subject matter[39] at a special election within a 12 month period.

2. Common Procedural Issues in the Initiative Process.

The local initiative process generally takes a relatively long period of time, with multiple interactions between the city clerk and the initiative proponents. In many cases, especially where professional petition circulators and an experienced city clerk are involved, there are relatively

few opportunities for the city attorney to "touch" the initiative process. Still, the city attorney has some statutory responsibilities, and there are some common procedural issues that arise that may require the city attorney's involvement.

a. **Title and Summary.** After the initiative proponents have published or posted the statutorily required notice of intent to circulate an initiative petition, they will also file a request for the city attorney to prepare a title and summary of the initiative petition within 15 days. The city attorney's duty to provide a title and summary is ministerial, and must be complied with even if the city attorney thinks the proposed measure is invalid.[40] This document should simply summarize, in 500 words or less, what the measure says. There is no statutory authority or requirement for the city attorney to do any analysis of the measure at this stage. Since any elector can seek a writ of mandate to compel the city attorney to amend the title or summary if either is false, misleading or in excess of the Elections Code requirements, there is no reason to provoke any dispute with the proponents at the earliest stage of the process by criticizing the measure, being argumentative, or refusing to prepare a title and summary.[41]

b. **Defects in Form or Substance of the Petition.** The city clerk has a mandatory duty to reject initiative petitions that do not include the required elements of a valid petition. Those elements are the contents of the notice of intent, a valid declaration of the circulator (including the dates of circulation), evidence that the initiative petition includes the full text of the measure being proposed, and the full name, signature and address, as registered to vote, of each signer, personally entered by the signer.[42] City clerks generally will be reluctant to reject petitions on any of these grounds without legal advice, and rightly so.

c. **Misconduct in Circulating the Petition.** It is a misdemeanor for any circulator of a petition to make false statements about, or misrepresent, the purpose and effect of a petition.[43] It is exceedingly difficult to document this type of violation in a way that can lead to prosecution, since reports to the elections official are often second hand or do not identify the circulator in question. While such

allegedly false statements do not impact the elections official's duty to process the petition, there is some narrow authority to suggest that absolutely false statements by initiative proponents in the petition itself and in the signature gathering process may invalidate an initiative measure even after it has been passed by the voters.[44] It must be noted that this case is an incredibly fact-specific case in which the initiative measure itself contained material misrepresentations as to the effect of the measure and initiative proponents made blatantly false statements. At trial the proponents did not even attempt to defend the truth of the statements. In invalidating the measure, the court noted that its ruling should be viewed narrowly in the context of the bad facts of the case.

d. **Timing.** In most cases, all initiative signatures and all sections of the petition must be secured together and filed at one time by the initiative proponents or a person authorized in writing by the proponents.[45] Late filings should not be accepted.

e. **Withdrawal of Signatures**. Any voter who has signed a petition may withdraw his or her signature by filing a written request with the elections official **before the petition is filed**.[46] Once the petition is filed with the elections official, signatures may not be withdrawn.

f. **Withdrawal of Measures**. The Elections Code permits initiative and referendum proponents to engage in negotiations regarding the issues raised in a petition, and proponents may withdraw the proposed measure at any time before filing the signed petition for verification by the elections official. A withdrawal request must be in writing and signed by all of the original proponents of the measure.[47]

g. **Examination of Signatures.** Once a petition is filed, the elections official makes an initial count of the signatures to determine, *prima facie*, whether a sufficient number of signatures has been filed. If there appear to be sufficient raw signatures, the elections official then has 30 days from the date of filing, excluding Saturdays, Sundays, and holidays, to verify the signatures on the

petition.[48] The Elections Code and the Secretary of State's regulations set forth guidelines and standards for determining whether signatures should be counted as valid or not. The verification period is the time during which the city attorney should be researching the legal validity of the proposed measure, if necessary, in order to be prepared to advise the city council regarding its options if the measure has a sufficient number of valid signatures. In certain extreme cases, the measure may be so obviously invalid that the city declines to even accept it for filing.

h. **Effect of a Valid Petition.** If the petition contains the valid signatures of 10% of the registered voters in the jurisdiction (or in a city of less than 1,000 voters the lesser of 25% or 100 signatures), the city council has three options: 1) adopt the measure as presented at the regular meeting at which the city clerk certifies the validity of the petition or within 10 days thereafter; 2) order the measure submitted to the voters at the next regular municipal election not less than 88 days in the future, or 3) order a report to be prepared within 30 days regarding the impacts of the measure on the city, and then take either of the previous two actions.[49] If the ordinance contains the valid signatures of at least 15% of the registered voters and includes a request that the city council call a special election on the matter and if the city council chooses to submit the measure to the voters it must do so at a special election on a date at least 88 but not more than 103 days following the call of the election.[50]

i. **Effect of the Vote.** If the city council puts the measure on the ballot and a majority of the voters approve it, it is a valid and binding ordinance of the city as of the date the election result is declared by the city council. Successful initiative measures go into effect ten days after the declaration of the vote, unless the measure provides otherwise. If an initiative measure is either adopted by the city council without a vote of the people, or approved by the voters, that ordinance cannot be repealed or amended except by a vote of the people, unless the original ordinance provides otherwise.[51] City attorneys who draft measures to be submitted to the voters are well-advised to include language in the measure that allows the city council to amend the adopted ordinance under certain

circumstances. This allows the city to make minor or practical changes to an ordinance from time to time without going back the voters for approval repeatedly.

j. **Conflicting Measures.** If two or more conflicting measures pass at the same election, the measure that receives the highest number of affirmative votes controls.[52] Generally, measures are considered to conflict if one or both expressly state that the measure conflicts with another, or if the measures comprehensively regulate the same subject. If asked to draft a city council-sponsored competing measure to be placed on a ballot with an initiative, the author should strongly consider including language about the effect and priority of competing measures.

3. Limitations on the Use of the Referendum.

The statutory and judicial limitations on the power of referendum are far more limited. As noted above, a city referendum can be brought only regarding a legislative decision made by the city council. Otherwise, referenda cannot be brought against the following types of legislative actions, each of which takes effect immediately on adoption[53]:

a. Ordinances that call or relate to a local election;

b. Urgency ordinances such as those adopted under Government Code Sections 36934, 36937 and 65858;

c. Ordinances relating to street improvement proceedings;

d. Other ordinances governed by particular provisions of state law that make the referendum process inapplicable; and,

e. Ordinances providing for tax levies or for governmental appropriations. However, this exception to the referendum power has largely been eliminated by the adoption of Proposition 218, which specifically amended the California Constitution to provide that the voters may use the power of initiative and referendum to repeal tax measures.

4. Common Procedural Issues in the Referendum Process.

The factors that can prevent a referendum from going forward to the ballot, or invalidate a referendum after the election, are much more process-oriented than substantive.[54] Referendum proponents' failure to completely or substantially comply with all the procedural steps in the referendum process will likely be fatal to the referendum. This is especially important given the compressed time frame within which a referendum petition can be circulated. In the short referendum period, proponents often are unable to "fix" procedural defects. Those steps are:

a. **Time.** The requisite number of registered voters' signatures on a referendum petition must be secured and filed with the elections official during regular business hours within 30 days following the date the ordinance was adopted and attested by the City Clerk. Petition signatures filed later that date are void.[55]

b. **Signature Threshold.** A referendum petition must contain the valid signatures of at least 10% of the registered voters in the jurisdiction or, if there are fewer than 1000 voters, the lesser of 25% or 100 voters.[56]

c. **Identify the Ordinance Number or Title.** Each page of the referendum petition must include the identifying number or title of the ordinance subject to referendum.[57] This, along with the full text requirement explained below, is a key requirement. There must be no question about the scope of the proposed referendum.

d. **Full Text.** Each section of the petition that is circulated must include the full text of the ordinance that is subject to referendum.[58] A number of cases have invalidated referendum petitions due to the proponents' failure to circulate the full text – even voluminous texts – of the ordinance subject to the referendum. This is true even where the subject of the referendum is an entire general plan.[59] Courts also have held that the "full text" requirement includes the proponents' obligation and circulations would have been required to carry around the entire document to circulate exhibits and diagrams that are a part of the ordinance subject to referendum.[60] The purpose of this requirement is to ensure that voters are not confused about the target of a referendum petition.[61] The courts interpret the "full text" requirement quite literally,

> even holding that a city clerk has a ministerial duty to reject a petition that has been circulated without the full text of the document at issue.[62]

When the proponents file a referendum petition, the city clerk's duties with regard to signature counts and verification are the same as described in Section 2 (g), above. If the referendum proponents file a legally compliant petition with sufficient valid signatures within the time allotted, the effective date of the ordinance is suspended and the city council must either entirely repeal the challenged ordinance or submit it to the voters at the next regular election or a special election at least 88 days following the order of the election.[63] To become effective, the ordinance must be approved by a majority of the voters. If the ordinance is not approved, or if the City Council repeals it, the same ordinance cannot be adopted for a year thereafter.[64]

5. City Participation in Ballot Measure Campaigns.

With the adoption of Proposition 218, many public agencies have been required to submit ballot measures to their voters for approval of important revenue measures. Because local agencies have more frequently become the proponents of ballot measures, there often are not formal campaign committees formed to raise funds and campaign on behalf of measures. As agencies have become more involved in revenue–related ballot issues, some agencies have started to expand their informational activities relating to other types of initiatives and referenda. This has led to an increased need for city attorneys to define the line between permissible and impermissible activities for public officials and public agencies. Even with the increase in activities, the law is quite well-settled that a public agency and its officers and employees may not expend public funds for the purpose of influencing the voters to vote in any particular way.

The Government Code provides, in relevant part:

> "An officer, employee, or consultant of a local agency may not expend or authorize the expenditure of any of the funds of the local agency to support or oppose the approval or rejection of a ballot measure, or the election or defeat of a candidate, by the voters.[65]"

In addition, it is a misdemeanor:

> "…for any elected state or local officer, including any state or local appointee, employee, or consultant, to use or permit others to use public resources for a campaign activity, or personal or other purposes which are not authorized by law.[66]"

The foregoing statutes codify the holding of the California Supreme Court in the leading case setting forth the basic rules against partisan government involvement in ballot measures.[67] In *Stanson v. Mott*, the court addressed the question of whether the State Director of Beaches and Parks was authorized to expend public funds in support of certain state bond measures for the enhancement of state and local recreational facilities. The court concluded that the Director of Beaches and Parks lacked such authority and set forth the basic rule that:

> " . . . at least in the absence of clear and explicit legislative authorization, a public agency may not expend public funds to promote a partisan position in an election campaign . . ."[68]

The court held that "a fundamental precept of this nation's democratic electoral process is that the government may not 'take sides' in election contests or bestow an unfair advantage on one of several competing factions." The court also held that this basic rule applied equally to candidate election campaigns as well as ballot measures.[69] Apart from official ballot arguments and other materials authorized by the Elections Code, there is no legislative authorization to expend public monies to promote or defeat a ballot measure. However, the *Stanson* court recognized that public funds may be expended for "informational purposes" to provide the public with a fair presentation of relevant information.[70]

Stanson recognized that problems may arise in attempting to distinguish improper "campaign" expenditures from proper "informational" activities:

> "With respect to some activities, the distinction is rather clear; thus, the use of public funds to purchase such items as bumper stickers, posters, advertising "floats," or television and radio "spots" unquestionably constitutes improper campaign activity (citation omitted), as does the dissemination, at public expense, of campaign literature prepared by private proponents or opponents of a ballot measure (citation omitted). On the other hand, it is generally accepted that a

> public agency pursues a proper "informational" role when it simply gives a "fair presentation of the facts" in response to a citizen's request for information (citation omitted) or, when requested by a public or private organization, it authorizes an agency employee to present the department's view of a ballot proposal at a meeting of such organization (citation omitted)...."[71]

The *Stanson* case and others that followed drew a relatively clear line between improper campaign expenditures and lawful informational activities by a public agency. Those cases hold generally that city expenditures in connection with ballot measure elections, even those expenditures that go so far as to urge voters to vote at a particular election – without advocating a particular result – are not unlawful as long as the communications do not **expressly advocate, or taken as a whole unambiguously urge,** the passage or defeat of a clearly identified measure.[72] But in 2009, the California Supreme Court took a look at the distinction between improper campaign activities and appropriate information activities, in the context of more aggressive public agency public information tactics in connection with a local ballot measure. In *Vargas v. City of Salinas*,[73] the court examined a challenge to the City's public information campaign that extensively and purposefully reached out to voters to inform them of the potential impacts to city services if a ballot measure was not approved. The outreach included a city newsletter, website content, extensive and repeated public analyses of the impacts of the measure by staff and other communications.

In a fact pattern that looked, to some extent, like a more intentional effort to influence the voters, the *Vargas* court added a contextual element to the determination of whether a public agency's communications related to a ballot measure are permissible. In a close case, the court held, the "style, tenor and timing" of communications may signal improper advocacy, even if the communications lack an express "vote yes" or "vote no" message.[74] The court contrasted the City's factual and relatively dispassionate communications to a hypothetical where a city put up large billboards that predicted some horror would occur if an identified measure passed. It is not easy to put the holding of the *Vargas* court into a convenient talking point of legal advice. In advising public agencies about communications relating to a ballot measure, it is perhaps most helpful to ask whether the proposed communication "looks, sounds, or feels" like a campaign

communication, even if it does not advocate a particular result in an election. The more a communication looks, sounds or feels like an unusual activity for the public activity – bumper stickers, glossy mailers and slogans come to mind - the more likely it will be subject to successful challenge. But if the public agency communicates as it normally does, through newsletters, a website, and the like, in measured tone that more closely resembles staff analysis, those communications are more likely permitted under the applicable case law.

The *Schroeder v. City of Irvine* case, decided before *Vargas*, is an interesting illustration of some communications measures that have been approved by courts. The Irvine City Council had authorized substantial expenditures of public funds to register voters in the City and inform them of the importance to the City of a countywide ballot measure. Although the City Council had taken a public position in favor of the proposed ballot measure, the materials it distributed did not advocate any particular vote on the measure and rarely mentioned the measure at all. A taxpayer challenged the expenditures as illegal "partisan campaigning" under *Stanson.* Because the City of Irvine's publicly-funded communications only urged the reader **to** vote, and not **how to** vote, the *Schroeder* court held Irvine's communications were appropriate. Further, although the petitioner argued that the unambiguous implication of the City's communications was for a yes vote, the court held that when reasonable minds can differ as to the message being conveyed, there has been no "express advocacy" in violation of *Stanson.* The court also held that cities are not prohibited from spending public funds to encourage voter registration if the city council determines there is a public purpose in doing so.

Thus, the above-cited cases and statutes leave some room for a public agency and its officers and employees to provide impartial information to the voters about a ballot measure. There also is authority for a city official to express the city's official position on the measure upon request.[75] It is also clear that, in addition to impartial informational activities, cities may spend public funds to draft a ballot measure,[76] and can likely use public funds to conduct polling to determine what elements should be in the measure.[77] In a 2008 case involving a regional public entity, the court made a distinction between the process of drafting a ballot measure and associated activities – what the court called "governing" – and actually campaigning in favor of or against the ballot measure itself.[78]

Once the measure is before the voters, however, additional caution is certainly warranted. This presents a delicate situation for the city attorney, likely faced with city councilmembers and staff members who want to be more aggressive about the need to "inform" the public about the vital need to pass the measure, as well as public relations consultants who seem to specialize in telling city officials how some other city attorney allowed another city to "push the envelope" without any problem. However, if the style, content, timing or tone of information provided at public expense either expressly advocates or unambiguously urges a particular result in an election, those expenditures of public funds would be illegal. The stakes for an illegal expenditure of public funds for partisan political purposes are high. A violation of Government Code Section 8314 by an individual is a misdemeanor. Under *Stanson*, public officials who authorize such unlawful expenditures may be held personally liable for repayment of the funds improperly spent, although that remedy appears to be rare.

6. Tips on Advising the City Clerk Regarding Initiatives and Referenda.

Regular elections are stressful enough for most city clerks. The uncertainty of an initiative or a referendum can create higher stakes than normal and increase the need for solid advice from the city attorney. Working as a team, it is important for the city attorney and city clerk to maintain impartiality and not view the initiative or referendum process as an adversarial situation. The city clerk, as elections official, has a duty to protect the impartiality and integrity of the election process, and to not get involved in partisan situations or take sides.

The city attorney can help city clerks by identifying issues and tasks early in the process; perhaps even by creating a timeline or checklist for a less experienced clerk to use as the process moves along. During the periods when petitions are being circulated and signatures are being verified, the city attorney can use that time to review the provisions of the measure and research any legal issues that may be presented. Once signatures have been verified there is a relatively short time window within which to advise your client regarding legal issues. It may also help to inform the city council and staff regarding the steps in the process and the projected timeline.

Finally, it is important that the city clerk recognize the ongoing confidentiality of the process. Initiative, referendum and recall petitions, as well as any memoranda prepared by the clerk in

examining the petitions, are not public records.[79] The identities of voters who sign petitions should be protected so as to not a chill voter's right to participate in the process. Signed petitions may only be shown to the city clerk and deputies, the proponent (if the petition is found to be insufficient) and specified law enforcement officials, including the city attorney, upon approval of the appropriate superior court.[80] Some city attorneys take the position that they have the independent authority to view petitions as part of the process of advising the city clerk. I see no support in the statute for that proposition. Instead, if there is some need for the city attorney to see a petition or petitions and court approval is not available, I have recommended that the city clerk deputize the city attorney for the limited purpose of receiving and processing the petitions. Once an election result has been certified, the city clerk must retain petitions in a secure fashion for eight months following the certification.[81]

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[1] http://librarysource.uchastings.edu/ballot_pdf/1911g.pdf

[2] *Id.*

[3] *Associated Homebuilders of Greater Eastbay, Inc. v. City of Livermore*, (1976) 18 Cal.3d 582.

[4] The Initiative and Referendum Institute, University of Southern California, http://www.iandrinstitute.org/California.htm

[5] City Atty Dep't, League of Calif. Cities, *California Municipal Law Handbook*, (CEB 2014 Ed.) §§ 3.80-3.150.

[6] Cal. Const. Art. 2, § 8.

[7] Cal. Const. Art. 2, § 9.

[8] *See*, Elections Code § 9201.

[9] Election Code §§ 9214 and 9214.

[10] Elections Code § 9222.

[11] *Santa Clara County Local Transportation Authority v. Guardino*, (1995) 11 Cal.4th 220.

[12] Elections Code § 9237.

[13] *Id.*

[14] *See, DeVita v. Napa County*, (1995) 9 Cal. 4th 763 (County General Plan may be amended by initiative, future changes subject to voter approval).

[15] *Simpson v. Hite* (1950) 36 Cal.2d 125.

[16] *See, Valentine v. Town of Ross* (1974) 39 Cal.App.3d 954 (approval of plans for a flood control project was administrative, not legislative, and not subject to referendum since the decision to go forward with the project had previously been made).

[17] *Yost v. Thomas* (1984) 36 Cal. 3d 561, 570.

[18] *Shaw v. People ex rel. Chiang* (2009) 175 Cal.App.4th 577, *rev. den.*

[19] *See, e.g., Arnel Development v. City of Costa Mesa* (1980) 28 Cal.3d 511 (zoning and rezoning proper subject of initiative).

[20] *Wiltshire v. Superior Ct.* (1985) 172 Cal.App.3d 296.

[21] *See Topanga Ass'n. v. County of Los Angeles* (974) 11 Cal.3d 506.

[22] *Simpson v. Hite* (1950) 36 Cal.2d 125.

[23] *Worthington v. City of Rohnert Park* (2005) 130 Cal.App.4th 1132.

[24] 56 Ops.Cal.Atty. Gen. 61, 63.

[25] *Citizens for Responsible Behavior v. Sup. Ct.* (1991) 1 Cal.App. 4th 1013.

[26] *Hawn v. County of Ventura*, (1977) 73 Cal.App.3d 1009.

[27] Cal. Const. Art. 2, §12.

[28] *Pala Band of Mission Indians v. Bd. Of Supervisors (1997) 54 Cal.App. 4th 565*.

[29] *Citizens for Responsible Government v. City of Albany* (1997) 56 Cal.App.4th 1199 (*reh'g denied, review denied).*

[30] *Marblehead v. City of San Clemente* (1991) 226 Cal.App. 3d 1504, 1507, *citing American Federation of Labor v. Eu* (1984) 36 Cal. 3d 687. *See also, Widders v. Furchtenicht* (2008) 167 Cal.App.4th 769 (City Attorney was justified in refusing to prepare a title and summary for a measure which purported to direct the City Council to adopt measures to address a specified problem).

[31] *Wiltshire v. Superior Court* (1985) 172 Cal.App.3d 296.

[32] *Hawk, supra.*

[33] *Voters for Responsible Retirement v. Bd. Of Supervisors* (1995) 8 Cal.4th 765.

[34] *Redevelopment Agency v. City of Berkeley* (1978) 80 Cal.App.3d 158.

[35] *Committee of Seven Thousand (COST) v. Superior Ct.* (1988) 45 Cal.3d 491.

[36] *See, City of Atascadero v. Daly*, (1982) 135 Cal.App.3d 466 (proposed initiative requiring voter approval of any city action to collect revenue invalid).

[37] *Newsom v. Bd. of Supervisors* (1928) 205 Cal. 262.

[38] *See, deBotarri v. Norco City Council* (1985) 171 Cal.App.3d 1204 (successful referendum petition would have left zoning inconsistent with adopted general plan).

[39] Elections Code Section 9218.

[40] Elections Code § 9203. *See also, Schmitz v. Younger* (1979) 21 Cal.3d 90 (duty to prepare title and summary is ministerial; validity of an initiative measure is a matter for a court to decide).

[41] The city attorney's responsibility to prepare an impartial analysis of the proposed measure, if it qualifies for the ballot, is the subject of a separate paper.

[42] Elections Code §§ 100, *et seq.*, and 9207, *et seq.* *See, Myers v. Patterson* (1987) 196 Cal.App.3d 130 (elections official has a ministerial duty to reject an initiative petition that does not include the text of the notice of intent).

[43] Elections Code § 18600.

[44] *San Francisco Forty Niners v. Nishioka*(1999) 75 Cal.App.4th 637.

[45] Elections Code §§ 9208, 9210.

[46] Elections Code § 9602.

[47] Elections Code § 9604.

[48] Elections Code §§ 9114, 9240.

[49] Elections Code § 9215.

[50] Elections Code § 9214.

[51] Elections Code § 9217.

[52] Elections Code § 9221.

[53] Elections Code § 9235.

[54] Signature verification procedures and election requirements that apply to initiative measures also govern the referendum process. Elections Code §§ 9240, 9243.

[55] Elections Code §§ 9235, 9242.

[56] Elections Code § 9237.

[57] Elections Code § 9238.

[58] *Id.*

[59] *See*, *Nelson v. Carlson* (1993) 17 Cal.App. 4th 732 (circulators' failure to attach copy of a local coastal plan amendment to their referendum petition invalidated the perition).

[60] *Lin v. City of Pleasanton* (2009) 176 Cal.App. 4th 408.

[61] *Id. at* 470, *citing Billig v. Voges* (1990) 223 Cal.App.3d 962, 966.

[62] *Defend Bayview Hunters Point Com. v. City and County of San Francisco* (2008) 167 Cal.App.4th 846, 851.

[63] Elections Code § 9241.

[64] *Id.*

[65] Government Code § 54954,

[66] Government Code § 8314.

[67] *Stanson v. Mott*, (1976) 17 Cal.3d 206.

[68] *Id*. at 209.

[69] *Id*. at 217.

[70] *Id*. at 221.

[71] *Id*. at 222.

[72] *Schroeder v. Irvine City Council*, (2002) 97 Cal.App. 4th 174.

[73] *Vargas v. City of Salinas* (2009) 46 Cal. 4th 1.

[74] *Vargas, supra, at 40.*

[75] *Stanson, supra*.

[76] *League of Women Voters v. Countywide Criminal Justice Coordinating Committee* (1990) 203 Cal.App.3d 529, 548-49.

[77] FPPC Hicks Advice Letter, No. I-98-007 (1998); FPPC Roberts Advice Letter, No. A-98-125(1998).

[78] *Santa Barbara County Coal. Against Auto. Subsidies v. Santa Barbara County Ass'n of Governments* (2008) 167 Cal. App. 4th 1229.

[79] Government Code § 6253.5.

[80] *Id.*

[81] Elections Code § 17200.

Impartial Analysis

Thursday, May 7, 2015 General Session; 9:00 – 10:30 a.m.

Michael Jenkins, City Attorney, Hermosa Beach, Rolling Hills and West Hollywood

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Notes:

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MONTEREY, CA

A PRACTITIONER'S GUIDE TO PREPARING THE IMPARTIAL ANALYSIS

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A PRACTITIONER'S GUIDE TO PREPARING THE IMPARTIAL ANALYSIS

Michael Jenkins[1]

California Elections Code Section 9280 reads as follows:

> 9280. Whenever a city measure qualifies for a place on the ballot, the governing body may direct the city elections official to transmit a copy of the measure to the city attorney, unless the organization or salaries of the office of the city attorney are affected. The city attorney shall prepare an impartial analysis of the measure showing the effect of the measure on the existing law and the operation of the measure. The analysis shall include a statement indicating whether the measure was placed on the ballot by a petition signed by the requisite number of voters or by the governing body of the city. If the measure affects the organization or salaries of the office of the city attorney, the governing board may direct the city elections official to prepare the impartial analysis. The analysis shall be printed preceding the arguments for and against the measure. The analysis shall not exceed 500 words in length.
>
> In the event the entire text of the measure is not printed on the ballot, nor in the voter information portion of the sample ballot, there shall be printed immediately below the impartial analysis, in no less than 10-point bold type, a legend substantially as follows: "The above statement is an impartial analysis of Ordinance or Measure ____. If you desire a copy of the ordinance or measure, please call the elections official's office at (insert telephone number) and a copy will be mailed at no cost to you."

California Elections Code section 9280, set forth above, authorizes the governing body to direct that the city attorney prepare an impartial analysis of a local ballot measure.[2] Section 9280 provides little guidance as to the format of the impartial analysis, dictating only that in 500 words or less it show "the effect of the measure on existing law and the operation of the

[1] Mr. Jenkins is a partner at Jenkins & Hogin, LLP and serves as City Attorney for the cities of Hermosa Beach, Rolling Hills and West Hollywood. Mr. Jenkins has written a lot of impartial analyses.

[2] The impartial analysis is optional. If the ballot measure affects the organization or salaries of the city attorney's office, the city clerk is to prepare the impartial analysis.

measure," and that it indicate whether the measure was placed on the ballot by a voter petition or by the governing body.

This paper will address issues that arise in preparing an impartial analysis. The city attorney's obligations are similar to those of the Attorney General as regards standards governing preparation of state ballot measures. Most of the case law in this area arises from challenges to Attorney General ballot summaries. The courts look to this case law when examining local agency impartial analyses. This paper also draws on cases that scrutinize measure titles, which are evaluated on a substantially similar standard as impartial analyses. Many of the cases cited in the paper hail from the early and mid-20th century; nonetheless, they remain good law.

The Word Count

Five hundred words can either be a lot of words or a little. Obviously, you are not obligated to use all 500 words if the measure is short and simple. Voters will appreciate a short impartial analysis. On the other hand, summarizing a complex ballot measure in 500 words can be a challenge, and it may take many drafts to distill the analysis to the maximum word count. Bottom line: the length of the impartial analysis should generally mirror the length and complexity of the measure.

Although I cannot cite to any authority to support this practice, I do not include the following in the word count:

- The title: "Impartial Analysis Prepared by the City Attomey
- My name and title at the end
- The paragraph described in the final paragraph of Section 9280 which must be included when the entire text of the measure is not printed in the ballot pamphlet.

Other rules governing counting words in candidate statements (and should be equally applicable to the impartial analysis) are promulgated by the Secretary of State and attached to this paper for your reference.

The Format

Section 9280 does not prescribe a format for the impartial analysis. Don't hesitate to be creative if doing so will improve the clarity of the analysis. I've attached at the end of this paper an example of an impartial analysis that uses headings to help guide the reader ("existing law," "proposed change," "effect")and another that used a chart to explain the intricacies of a particularly complicated measure. The bottom line is that the impartial analysis must explain the general subject matter of the measure, the current law and how the measure changes the law.

Exercise creativity as necessary to accomplish that end in a manner that communicates clearly and effectively.

The Impartial Analysis Must Be Impartial

In *Amador Valley v. State Board of Equalization* (1978) 22 Cal. 3d 208, 243 (challenge to Prop 13), the Supreme Court stated the following:

> Prior to the circulation of an initiative measure, the Attorney General is required to prepare a title and summary of its 'chief purposes and points' - not exceeding 100 words. (Cal. Const., art. II, § 10, subd. (d); Elec. Code, §§ 3502, 3503.) The Attorney General's statement must be true and impartial, and not argumentative or likely to create prejudice for or against the measure. (Elec. Code, § 3531.) The main purpose of these requirements is to avoid misleading the public with inaccurate information.

Every word and phrase of the analysis should be examined to assure that the analysis is completely unbiased. It is useful to have one or two people in your office (lawyers and nonlawyers) read the draft with an eye towards whether it is understandable and impartial.

Portions of your impartial analysis may end up being used in campaign literature; there is nothing you can do about that. I have attached sample campaign advertisements quoting from an impartial analysis in a controversial election. At a minimum, you should try to avoid statements that, standing alone, can be manipulated in advocacy campaign pieces.

Courts have held that the impartial analysis, along with other ballot materials, constitutes evidence of voter intent for the purpose of statutory construction:

> In addition, when, as here, the enactment follows voter approval, the ballot summary and arguments and analysis presented to the electorate in connection with a particular measure may be helpful in determining the probable meaning of uncertain language.

Amador Valley, supra, at 246. The court in *Washburn v. City of Berkeley* (1987) 195 Cal. App. 3d 578, 585 elaborates on this point:

> In enacting section 5025 and other similar statutes (see, e.g., Elec. Code, §§ 10013.5, 3576; Gov. Code, § 88005.5), the Legislature has expressed its determination that the state has a strong interest in providing the electorate with accurate information in voter pamphlets. Our Supreme Court has also commented on the importance of the pamphlet, stating: "The voter's pamphlet, which accompanies the sample ballot, purports to be an authoritative document that appears to give an imprimatur of official approval to statements ... included therein. It is quite likely that this document would carry greater weight in the minds of the voters than normal campaign literature. ..." (*Knoll v. Davidson*

> (1974) 12 Cal.3d 335, 352 [116 Cal.Rptr. 97, 525 P.2d 1273].) Accuracy in ballot arguments is of additional importance because they are "accepted sources from which [courts] ascertain the voters' intent and understanding of initiative measures." (*In re Lance W.* (1985) 37 Cal.3d 873, 888, fn. 8 [210 Cal.Rptr. 631, 694 P.2d 744]; *Legislature v. Deukmejian* (1983) 34 Cal.3d 658, 673, fn. 14 [194 Cal.Rptr. 781, 669 P.2d 17].)

This is yet another reason to treat this as among the more important tasks you perform as city attorney.

If the impartial analysis is clearly misleading, it will be struck down. This is the standard that applies to all ballot pamphlet materials, all of which serve the purpose to inform the electorate accurately. In *Clark v. Jordan* (1936) 7 Cal. 2d 248, the court notes that a title prepared for an initiative measure that described it as abolishing certain taxes failed to also mention that it was adding a new tax:

> Everything that possibly could induce electors to sign the proposal is carefully included in the short title, but the one thing that would cause them to hesitate – the imposition of new taxes on real property – was certainly excluded. As was stated in the oral argument, the "short title" includes "all the sweet and excludes all the bitter." Such a title is clearly misleading and does not substantially comply with section 1197b of the Political Code.

Id. at 251.

The court expresses this sentiment eloquently in *People v. City of Los Angeles* (1921) 187 Cal. 56, 61: "The power of the legislature to prescribe the form of ballot may be fully conceded, but certainly it is not to be assumed that such body ever intended to provide a form of ballot that would present a proposition to the elector in such a way that it would appear to him to be an entirely different proposition from the one actually intended, even if we should assume it could legally do this."

The Impartial Analysis Must be Accurate But Need Not Catalogue Every Minor Point in a Measure

Separating the key provisions of the measure from the rest is typically a problem with long and complex measures. It is not unusual for your first draft to be 800 words; then comes the challenging task of deciding what you must include and what you may properly exclude. This requires substantial thought and consideration. Case law makes clear that you must cover the highlights:

> We have said, however, that the title and summary need not contain a complete catalogue or index of all of the measure's provisions and 'if reasonable minds may differ as to the sufficiency of the title, the title should be held sufficient.' (*Epperson v. Jordan* (1938) 12

> Cal.2d 61, 66 [82 P.2d 445].) As a general rule, the title and summary prepared by the Attorney General are presumed accurate, and substantial compliance with the 'chief purpose and points' provision is sufficient.

Amador Valley, supra, at 243.

As the court further notes in *Brennan v. Board of Supervisors* (1981) 125 Cal. App. 3d 87, 92:

> Ballot measure summaries prepared by the Attorney General have, on occasion, come under judicial scrutiny. It has been consistently held that a ballot summary need not contain a reference to "auxiliary or subsidiary" matters; a statement of the major objectives or "chief purpose and points" of the measure is satisfactory. (*People v. Frierson* (1979) 25 Cal.3d 142, 187 [158 Cal.Rptr. 281, 599 P.2d 587]; *Amador Valley Joint Union High Sch. Dist. v. State Bd. of Equalization* (1978) 22 Cal.3d 208, 243 [149 Cal.Rptr. 239, 583 P.2d 1281]; *Perry v. Jordan* (1949) 34 Cal.2d 87, 94 [207 P.2d 47].) In *Fox etc. Corp. v. City of Bakersfield* (1950) 36 Cal.2d 136, 145 [222 P.2d 879], the court noted: "'The title need not contain a summary or index of all of the measure's provisions. Within certain limits what is and what is not an important provision is a question of opinion. Within those limits the opinion of the attorney-general should be accepted by this court.'" Moreover, "[o]nly in a clear case should a title ... [or summary] be held insufficient." (*Epperson v. Jordan, supra.*, 12 Cal.2d 61, 66.)

And, as the court further explains:

> In our view, the failure of the Committee's digest to account for all technical aspects of Proposition U does not, given its adequate coverage of the primary focus of the measure, render it inadequate. Faced with the difficult task of simplifying a complex proposal, the Committee drafted a summary which, if not all-encompassing, at least briefly described its major subjects. While the trial court's draft presented a more complete digest of the measure, that is not the test. As appellate decisions have often noted, "substantial compliance" is sufficient, and if reasonable minds may differ as to the sufficiency of the summary, it should be held sufficient. (*Amador Valley Joint Union High Sch. Dist. v. State Bd. of Equalization, supra.*, 22 Cal.3d 208, 243; *Vandeleur v. Jordan* (1938) 12 Cal.2d 71, 73 [82 P.2d 455].)

Id. at 96.

See also Epperson v. Jordan (1938) 12 Cal. 2d 61, 66:

> Although the title must contain a "summary of the chief purpose and points of said proposed measure" it need not be a catalogue or index to all of the provisions of the measure. In approaching the question as to whether the title so prepared is a proper one

> all legitimate presumptions should be indulged in favor of the propriety of the attorney-general's actions. Only in a clear case should a title so prepared be held insufficient. Stated another way, if reasonable minds may differ as to the sufficiency of the title, the title should be held to be sufficient. These rules of construction are in accord with the fundamental concept that provisions relating to the initiative should be liberally construed to permit, if possible, the exercise by the electors of this most important privilege.

In *Epperson,* the court defers to the Attorney General's selective inclusion of some "auxiliary" matters and his exclusion of others:

> The fact that it includes some matters which are auxiliary and subsidiary, and fails to mention others of the same character does not render the title fatally defective. A mere reading of the many objections to the title raised by petitioners indicates that it is their belief that the title must include a complete index of all of the provisions of the proposal regardless of whether such provisions are main provisions or are auxiliary and subsidiary thereto. To do this within the limits of one hundred words would be palpably impossible. We have carefully read each of the nine objections raised by petitioners to the present title and while several of these embody some very important matters, we think that all of them are subsidiary and auxiliary to the chief purpose and points of the proposal as heretofore set forth. No useful purpose would be served by considering each of them separately.

Id. at 70-71.

That deferential standard notwithstanding, the court in *Horwath v. City of East Palo Alto* (1989) 212 Cal. App. 3d 766 found the impartial analysis of a rent control ballot measure wanting. The measure included an 8% rent rollback, which was not mentioned in impartial analysis. The court notes:

> At the outset we resolve any misperceptions there may be about whether the city attorney met his responsibilities under section 5011. Clearly, by omitting any discussion of the rollback, the city attorney failed to prepare an impartial analysis of Measure A within the meaning of section 5011."

Id. at 772.

The impartial analysis at issue in *Horwath* was challenged after the election, rather than during the 10-day review period designated in Elections Code section 9295. Consequently, the court was faced with the question whether to invalidate the election based on this critical omission. Fortunately for the City (and the city attorney), the court answers this question in the negative:

> With these cases and principles in mind, we can fashion a model for deciding whether the defective ballot measure analysis triggers invalidation of Measure A on due process grounds. Determination of how much process is due in a local, direct decisionmaking context - where the complained-of irregularities consist of omissions, inaccuracies or misleading statements in the ballot materials - will depend on whether the materials, in light of other circumstances of the election, were so inaccurate or misleading as to prevent the voters from making informed choices. In conducting this inquiry courts should examine the extent of preelection publicity, canvassing and other informational activities, as well as the substance or content of such efforts. The ready availability of the text of the ordinance, or the official dissemination and content of other related materials, such as arguments for or against the measure, will also bear on whether the statutory noncompliance rendered the election unfair. Finally, courts should take into account the materiality of the omission or other informational deficiency. Flaws striking at the very nature and purpose of the legislation are more serious than other, more ancillary matters.

The court concludes as follows:

> This omission falls somewhere in between a minimal defect and one going to the core character and purpose of the proposed legislation. However, in light of what was disclosed, coupled with the extent of preelection publicity on the very topic of the rollback, as well as the availability of the full text of the proposed ordinance, we cannot conclude, on the record before us, that the City's misconduct was so egregious as to raise a presumption of unfairness.

Good result for the city, but you don't want to be that city attorney if you can avoid it.

How Far Can You Go Expressing Doubt About the Legality of the Measure?

If the measure is clearly and unequivocally unlawful, unconstitutional or beyond the authority of the people, it should not be on the ballot at all. So, if the measure has made it to the ballot, you should be wary of statements suggesting that the measure is illegal unless it unquestionably is.

Here are some statements that I think are within bounds where the measure suffers from potential defects:

Where the subject matter of the measure is the subject of pending litigation:

Recent federal court decisions in other states have cast doubt on whether the ordinance, as currently written, can be imposed on long distance, cellular and bundled telephone services. Several California cities with ordinances similar to Hermosa's are currently embroiled in litigation on this issue. Should California courts determine such ordinances inapplicable to those telephone services, the revenues collected from the current ordinance would be reduced

substantially. Adoption of the proposed ordinance would protect the City from an adverse outcome in any such litigation.

Where pre-election lawsuit failed to remove the measure from the ballot or declare it infirm:

The validity of Measure A was the subject of a pre-election lawsuit. The court determined that the legal questions about Measure A could be decided after the election if the measure is approved. If Measure A passes and a lawsuit challenging one or more of its provisions is filed, the outcome of that lawsuit cannot be predicted with certainty.

Where the ballot measure is unclear:

Measure A states that revenue from the new tax is intended for "maintenance and expansion of city services." It is unclear from the measure whether this is a restriction on the use of the revenues. The California Constitution requires a two-thirds vote to pass a tax measure if use of tax revenues is restricted; a simple majority is required to pass a tax measure where the revenue may be used for "general governmental purposes." It is not clear whether the proposed tax is a "general" or "special" tax; hence, it is uncertain whether a majority or a two-thirds vote is required for passage of the measure.

Where there exists a possibility that the measure may not withstand judicial scrutiny:

Existing civic center shopping centers may increase the number of formula businesses while new ones and those outside the civic center are subject to strict limits. Absent a legitimate basis, California law generally requires similarly situated property owners to be subject to the same laws; consequently, this provision may not withstand judicial scrutiny.

When expressing doubt about the measure, keep in mind that you are not a seer and ordinarily cannot predict with any degree of certainty whether a measure will be challenged or whether it will withstand judicial scrutiny. Statements of doubt must be measured in order to avoid the possibility that they will induce voters to vote no, notwithstanding the risk that some critic further down the road may seek to blame you for failing adequately to warn the voters of the measure's failings and the consequences that may flow therefrom.

Finally, several years' ago, I faced a situation where the measure sponsor disavowed and sought to remove the measure from the ballot after it was legally too late to do so. I included the following in the impartial analysis:

> At the City Council meeting of July 25, 2011, the proponent of the initiative announced that he was withdrawing the initiative from the ballot. However, State law governs the procedures for initiative measures and by that point in time it was too late to keep the initiative off the ballot.

Don't Wait Until the Last Minute

The impartial analysis has the same deadline as the ballot arguments. This typically gives you roughly ten days to prepare it. Don't leave it to the last minute – the analysis should be written with care.

I typically prepare one or more drafts and then let it sit for a day before returning to it with fresh eyes. I am looking for these considerations;

- Is anything significant omitted?
- Where space constraints require some details of the measure be left out, are the excluded items not significant?
- Are the issues presented in a logical and understandable sequence?
- Is the tone and content neutral and unbiased?
- Is a statement included as to whether the measure was placed on the ballot by the city council or by voter petition?

Once I have been through the analysis multiple times and have a respectable draft that satisfies these tests, I ask one or two people in my office to read the analysis and insist on frank and unrestrained critiques. Only after considering those comments do I then finalize the analysis and send it to the city clerk.

The City Council Plays No Role in Preparing the Impartial Analysis

This goes without saying, but I will say it anyway. The city council is responsible for placing the measure on the ballot and may comment on the wording of the ballot question. That may embolden some councilmembers to ask also to comment on the impartial analysis; the answer is "no." The analysis is yours and yours alone and no member of the city council or staff should be involved in its preparation.

The Standard of Review is Deferential

Absent a glaring error or omission, the courts are deferential and will deny challenges to impartial analyses on a substantial compliance standard of review:

> A title so prepared is presumed sufficient, and doubts are to be resolved in favor of its sufficiency; substantial compliance is sufficient and it need not contain a summary or index of the provisions of the measure or auxiliary and subsidiary matters.

Perry v. Jordan (1949) 34 Cal. 2d 87, 94.

In *Fox Bakersfield Theatre Corp. v. City of Bakersfield* (1950) 36 Cal. 2d 136, 1451 the California Supreme Court observed:

> Here the main and general purpose of the initiative was the imposition of a tax on amusement businesses. That is adequately covered in the title of the ordinance stated on the ballot. The mention of the method of computing the tax as to some businesses but not others was merely incidental or auxiliary and may be disregarded. As said in *Brown v. Jordan, supra,* 84: "If it be conceded that after disclosing the chief purpose and points of the proposal, the title contains references to some provisions of the proposal no more important than some to which reference was omitted, this does not render the title fatally defective. The title need not contain a summary or index of all of the measure's provisions. Within certain limits what is and what is not an important provision is a question of opinion. Within those limits the opinion of the attorney-general should be accepted by this court." There was substantial compliance here.

In *Horwath, supra,* 212 Cal. App. 3d at 777-778, the court raises the bar further, holding that for a measure to be invalidated due to a deficient impartial analysis, the challenger must demonstrate that the outcome of the election would have been different had the analysis been compliant. Needless to say, this burden is nearly impossible to satisfy.

All of that said, every effort should nonetheless be made to assure that the impartial analysis reflects your best writing. In the event that an impartial analysis is successfully challenged, the petitioner is entitled to an award of attorney fees under Code of Civil Procedure section 1021.5, the private attorney general statute. In *King v. Lewis* (1990) 219 Cal. App. 3d 552, the court held that "the public's right to an accurate impartial analysis . . . constitutes an important right within the meaning of" CCP section 1021.5. In that case, however, the court found that two word changes and one deletion ordered by the trial court did not significantly alter the meaning of the impartial analysis and hence, did not warrant an award of attorney fees.

Conclusion

Preparation of the impartial analysis is a task you should take seriously. As city attorney, you play an important role in assuring the integrity of the electoral process and in informing the voters of the meaning and significance of ballot measures. Your analysis may be quoted in campaign materials and in letters to the editor to the local newspaper. Your analysis, along with other ballot materials, will be given weight by a reviewing court when construing the meaning and intent of the measure. Make the impartial analysis a piece of writing that serves your community well.

SECRETARY OF STATE WORD COUNT GUIDELINES

WORD COUNTING GUIDELINES

(Elections Code Chapter 1. General Provisions, Section 9)

The guidelines below are used by the Election Official for counting words on candidate statements, ballot measure text, arguments, rebuttals and other ballot enclosures. The guidelines do **not** apply to ballot designations for candidates. If the text exceeds the word limit, the author will be asked to delete words or change a sufficient number of words, or a sentence, until the statement is within the required word limit.

1. Punctuation marks are not counted. Symbols such as "&" (and), and "#" (number/pound) are not considered punctuation and each symbol is counted as one (1) word.

2. The words "a", "the", "and", "an" are counted as individual words.

3. **GEOGRAPHICAL NAMES** such as countries, states, counties, cities, towns, or jurisdictions are counted as one (1) word.
   Such as: "City of Los Angeles" = 1 word
   "City and County of San Francisco" = 1 word

4. **ABBREVIATIONS** each acronym or abbreviation for a word, phrase, or expression is counted as one (1) word.
   Such as: UCLA, PTA, USMC, LAPD, U.S.M.C.

5. **HYPHENATED WORDS** that appear in any generally available standard reference dictionary published in the U.S. at any time within the last 10 calendar years immediately preceding the election are counted as one (1) word.
   Such as: Attorney-at-law

6. **DATES...** consisting of a combination of digits are counted as one (1) word.
   Such as: 3/18 7/21/89

   DATES... consisting of a combination of words and digits are counted as two (2) words.
   Such as: July 21, 1983 18 June, 1987

7. **NUMERIC COMBINATIONS** are counted as one (1) word.
   Such as: 1973 13 1/2 5% 8/3/73 #14

8. **MONETARY AMOUNTS** Such as: $1,000.00 are counted as one (1) word
   Such as: $4 million are counted as two (2) words

9. **NAMES OF PERSONS AND THINGS** are counted as individual words.
   Such as: Gus Wright (2 words)
   L. A. Basketball Team (3 words)

10. **TELEPHONE/FAX NUMBERS** are counted as one (1) word.
    Such as: 1 (800) 815-2666 1-562-462-2317

11. **INTERNET WEB SITES/E-MAIL ADDRESSES** are counted as one (1) word.
    Such as: 1) http://www.co.la.ca.us 2) www.lavote.net 3) http://www.lacounty.Info

CANDIDATE'S STATEMENT INFORMATION SHEET

Please type using regular lowercase letters, do not use all CAPS.
Type your statement clearly and legibly - DO NOT handwrite or print.

Section 13307 of the Elections Code of the State of California sets forth guidelines for candidate's statements. Please follow them:

1. The statement of each candidate shall be printed in type of uniform size and darkness and with uniform spacing.
2. The statement shall not include any party affiliation or membership or activity in partisan political organizations.
3. Reference to other candidates for that office or to another candidate's qualifications, character, or activities are prohibited.
4. Your statement will be printed as submitted; therefore you are advised to carefully check for errors in punctuation and grammar. Spelling however, will be corrected by the computer automatically.
5. Remember to sign this form and any supplemental sheets if used and attach them to your statement. If you wish to have a Foreign language translation of your statement prepared for printing in the Voter's Pamphlet, be sure to check the space(s) provided on the front of this form.

WORD COUNT STANDARDS

As stated in Section 9 of the Elections Code.

(a) Counting of words, for purposes of this code, shall be as follows:
- (1) Punctuation is not counted.
- (2) Each word shall be counted as one word except as specified in this section.
- (3) All geographical names shall be considered as one word; for example, "City and County of San Francisco" shall be counted as one word.
- (4) Each abbreviation for a word, phrase, or expression shall be counted as one word. *E.G. UCLA, PTA, L.A.P.D.*
- (5) Hyphenated words that appear in any generally available standard reference dictionary, published in the United States at any time within the 10 calendar years immediately preceding the election for which the words are counted, shall be considered as one word. Each part of all other hyphenated words shall be counted as a separate word.
- (6) Dates consisting of a combination of words and digits shall be counted as two words. *E.G. April 10, 1990.* Dates consisting only of a combination of digits shall be counted as one word. *E.G. 4/10/90.*
- (7) Any number consisting of a digit or digits shall be considered as one word. Any number which is spelled, such as "one," shall be considered as a separate word or words. "One" shall be counted as one word whereas "one hundred" shall be counted as two words. "100" shall be counted as one word.
- (8) Telephone numbers shall be counted as one word.
- (9) Internet web site and email addresses shall be counted as one word.

(b) This section shall not apply to counting words for ballot designations under Sections 13107 and 13107.5.

FOR MEMBER OF THE CITY COUNCIL
JOHN SMITH **Age: 45**
Occupation: Businessman

I have been a 30 year resident of this City and thoroughly enjoy living here. I would like to increase citizen education and police resources to stop the gang and graffiti activity that are overtaking our city.

I would like to implement environmental standards for cleaner water and air quality.

I respectfully ask for your support and thank those of you who cast your vote for me. A vote for me is a vote for a better City Council.

/s/ John Smith

SAMPLE OF STATEMENT FORMAT

Please use Helvetica 10 pt type.

SAMPLE IMPARTIAL ANALYSES

CITY ATTORNEY'S IMPARTIAL ANALYSIS OF MEASURE R

Ballot Measure R proposes an ordinance that would make two categories of changes affecting commercial property.

1. Require voter-approved specific plan.

Existing law: Any proposed development must comply with Malibu's General Plan, Zoning Ordinance and Local Coastal Program, which together set specific rules for use and development of private property. Commercial development projects must obtain approvals from the City, which can only approve projects that comply with the rules.

Proposed change: The measure would require voter approval of specific plans for commercial and commercial-residential projects over 20,000 square feet.

Effect: Specific plans are planning tools that may establish project-specific development rules. Legally, voter approval may be a prerequisite for specific plans that propose new rules. Measure R is not limited to projects that propose new rules. The measure also mandates specific plans for projects that comply with existing rules. This mandate is legally questionable as applied to proposed projects that otherwise comply with existing rules. Specific plans may be rejected by the voters. Even though required by initiative, the City could face monetary liability should voters fail to allow reasonable development of private property.

2. Change City's formula retail regulations.

Existing law: The City defines formula retail businesses (commonly called "chain stores") as businesses with 10 or more stores nationally that share features like merchandise/menu, façade, layout, uniforms, or décor. The City prohibits most formula retail businesses over 3500sf and limits shopping centers to 45% of such tenants.

Proposed change: The measure would (1) change the definition to regulate businesses with 10 or more stores worldwide, instead of nationally; (2) decrease the maximum size from 3500sf to 2500sf; and (3) decrease the cap in shopping centers from 45% to 30% of tenants. The measure also would allow unlimited formula retail businesses in existing tenant spaces between 1400sf and 5000sf in five civic center shopping centers.

Effect: If the measure is adopted, its exemptions would allow the five existing civic center shopping centers to increase their formula retail occupancy to as much as 83% of their aggregate retail square footage. The exemptions operate to increase potential formula retail in the civic center contrary to the measure's stated purpose to prevent a "predominate sense of familiarity or sameness." The measure also creates different rules for new shopping centers than for certain existing ones. Existing civic center shopping centers may increase the number of

(Continued on next page)

CITY ATTORNEY'S IMPARTIAL ANALYSIS OF MEASURE R (Continued)

formula businesses while new ones and those outside the civic center are subject to strict limits. Absent a legitimate basis, California law generally requires similarly situated property owners to be subject to the same laws; consequently, this provision may not withstand judicial scrutiny.

Measure R was placed on the ballot by initiative petition that was signed by a legally sufficient number of registered voters of the City of Malibu. To be adopted, Measure R must be approved by a simple majority of the ballots cast in this election.

A "yes" vote on Measure R favors the Measure.
A "no" vote on Measure R opposes the Measure.

IMPARTIAL ANALYSIS OF MEASURE F

Measure F is a proposal to adopt an ordinance that would establish new regulations, procedures, programs and restrictions pertaining to temporary events and other activities in the coastal zone. The coastal zone occupies all land from the shoreline to Ardmore Avenue, excluding the Hermosa Valley residential neighborhood from 24th Place to 18th Street.

The proposed ordinance is lengthy and complex. The following shows the effect of the main, but not all, provisions of the ordinance on existing law:

CURRENT LAW	PROPOSED ORDINANCE
Temporary events, except school events, in coastal zone require special events permit and review by Parks and Recreation Commission and City Council	Adds numerous application requirements; requires noticed public hearings; and Parks and Recreation Commission and City Council review based on twenty-two criteria for temporary events. Limits number and frequency of temporary events; prioritizes specified events
Conditions to mitigate event impacts imposed on a case-by-case basis	Mandates specific conditions for all temporary events
No reporting requirements	Requires detailed evaluation and analysis by qualified "independent third party." Requires City to prepare and publish in specified formats specific data, transcripts and reports (based on logs, videotapes, photographs)
Admission charges may be permitted, subject to Coastal Commission regulation; commercial sales on beach limited to official memorabilia (no food or drink)	Prohibits admission charges to temporary events, VIP seating and commercial sales on beach
Beach designated as an open space recreational resource	Prohibits construction of permanent structures, except infrastructure, on beach

(Continued on next page)

IMPARTIAL ANALYSIS OF MEASURE F (Continued)

CURRENT LAW	PROPOSED ORDINANCE
Advertising permitted on lifeguard towers, restrooms, trash cans, lifeguard/maintenance vehicles and in connection with special events	Prohibits permanent commercial advertising on beach, except on lifeguard/ maintenance vehicles. Allows limited advertising for temporary events
City administers storm water management program	Mandates diversion of storm water run-off a "top ten" budget priority
Beach Clean-Up Days regularly organized by Community Resources Department	City must promote not fewer than four beach clean-up days between May 1 and September 30 each year
Ocean water tested by several governmental and nonprofit entities	City must test ocean water weekly
No restrictions on use of special event revenue	Place revenues from temporary events in special fund; use exclusively for elimination of existing permanent commercial advertising on beach, ocean water testing, diversion of storm water run-off, enhancement of beach recreational equipment, beach maintenance and establishment of nonprofit marine research facility
	Install public notice board at foot of pier for notices
	Imposes 3-year ban on applications from those who fail to obtain a permit or fail to mitigate all event impacts "to level of insignificance"
	Requires policy protecting and replacing on-street parking spaces in coastal zone.

(Continued on next page)

IMPARTIAL ANALYSIS OF MEASURE F (Continued)

CURRENT LAW | **PROPOSED ORDINANCE**

Proposed Local Coastal Program Specific preparation of a Local under consideration by Coastal Coastal Program Commission.

The fiscal impact of the proposed ordinance has not been determined, but the ordinance may require new programs not currently funded in the City's budget.

A "yes" vote is in favor of adoption of the proposed ordinance, a "no" vote is against adoption of the ordinance. A majority of "yes" votes is required for the ordinance to be enacted.

MICHAEL DENKINS
City Attorney

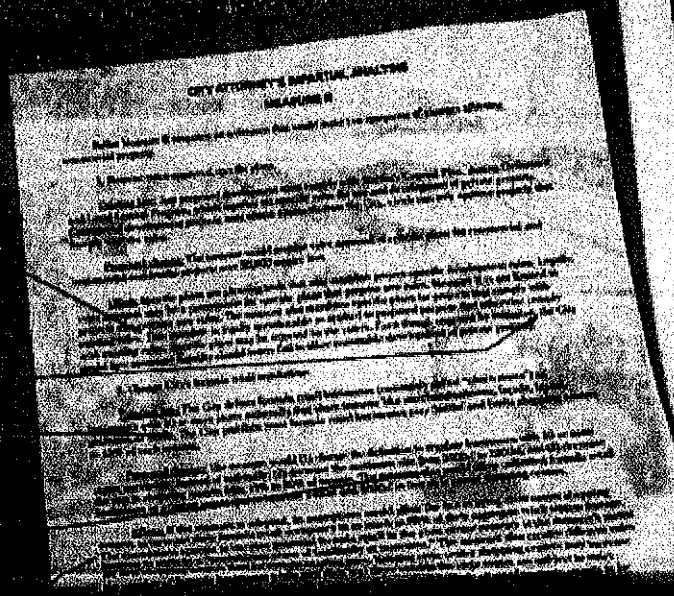
The above statement is an impartial analysis of Measure F. The full text of the Measure will be mailed in a supplemental voter pamphlet to each household. You may also obtain a copy by calling the Hermosa Beach City Clerk's Office at (310) 318-0204.

CAMPAIGN LITERATURE

Official Impartial Analysis

Measure R

Questionable Exemptions, Drafting Errors, Legally Vulnerable



Vote NO on Measure R

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Filling Vacancies & Cancelling City Council Elections

Thursday, May 7, 2015 General Session; 9:00 – 10:30 a.m.

Randy E. Riddle, Renne Sloan Holtzman Sakai

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:

FILLING VACANCIES OFFICES AND CANCELLING ELECTIONS: THE NUTS AND BOLTS

This paper discusses the law governing two election-related issues: filling vacancies in elected offices, and situations where a city may cancel an election. This paper is intended to provide an overview of the primary statutes, cases and attorney general opinions addressing these issues.

A. A Fond Farewell

Before discussing the law governing how to fill a vacancy, it is important to address when a vacancy is deemed to exist. There are numerous ways in which a vacancy may arise. Government Code section 1770 specifies a number of circumstances in which a public office – which includes city elective office – may be deemed vacant:

(1) Death.
(2) An adjudication pursuant to a quo warranto proceeding declaring that the incumbent is physically or mentally incapacitated due to disease, illness, or accident, and that there is reasonable cause to believe that the incumbent will not be able to perform the duties of his or her office for the remainder of his or her term.[1]
(3) Resignation, which in the case of a city council member is effected by delivering a letter of resignation to the city clerk.
(4) Removal from office.
(5) Ceasing to be to be resident of the jurisdiction in which they serve.[2]
(6) Absence from the state without the permission required by law beyond the period allowed by law.
(7) Ceasing to discharge the duties of his or her office for the period of three consecutive months, except when prevented by sickness, or when absent from the state with the permission required by law.[3]
(8) Conviction of a felony or of any offense involving a violation of his or her official duties.
(9) Refusal or neglect to file his or her required oath or bond within the time prescribed.
(10) The decision of a competent tribunal declaring void his or her election or appointment.

[1] See 78 Ops.Cal.Atty.Gen. 134 [granting leave to proceed in quo warranto to determine whether councilmember vacated office due to physical or mental incapacity].)

[2] More specifically, a city council member who moves his or her residence outside the city or district from which he or she was elected immediately vacates his or her office. (Government Code sections 36502 and 34882, respectively; see 79 Ops.Cal.Atty.Gen. 21 (1996) [duty of mayor to maintain residence within the city].)

[3] As to city council members, this provision is modified by Government Code section 36513, which provides that a city council office becomes vacant if the city councilmember is absent without permission from all regular city council meetings for 60 days consecutively from the last regular meeting he or she attended, or 70 days if the council meets once a month. It would be prudent for a city to define by ordinance the process for obtaining permission to be absent from council meetings.

(11) The making of an order vacating his or her office or declaring the office vacant when the officer fails to furnish an additional or supplemental bond.
(12) His or her commitment to a hospital or sanitarium by a court of competent jurisdiction as a drug addict, dipsomaniac, inebriate, or stimulant addict; but in that event the office shall not be deemed vacant until the order of commitment has become final.
The Government Code includes provisions that specify other situations that can lead to a vacancy in public office. Under Government Code section 1099, an official forfeits an office if he or she assumes an office that is incompatible with the first office, creating a vacancy. Under Article XII, section 7 of the California Constitution, anyone holding an office in the state who accepts a free pass or discount from a transportation company forfeits his or her office.[4] Most of the law discussing the issue of whether a particular office has become vacant takes the form of attorney general opinions, usually in opinions addressing whether to grant leave to bring quo warranto proceedings to challenge a particular individual's right to hold a particular office. (See, *e.g.*, 64 Ops.Cal.Atty.Gen. 42 (1981) [concluding that office of city attorney may be deemed to be vacated where attorney was suspended from practice of law, and discussing meaning of "vacancy" in office in other contexts].)

B. Hello, Replacement

Once it is determined that a vacancy in an elective office exists, Government Code section 36512 governs the process for filling the vacancy. That section provides that the council must, within 60 days from the date of the vacancy, either fill the vacancy by appointment or call a special election to fill the vacancy. A person appointed or elected to fill a vacancy holds office for the unexpired term of the former incumbent.

If the city council chooses to fill the vacancy through a special election – or if the council seeks to fill the position by appointment but does not do so within 60 days of the vacancy – the special election must be held on the next regularly established election date not less than 114 days from the call of the election.

Government Code section 36512 provides the city council with another option. It may choose to adopt an ordinance to govern the process for filling a vacancy. Such an ordinance may adopt any of the three following approaches for filling vacancies:

(1) It may requires that a special election be called immediately to fill every city council vacancy and [elected mayor]. The ordinance must provide that the special election will be held on the next regularly established election date not less than 114 days from the call of the special election.

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[4] For example, it would, in my view, run afoul of section 1099 for an individual to be a member of both a city council, and a member of the local school board, since there would potentially be a significant clash of loyalties between the two offices, which owe their duty of loyalty to two different constituencies. (65 Ops.Cal.Atty.Gen. 606 (1982) [issued before enactment of section 1099].) Accordingly, a city council member elected to the school board would forfeit his or her office upon becoming a member of the school board.

(2) It may require that a special election be held to fill a city council vacancy and [elected mayor] when petitions bearing a specified number of verified signatures are filed. The ordinance must provide that the special election shall be held on the next regularly established election date not less than 114 days from the filing of the petition. A city council that has enacted such an ordinance may also call a special election without waiting for the filing of a petition.
(3) It may provide that a person appointed to fill a vacancy on the city council holds office only until the date of a special election which shall immediately be called to fill the remainder of the term. The special election may be held on the date of the next regularly established election or regularly scheduled municipal election to be held throughout the city not less than 114 days from the call of the special election.

Section 36512 prohibits filling a vacancy by appointment if the appointment would result in a majority of the members serving on the council having been appointed. Rather, the vacancy must filled through a special election.

Finally, Section 36512 contains special provisions related to filling vacancies in city council seats elected by district, where the vacancy is created by resignation of a councilmember for reasons other than facing charges of, or conviction for, corruption or criminal behavior, or who is subject to a recall election.[5] Under those provisions, the resigning city council member may cast a vote on the appointment if the resignation will go into effect upon the appointment of a successor. A city council member may not cast a vote for a family member or any other person with whom the city council member has a relationship that may create a potential conflict of interest. Moreover, if a city council member elects to cast a vote under these provisions, the city council member is prohibited advocating on any measure or issue coming before the city council in which the city council member may have a personal benefit, entering into a contract of any kind with the city or a city vendor, accepting a position of employment with the city or a city vendor, or applying for a permit that is subject to the approval of the city council.

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C. What If They Held an Election: Grounds for Cancelling an Election for City Office

The California Constitution, statutes and city charters all contemplate that mayors and members of city councils will be elected at regularly scheduled elections. California law, however, recognizes certain situations where such elections may be cancelled. This paper addresses the two most common situations where elections may be cancelled.

1. A Decided Lack of Interest

Elections Code Section 10229 addresses the most common situation where an election to select a mayor or city council member may be cancelled: where the number of persons who have been

[5] Presumably this provision is intended to ensure that the residents of the affected district are represented in the process of selecting the new council member.

nominated for the city office at a general municipal election does not exceed the number of offices to be filled at that election. In that situation, Section 10229 actually provides three options to the city council: 1. Appoint to the office the person who has been nominated. 2. Appoint to the office any eligible voter if no one has been nominated. 3. Hold the election if either no one or only one person has been nominated.

Section 10229 first specifies that it applies where:

> by the 88th day, during normal business hours as posted, prior to the day fixed for a regularly scheduled municipal election or the 83rd day before the election, during normal business hours as posted, if an incumbent fails to file pursuant to Section 10225, (i) no one or only one person has been nominated for any office that is elected on a citywide basis, or (ii) no one or only one person is nominated to be elected from or by a legislative district, or (iii) in the case of any office or offices to be elected at large, the number of persons who have been nominated for those offices does not exceed the number to be filled at that election; if, by the 88th day, during normal business hours as posted, before a municipal election to fill any vacancy in office, no one or only one person has been nominated for any elective office to be filled at that election, and the election is [to fill a vacancy in an elective office under Government Code Section 36512 Code] . . . .

Section 10229(b) also makes clear that it does *not* apply if more than one person has been nominated to another city office to be elected on a citywide basis or a city measure has qualified and is to be submitted to the voters at that municipal election.

The Legislature has also specified the procedure that must be followed under Section 10229. First, the city clerk must certify to the city council – at a regular or special meeting council meeting – the existence of facts showing that Section 10229 may be properly invoked, and the options available to the city council. Second, notice of these facts must be published or posted after the close of the nomination period, and at least five days before the meeting at which the city council intends to make appointments. Third, the appointments must be made no later than the 75th day before the election. If all of these requirements are satisfied, the city council may make its appointments, and cancel the election. If not, the election must still be conducted.

Finally, Section 10229 addresses three additional issues. First, it provides if the governing body of a city makes an appointment, the city clerk may not accept for filing any statement of write-in candidacy submitted after the council has made the appointment. Second, it confirms that a city may, by ordinance adopted pursuant to Government Code section 36512, require that a special election be held, or that a person appointed to fill a vacancy on the city council may hold office only until the date of the special election, or both. Finally, it states that if an appointment to office is made in a particular council district, that appointment will not affect the conduct of the election in other council districts. There are no cases are attorney general opinions interpreting this section.

If an appointment to office is made in a particular legislative district pursuant to subdivision (a), that appointment shall not affect the conduct of the municipal election in other legislative districts of the city.

2. On a Sadder Note

Elections Code Section 8026 *requires* that an election for a city-wide office be cancelled where an incumbent is a candidate and only one other candidate (excluding any write-in candidates) has qualified for the ballot for that office, and either the challenger or the incumbent dies "after the hour of 12:01 a.m. of the 68th day before the election." In that case, the city council is required to call a special election to fill that office.

In *Faulder v. Mendocino County Board of Supervisors* (2006) 144 Cal.App.4th 1362, the court addressed whether Section 8026 was limited solely to primary elections, or whether it extended to general elections as well.[6] In that case, the incumbent district attorney, who was seeking reelection against only one other candidate, died less than 68 days before the election. The county argued that Elections Code section 15402, rather than Section 8026, governed that situation. Section 15402 generally requires that if a deceased candidate receives the majority of votes in an election, the vacancy is filled in the same manner as if he or she had died after the election.

The *Faulder* court concluded that "section 8026 applies to *all* elections, including general elections, when a candidate in a two-person, nonpartisan, nonjudicial contest dies within 68 days of the date set for the election." (144 Cal.App.4th at p. 1367.) Accordingly, the court ordered the cancellation of the election for district attorney. (*Id.*)

The Legislature subsequently amended this section to make clear that it only applies to primary elections, and that Elections Code section 15402 governs this situation in general elections.

CONCLUSION

There are a limited number of cases and administrative opinions interpreting these important statutory provisions. As is often the case, seeking the guidance of your city attorney colleagues who may have faced similar situations will likely be your best course.

[6] Section 8026 applies to counties and special districts as well as cities.

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General Municipal Litigation Update

Thursday, May 7, 2015 General Session; 10:45 – Noon

J. Stephen Lewis, General Counsel, Santa Monica Rent Control Board

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None

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None

Los Angeles Police Protective League v. City of Los Angeles

232 Cal.App.4th 907 (December 2014)

Take-Away: A state statute that requires local government action does not preempt local policies that merely fulfil that requirement; and taxpayers and local-government employees have no standing to challenge such policies, which are an appropriate exercise of local-government discretion.

Facts: Various state statutes govern when a peace officer may impound a car operated by an unlicensed driver. The Los Angeles Board of Police Commissioners approved a directive, written by the police chief, instructing police officers when to impound (and when not to impound) cars under those statutes. After the police chief's directive was implemented, impounds in Los Angeles dropped by more than a third.

An individual taxpayer and a union representing police officers sued, claiming that the directive was preempted by the state impound statutes. They appeared to believe that the dramatic decline in impounds showed that the directive was frustrating the purpose of the impound statutes, and therefore in conflict with them. Both plaintiffs argued that, because state law specifies when cars may be impounded, local regulation is necessarily forbidden. They also argued that the police chief's directive was in conflict with state law, and therefore preempted, because it improperly gave the chief discretion that state law vests in individual officers. The trial court agreed and enjoined the directive's enforcement. The Court of Appeal reversed.

Analysis and Holdings: First, the Court of Appeal acknowledged that local laws that are in conflict with state law are preempted. But the court concluded that the police chief's directive isn't in conflict with state law, because it merely specifies how state law will be implemented—merely "provide[ing] guidance regarding the enforcement of" state impound statutes, without purporting to limit or expand when an impound is lawful.

Second, and more fundamentally, the Court of Appeal held that neither the taxpayer nor the police officer's union had standing to sue to challenge the directive. While taxpayers have liberal standing to challenge alleged misuse of government funds, they do not have standing to bring the courts into "political issues or issues involving the exercise of discretion" by local government. In support of this proposition, the court quoted from *Humane Society of the United States v. State Bd. of Equalization* (2007) 152 Cal.App.4th 349: "To hold otherwise would invite constant harassment of city and county officers by

disgruntled citizens and could seriously hamper our representative form of government at the local level. Thus, the courts should not take judicial cognizance of disputes which are primarily political in nature, nor should they attempt to enjoin every expenditure which does not meet with a taxpayer's approval." The police officer's union lacked standing because there is no legal prohibition on the police chief's deciding how state law will be complied with, and that exercise of discretion is not "a matter concerning wages, hours, or work conditions which delimits the scope of its representation."

Torres v. City of Montebello

234 Cal.App.4th 382 (February 2015)

Take-Away: In a general law city, written contracts entered into by the city must be signed by the city's mayor—unless the mayor is absent, in which case the contract may be signed by the city's mayor pro tem. But a mayor is not "absent" merely because he or she refuses to sign a contract; a contract signed by the mayor pro tem merely to overcome the mayor's refusal is void. (*NB: a city may, by ordinance, assign contract-signing authority to an officer other than the mayor, but no such ordinance was in place in this case*)

Facts: A candidate for a city council seat approached a company about becoming the city's exclusive commercial-waste hauler. The company then contributed to the candidate's campaign. When the candidate won his election, he officially proposed the exclusive waste-hauling contract to the full city council. After an initial public hearing and deliberation, council directed staff to draft a proposed contract; and, after subsequent meetings, the council voted 3-2 to approve it. Among the two dissenting councilmembers was the mayor.

When the mayor refused to sign the contract, the city attorney advised him that he had a ministerial duty to sign it and, if he continued to refuse, he would be deemed absent, and the mayor pro tem would execute the contract on the city's behalf. The mayor continued to refuse to sign the contract, and the mayor pro tem signed it. The contract bore a notation explaining that the pro tem signed it because the mayor was absent.

Montebello resident Mike Torres sued to invalidate the contract, arguing that it was void because it had not been executed by the mayor as required by Govt Code § 40602, which says that "[t]he mayor shall sign…[a]ll written contracts and conveyances made or entered into by the city." The waste hauler, not wishing to lose its contract, argued that the contract was valid under Govt. Code § 40601, under which, "[i]n the absence of the mayor, the mayor pro tempore shall exercise the powers granted in [§ 40602]." Because the mayor refused to sign the contract, the company argued, he was absent as that term is

used in § 40601.

The trial court disagreed with the waste hauler, agreed with Torres, and declared the pro-tem signed contract void for failure to comply with the Government Code requirement that the Mayor sign all contracts. The waste hauler appealed.

Analysis and Holdings:

The Court of Appeal began its analysis by noting that Montebello is a general law city, and that a "general law city ... must comply with state statutes that specify requirements for entering into contracts." Because a state statute specifies the means by which a general law city may enter into a contract, that method must be complied with; contracts entered into by some other method are void, because state law makes compliance with the prescribed method a "jurisdictional prerequisite to the exercise of the power to contract at all."

Under the Government Code, a general-law city's contracts must be signed by the city's mayor, with the qualification that, in the mayor's "absence," his or her duties may be performed by the mayor pro tem. Looking to other Government Code provisions relating to a mayor's absence, the Court of Appeal concluded that "absence" means physical absence, not a mere refusal to act. Since the mayor in this case was not physically absent (both the mayor and pro tem were in city hall when the pro tem signed the contract), only he, and not the pro tem, had the legal authority to sign the waste-hauling contract.

The court acknowledged that the mayor might have been derelict in his duty; it is possible, as the city attorney had contended, that the mayor had a ministerial duty to sign the contract because it was approved by the city council. But if other city officials believed that the mayor was refusing to perform some duty that the law required him to perform, their remedy was to petition the court for a writ of mandate compelling his action, not to take extralegal action on their own.

The court also held that Torres was not entitled to prevailing-party attorney fees under the private attorney general (PAGA) statute, because his litigation was funded by a consortium of the waste hauler's competitors. The court acknowledged that Torres had no financial interest in the suit's outcome, and that PAGA is intended to make litigation financially viable to those who initiate it for public, rather than private, benefit by awarding prevailing-party attorney fees to those to financially disinterested plaintiffs. But the court held that a party with a significant financial interest in the suit's outcome, like the waste haulers' competitors that funded this case, could not "hide behind" a financially disinterested plaintiff merely to get an award of fees that they would not otherwise be entitled to.

Bertoli v. City of Sebastopol

182 Cal.Rptr.3d 308 (January 2015)

Take-Away: Even if a request for public records under the CPRA is improper because it is unduly burdensome, a lawsuit to compel production of those records is not "clearly frivolous," and therefore does not justify an award of prevailing-party fees to government entity, if the records request is not made for an improper purpose and there is a good-faith argument that the requested records are public.

Facts: A fifteen-year-old pedestrian was struck by a car while crossing the road at a marked crosswalk in the City of Sebastopol, resulting in serious physical and mental disabilities. The lawyer representing the pedestrian victim served the city with a request for 62 categories of public records purporting to relate to the accident. The request sought records going back at least ten years. Some were unlimited in time, and some sought records retained on city employee's private computers.

The city provided partial responses and offered to work with the requesting lawyer to narrow the scope of records sought. After unavailing correspondence back and forth, the accident victim's lawyer sought a writ of mandate to compel the city's response to his full requests. The trial court denied the writ petition, noting that the city had worked in good faith to respond to a records request that constituted an "unprecedented fishing expedition" that would be "an alarming invasion of property rights, an extravagant use of limited city resources, and an unwanted green light for immoderate discovery." The trial court also granted the city's motion for attorney's fees of $42,280 to "punish" appellants for filing their "clearly frivolous" petition. (Although plaintiffs are entitled to prevailing-party attorney fees under the CPRA, government entities are entitled to fees only if the litigation to enforce the request is "clearly frivolous.") The trial court granted the city's fee motion.

Analysis and Holdings: The Court of Appeal overturned the attorney-fee award, finding that the Plaintiff-requestor's position was not clearly frivolous. In doing so, the court first agreed with the trial court that the records request was "overly aggressive, unfocused, and poorly drafted to achieve their desired outcomes." The court also noted that such a request, which "requires an agency to search an enormous volume of data for a 'needle in the haystack' " may be unduly burdensome—as this one was—when it "compels the production of a huge volume of material" to achieve a public benefit that is out of proportion to the burden that the production would place on the public agency.

But although the court ruled that the city properly declined to comply with

the entire records request, and the trial court properly denied the requestor's writ petition, it noted that all of the records sought were either clearly or arguably public, and the purpose in requesting them was to pursue a matter of public interest. Litigation to enforce a CPRA request is "clearly frivolous," the court held, only when prosecuted for an improper motive—e.g., to harass the respondent or for purposes of delay—or when lacking any merit—i.e., when any reasonable attorney would agree the [litigation] is totally without merit." When a court must weigh the burdens and benefits of a request for records that are clearly or arguably public, the litigation in support of a CPRA request is not clearly frivolous, even if it ultimately lacks merit.

Fredericks v. Superior Court

233 Cal.App.4th 209 (January 2015)

Take-Away: Government agencies can't limit their disclosure of public records, absent express statutory authority; nor can they charge for other than direct copying costs, except in the case of electronic records as permitted by statute.

Facts: San Diego resident Farhad Fredericks asked the city and its police department for all "complaints and/or requests for assistance" pertaining to burglary and identity theft during a six-month period. The police department produced redacted responses covering a period of only the immediately-preceding two months. If Fredericks wanted records predating the two-month period, he was told, disclosure would be conditioned on his paying $65 per hour for staff preparation costs, plus a $0.25 charge per page disclosed. Fredericks petitioned for a writ of mandamus to compel compliance with his full six-month records request with no condition that he pay ancillary production costs. The trial court denied his petition, entering judgment in the city's favor on the ground that police departments are required to produce service reports going back only 60 days. Fredericks petitioned the Court of Appeal for a writ mandating that the trial court order San Diego to comply with his records request.

Analysis and Holdings: The Court of Appeal issued a writ ordering the trial court to vacate its judgment in the city's favor and consider the matter further. The appellate court noted that the CPRA includes no 60-day limit on the disclosure of complaints to police departments. In the absence of such a statutory limit, the court held, one cannot be imposed by government agencies or the courts. Rather, agencies and the courts must hew to statutory limits on nondisclosure, with a view toward the public policy favoring disclosure.

The appellate court acknowledged that complying with Frederick's request could be unduly burdensome; it is possible, the court noted, that the request

would encompass so much privileged information that the burden of detailed review and redaction would outweigh the public benefits of disclosure in this case. But in order for the department to be excused from complying with the request, an actual showing of undue burden must be shown, and the trial court must make a finding of undue burden after a careful weighing of the evidence—it cannot impose a strict 60-day limit when none is provided for by statute.

The Court of Appeal also noted that the CPRA permits a government entity to collect only the direct costs of duplicating disclosed records, and permits ancillary costs only in the case of production from electronic records. Given those statutory provisions, the court held, San Diego could not lawfully condition its disclosure of public records on payment of the ancillary costs of a government employee's time spent reviewing and redacting those records.

Ardon v. City of Los Angeles

232 Cal.App.4th 175 (December 2015)

Review Granted and Opinion Superseded March 11, 2015

Take-Away: Once a privileged record is disclosed in response to a CPRA request, the privilege is forever waived.

Facts: During litigation against the City of Los Angeles, the plaintiff's lawyer made a request under the CPRA for public records related to the litigation's subject matter. An employee in the city clerk's office produced all documents that were responsive to that request, including two that had previously appeared on the city's privilege log in the litigation, and a third document, also subject to the attorney-client privilege, that referred to the other two privileged ones. The city moved to compel the plaintiff's lawyer to return the privileged documents and disqualify her from the litigation. The trial court denied the motion.

Analysis and Holdings: The Court of Appeal's analysis started and ended with the CPRA's plain language, that "whenever a state or local agency discloses a[n otherwise privileged] public record to any member of the public, this disclosure shall constitute a waiver of the exemptions specified in [s]ections 6254, 6254.7, or other similar provisions of law." Although there is no question that the city's motion to compel the documents' return would have been meritorious if they had been inadvertently disclosed in discovery, the court held that the CPRA's plain statement that disclosure in response to a CPRA request waives any privilege includes no qualifying language, making the waver absolute—even with respect to pending litigation.

Woody's Group, Inc. v. City of Newport Beach

183 Cal.Rptr.3d 318 (January 2015)

Take-Away: Cities must follow their own local laws governing their quasi-adjudicatory processes, just like members of the public. Unless local law allows a public official to bring a matter before the body on which he or she sits, the official may not do so. And regardless of local law, there must be no unacceptable probability of actual bias on the part of the municipal decision maker, as occurs when a member of the quasi-adjudicatory body has apparently prejudged the matter.

Facts: The Newport Beach planning commission approved a CUP and variance to allow a local restaurant to have a patio cover, remain open until 2 a.m. on weekends, and allow indoor dancing. Although the city's municipal code permitted appeals from planning commission decisions to be filed by "interested parties,"—and then only on a form provided by the city clerk and accompanied by the appropriate fee—an individual councilmember who was not an "interested party" brought the matter before the council for review without using the required form or paying the required fee. He did this by sending the city clerk an email saying that he "strongly believ[ed] " that the planning commissions' approval was wrong for a variety of reasons. The city council heard the councilmember's appeal and overturned the planning commission's decision. In addition to seeking other relief, the restaurant sought a writ of administrative mandamus, which the trial court denied.

Analysis and Holdings: The Court of Appeal reversed. In doing so, it first noted two general principles of fundamental fairness:

- You cannot be a judge in your own case; and
- You cannot change the rules in the middle of the game.

The court found that Newport Beach violated both of these principles. First, it noted, it was inappropriate for the appealing councilmember to sit in a quasi-adjudicatory capacity in a case that he initiated himself—especially a case in which he expressed a view about the case's appropriate outcome before it was even heard by the city council.

Second, the court noted, the city's municipal code specifies who may appeal a planning commission decision and how they must do so. Although the city council had apparently established a "custom" of waving those statutory requirements in the case of appeals desired by a councilmember, the court held, a government body cannot by "custom" override plain statutory language—not even its own.

Golightly v. Molina

229 Cal.App.4th 1501 (September 2014)

Take-Away: Because the Brown Act applies to "collective decision making" by "legislative bodies," executive action by multiple officials employed by such a body, each acting individually in his or her official executive capacity and without deliberation with the others (i.e., non-collectively) does not violate the Act.

Facts: Under state law, county boards of supervisors may allocate funds for social programs to benefit county residents, and Los Angeles County's board does this. The board allocates the funds as part of its annual budget, but delegates to the county's CEO the authority to enter into specific contracts with social services organizations. Before the CEO may enter into such contracts, they must be approved and countersigned by the county auditor, the board's executive officer, and the county counsel, each reviewing the proposed contracts for issues within his or her expertise. A resident sued the county, alleging that, by delegating its authority to enter into social-services agreements to the four county officials, the board, or its officers acting as a de facto committee of the board, violated the Brown Act, which requires legislative bodies to conduct their business in a manner that is open and public.

Analysis and Holdings: The Court of Appeal held that, because the four county officials do not meet to discuss the proposed contracts, do not deliberate together, and therefore do not engage in collective decision-making, the officials are not a "legislative body" governed by the Brown Act. In reaching this holding, the court was mindful that legislative bodies may not avoid the Brown Act's public-meeting requirement by engaging in serial meetings or other subterfuges to collectively decide an issue without appearing to do so. But in this case, the court noted, there was no suggestion that any of the four county officials engaged in any form of deliberation—overt or covert—with the others to decide whether to countersign the contracts, but instead each individually examined the contracts solely for compliance with requirements within his or her official purview.

The court also noted that the state law allowing county boards of supervisors to enter into social services agreements expressly allows delegation of that responsibility to appropriate officials; delegation of administrative functions is appropriate as a matter of common law even without specific statutory authorization; the Board retains for itself ultimate budgeting authority to allocate funds for social services, and does so at open, public meetings; and by delegating contracting authority to county officials with relevant expertise, the board established adequate safeguards to ensure compliance with its legislative direction.

3. Elections

[None]

4. Personnel

Indio Police Command Unit v. City of Indio

230 Cal.App.4th 521 (September 2014)

Take-Away: Although city management has the right to make fundamental decisions concerning the effective operation of local government, it must in good faith meet and confer with its employees' union about how those decisions will be implemented—and this means engaging in a meaningful dialog that is unhampered by city management's pre-meet-and-confer decision to proceed with its plan regardless of union input.

Facts: The City of Indio planned to reorganize its police force. As part of the reorganization, two positions within the police officer's collective bargaining unit would be eliminated and replaced with two new management positions. Other bargaining-unit positions would be eliminated, resulting in layoffs. Through its legal counsel, the police officer's union asked to meet and confer with the city about the proposed reorganization. The City replied that it would meet and confer about the reorganization's effect on employees, but not about whether the reorganization would occur, which the city had already decided. Each additional time the union asked to meet and confer with city officials, the officials replied that the reorganization plan would take place "no matter what," and the PCU had no right to offer a "response" to the plan.

The police union sued the city for failing to meet and confer in good faith. The city defended itself by arguing that it had no obligation to meet and confer with the union about whether to reorganize the police department and, in any event, it did so. The trial court rejected the city's defense arguments, agreed with the union, and enjoined the city from implementing the reorganization without first meeting and conferring with the union in good faith. The city appealed.

Analysis and Holdings: The Court of Appeal affirmed the trial court's judgment. The appellate court agreed with the city that an internal reorganization does not require an employer to meet and confer with its employee's union if it is a "fundamental policy decision" that concerns "the effective operation of local government" and doesn't adversely affect employee's pay or working conditions. But when reorganization does affect pay or working conditions, meeting and conferring is

required—even though the city retains the ultimate authority to implement the reorganization if, after meeting and conferring, no agreement can be reached.

The court noted that Myers-Milias-Brown Act (MMBA) requires public agencies to meet and confer with public-employee unions about material changes to employment conditions, and must "consider fully" the union's views before deciding whether to implement those changes. The court noted several previous cases, including the California Supreme Court decision in *Building Material & Construction Teamsters' Union v. Farrell*, in which appellate courts have held that employment conditions are materially affected, requiring a good-faith meet and confer process, when positions are eliminated from a bargaining unit or work is transferred from that bargaining unit, even if no current member of the unit will be immediately affected. Because there was no dispute that positions would be eliminated from the police officers' bargaining unit (and there would be layoffs adversely affecting some members), a good faith meet and confer process was required. And because the city made clear that, although they would listen to the union, they would not alter their plans, the city did not meet and confer in good faith.

Los Angeles Police Protective League v. City of Los Angeles

232 Cal.App.4th 136 (December 2014)

Take-Away: Under the Public Safety Officers Procedural Bill of Rights Act (POBRA), an officer who is transferred from one assignment to another does not have the right to an administrative appeal unless transfer is made "for purposes of punishment" or affects the officer's compensation or other specified rights. A transfer made to give an officer a fresh start away from a position in which he or she was performing poorly is not made "for purposes of punishment." And a transfer that affects compensation or privileges that the officer enjoyed (but had no right to) in the pre-transfer assignment does not affect the officer's compensation or specified rights.

Facts: A Los Angeles police lieutenant was transferred from one division to another after her supervisors concluded that her management style appeared likely to cause some of the officers that she oversaw to leave the division. She was transferred to a new division for which her supervisors thought that she would be "a good fit," for a "fresh start" that would benefit both the lieutenant and the department. She retained her rank and salary, but lost certain discretionary benefits that came with the position from which she was transferred. A detective was transferred from one division to another after his supervisors concluded that allegations of misconduct affected his effectiveness in the first division. Like the lieutenant, he was transferred to a new division

with no change in rank or pay, for his own benefit and that of the department.

The lieutenant and the detective demanded an administrative appeal under POBRA, which affords public safety officers the right to an administrative appeal of any "punitive action," which the statute defines as "any action that may lead to dismissal, demotion, suspension, reduction in salary, written reprimand, or transfer for purposes of punishment." They demanded the appeal because, they alleged, the transfers had resulted in adverse employment consequences and because they believed that their transfers were punitive. The city disagreed and denied the right to an appeal. The officers sued.

The Court of Appeal affirmed the trial court's judgment that no administrative appeal was warranted.

Analysis and Holdings:

First, the court rejected the officer's contention that their mere allegation that a transfer is punitive—without actual evidence that it is—warrants an administrative appeal. In doing so, the court concluded that requiring appeals based on nothing but an employee's subjective belief that a transfer was punitive "would seriously hobble administrative discretion to transfer employees to fit [a police department's] needs, and frustrate POBRA's purpose, which is "[en]sure that effective services are provided to all people of the state."

Second, the court rejected the officer's argument that, because their transfers followed, and were in response to, claimed problems with their performance, the transfers were necessarily punitive. In rejecting this argument, the court made a distinction between transfers that are intended to punish performance deficiencies (i.e., impose discipline) and those that are intended to compensate for deficiencies by placing an employee in a new environment at the same rank and pay grade in hopes that the new assignment will allow him or her to perform more effectively.

The court also rejected the officers' arguments that their transfers had led to adverse employment consequences warranting an appeal hearing. First, the court noted, much of the claimed adverse consequence was purely speculative and unsupported by any evidence. For example, the lieutenant speculated that she would have a lower chance of promotion as the result of her new assignment, though there was no evidence of that. The detective claimed that he had been monitored and placed on restrictive duty in his new assignment because of the transfer, but the court noted that it was more likely because he had pleaded guilty to sexual harassment. Second, and more fundamentally, the court held that the only "adverse employment consequences" entitling an officer to an administrative appeal under POBRA are those specified in the statute.

Finally, the court held that, even to the extent that a transfer causes an officer to suffer some compensation loss, which is an adverse consequence specified by statute, the loss does not entitle the officer to an administrative appeal unless he

or she was *entitled* to the lost compensation, rather than it being merely incidental. In this case, the lieutenant noted that she worked 170 fewer hours in her new position, due to the position's different need for overtime. She also noted that her new assignment did not afford her a drive-home car as her previous assignment had. But because she was not entitled to work overtime or to have a drive-home car in her previous position, and could not establish that overtime or a car were reasonably required in her new position, the loss of that overtime and car, which was merely incidental to her previous assignment and not a right of her employment, were not losses in her salary.

Deputy Sheriff's Assn. v. County of San Diego

233 Cal.App.4th 573 (January 2015)

Take-Away: Even when it mandates lower benefits than those called for by an in-place collective-bargaining agreement, the California Public Employees' Pension Reform Act of 2013 (PEPRA), limiting pension benefits for new public employees, does not violate the California Constitution's contracts clause, because the new employees have no vested contract right under collective bargaining agreements that predate their employment.

Facts: The County of San Diego entered into a collective bargaining agreement with its sheriff's department employees. The agreement guaranteed a pension for covered employees that would be calculated under a certain formula, and required the county to contribute to the pension fund in a certain amount. While the agreement was still in effect, the Legislature enacted the California Public Employees' Pension Reform Act of 2013 (PEPRA), under which the county was required to provide a new, lower-yield pension formula to new employees and contribute to the pension fund in a smaller amount. To comply with PEPRA, the county offered new employees pensions that would be calculated under the new, lower-yielding formula and contributed a lower amount to the pension fund, even while the agreement requiring the original, higher-yielding formula and higher contribution was still in effect.

The union representing the employees sued the county and the state, arguing that PEPRA's impairment of the collective bargaining agreement was invalid under the state constitution's contracts clause. The trial court disagreed and entered judgment for the county.

Analysis and Holdings: The Court of Appeal affirmed the trial court's judgment that PEPRA did not unconstitutionally impair the collective bargaining agreement with respect to the pension formula. But it reversed the trial court's judgment that the county's decrease in pension contributions was permissible, holding that the decrease was barred by state law..

In affirming that PEPRA's mandated lower pension formula didn't violate the contracts clause, the court began by acknowledging that collective bargaining agreements are contracts. The court also acknowledged that the government generally may not impair contracts, including collective bargaining agreements, without violating the state's contracts clause. But the court noted that, under California law, there is no contract clause protection for *unvested* contractual rights. The court cited precedent under which an employee becomes a party to a contract with a California government entity only when he or she accepts employment and performs work. Since the new, lower formula applied only to new employees who were not yet county employees when the formula was instituted, the court held, they had no vested contractual right to the pension formula under the collective bargain agreement.

Turning to the decreased pension plan contribution, the court noted that PEPRA (specifically Government Code § 7522.30, subdivision (f)), explicitly states that it is not intended to impair in-place contracts setting pension-contribution levels (as opposed to pension pay-out formulas) until the contract expires—even for employees hired after the contract was entered into. So, without reaching the plaintiff's constitutional claim as to the contribution-level issue, the court ruled in their favor on purely statutory grounds, holding that the county's purported abrogation of the in-place contract with respect to contribution levels violated state law.

Protect Our Benefits v. City and County of San Francisco

___ Cal.App.4th ___, 2015 WL 1404952 (March 2015)

Take-Away: Employees who retire before a retirement benefit is instituted have no vested contractual right to that benefit; so a local government may limit, condition, or eliminate the benefit with respect to those retirees. But a local government cannot limit, condition, or eliminate the benefit for employees who will (or did) retire after the benefit was instituted, without violating the contracts clause of the state and federal constitutions.

Facts: In 1996, San Francisco voters amended the city charter to provide that, when the city's retirement system yielded greater than expected earnings, the excess would be "placed in a reserve account and used to pay a supplemental COLA of up to three percent of current benefits, inclusive of the basic COLA." In years when the funds in the reserve account were insufficient to pay the supplemental COLA, pensions would "revert to the level they would have been if supplemental cost of living adjustments had never been made." In 2002, the voters further amended the city charter to make the supplemental COLA permanent, in the sense that once it had been added to an employee's pension payment, it could not be reduced. In 2008, just before the national financial

crisis, the voters amended the city charter to increase the amount of the supplemental COLA from 3% to 3.5%.

In 2011, in the depths of the national financial crisis, city voters again amended the city charter—this time"[t]o clarify the intent of the voters [that] no supplemental cost of living benefit adjustment shall be payable unless the Retirement System was also fully funded based on the market value of its assets for the previous year."

Protect our Benefits ("POB") sued, arguing that, by conditioning retirees' eligibility to a supplemental COLA on the retirement system being fully funded, the 2011 charter amendment reduced retiree benefits in violation of the state and federal contracts clauses.

Analysis and Holdings:

The court of Appeal agreed with POB, but only with respect to employees who worked for the city when the initial supplemental COLA was instituted in 1996. Noting that employee pensions are contractual rights that accrue upon acceptance of employment, the Court of Appeal reiterated well-settled law that those contractual rights are protected by the contracts clauses of the federal and state constitutions, and that "upon accepting public employment, one acquires a vested right to a pension based on the system then in effect, and to additional benefits conferred during …employment." Because employees who worked for the city when the supplemental COLA was instituted acquired a vested contractual right to it, the supplemental COLA could not be diminished by being conditioned on the pension system's full funding without violating the contracts clause. (The court rejected the city's contention that the 2011 charter amendment merely "clarified" existing law, finding instead that the amendment imposed a substantive change.)

But with respect to employees who retired before the 1996 supplemental-COLA benefit was enacted, the court held, they had no vested contractual right to it. They had not exchanged their labor for the right, and had in no way contracted for it. So, while they might have enjoyed supplemental COLAs after the 1996 charter amendment, they had no contractual right to them. Therefore, the court held, the 2011 diminution of the benefit did not affect their contractual pension rights, and so did not violate the contracts clause.

5. Finance and Economic Development

City of Emeryville v. Cohen

233 Cal.App.4th 293 (January 2015)

Take-Away:

State law requiring the orderly winding down of redevelopment agencies permits successor agencies to "reenter" agreements that their predecessor

redevelopment agencies had entered into before they were dissolved. Nothing in state law retroactively invalidates those reentered-into agreements.

Facts:

The City of Emeryville's redevelopment agency pledged funds to the city for redeveloping 27 projects. A few months later, the Legislature enacted Assembly Bill 1X 26, dissolving redevelopment agencies and forbidding them to engage in new business after June 28, 2011, though local governments could create "successor agencies" to bring to a conclusion those projects as to which a redevelopment agency had already entered into an enforceable obligation. The bill added § 34178, subd. (a) to the Health & Safety Code, to say that contracts between a redevelopment agency and the local government that created it "are invalid and shall not be binding on the successor agency," but that "a successor entity wishing to enter or reenter into agreements with the [local government that had formed the dissolved redevelopment agency] may do so upon obtaining the approval of its oversight board."

Emeryville created a successor agency to complete projects as to which its redevelopment agency had entered into an enforceable obligation. A year after Assembly Bill 1X 26 invalidated its 27-project contract, the city and its successor agency executed five new agreements that restated the provisions as to five of the original 27 projects. The successor agency's oversight board approved three of them. At about the same time, the Legislature enacted AB 1484, adding a new provision to the Health & Safety Code, § 34177.3, giving the state Department of Finance (DOF) veto authority over obligations approved by oversight boards. Emeryville's successor agency submitted its agreements to DOF the day after the Legislature granted the department veto power. A month later, the DOF rejected the agreements.

Emeryville sued, arguing that, although the DOF has the authority to veto any *new* agreement, Health and Safety Code § 34177.3—which was enacted after the agreements here had been fully entered into an approved by its successor agency's oversight board—was not retroactive; so DOF could not veto previously-entered-into successor-agency agreements. The trial court agreed that Health & Safety Code § 34177.3 was not retroactive, and issued a writ of mandate compelling the DOF to recognize the three agreement's validity. The DOF appealed.

Analysis and Holdings:

The Court of Appeal denied the DOF's appeal, affirming the trial court's judgment that the state law giving the department veto power over successor agency agreements was not retroactive. In doing so, the court first reiterated the well-settled rule that statutes are generally prospective only, unless they explicitly state otherwise. The court then noted the absence of any language in Health & Safety Code § 34177.3 purporting to give the DOF the right to

retroactively undo contracts that were fully entered into and final before the statute was enacted.

The court next rejected the DOF argument that, because § 34177.3, subdivision (d), states: "Any actions taken by redevelopment agencies to create obligations after June 27, 2011, are ultra vires and do not create enforceable obligations"—and because the three agreements that Emeryville's successor agency re-entered into were executed after that date—they necessarily were subject to the department's veto. The Court of Appeal noted that the statutory language refers to actions taken by *redevelopment* agencies, not by *successor* agencies, which is who took the action at issue here. The department also argued that, because § 34177.3, subdivision (a), says that "[s]uccessor agencies …shall not… create new enforceable obligations ... or begin new redevelopment work, except in compliance with an enforceable obligation that existed prior to June 28, 2011," the agreements at issue here, entered into after that date, are invalid. But, again looking at the statute's plain language, the court rejected this argument because the agreements did not create "new" obligations, but merely re-entered into obligations that already existed.

County of Sonoma v. Cohen

235 Cal.App.4th 42 (March 2015)

Take-Away: The provision of the Great Dissolution law stating that a redevelopment agency's successor agency or oversight board shall not exercise the power to restore funding for an obligation that was deleted or reduced by the Department of Finance, except through the meet and confer process or pursuant to a court order, does not apply retroactively to invalidate the approval of reentry agreements entered into before the provision's enactment.

Facts: In January 2011, the Sonoma Redevelopment Agency and the county entered into a development agreement under which the agency agreed to fund two redevelopment projects. A year later, after state law ordered the dissolution of redevelopment agencies, the county made itself the successor agency. In March 2012, the successor agency's oversight board authorized a resolution to reenter into the 2011 agreements, and the county executed the necessary reentry agreement.

As required by state law, the county submitted to the Department of Finance a "Recognized Obligation Payment Schedule" (ROPS). The ROPS included the two reentered agreements. The DOF disallowed the ROPS because, while it recognized that that oversight boards have statutory authority to approve reentry agreements, reentry agreements are not themselves "enforceable obligations." The DOF reached this conclusion because the policy behind the Legislature's dissolution of redevelopment agencies was to prevent potentially collusive

agreements between those agencies and the government bodies that created them. Since a reentered agreement is simply a reiteration of an agreement between potentially colluding parties, the DOF concluded, it necessarily cannot be an "enforceable obligation" under the legislative policy.

Analysis and Holdings:

While the Court of Appeal acknowledged the Legislature's purpose in dissolving redevelopment agencies, it noted that policy considerations cannot trump statutory provisions. During the period in question, state law (Health & Safety Code Sections 34178, subd. (a) and 34180, subd. (h) "unambiguously authorized a successor agency to request approval of a reentry agreement and an oversight board to grant the request." "This express grant of authority," the court held, "cannot simply be negated through resort to the spirit of the … law"

Citizens for Fair REU Rates v. City of Redding

233 Cal.App.4th 402 (January 2015)

Take-Away:

A transfer of funds from a city-owned utility into the city's general fund may be a tax, if it is paid for by a utility rate that is intended to cover the fund transfer's cost, and if it raises more revenue than necessary to cover the reasonable and necessary cost of providing the utility service.

Facts:

Cities may charge privately-owned utilities a 1% ad valorem tax, which the utilities may in turn pass through to their customers, to offset or cover the cost of the municipal services that the utilities use (fire, police, use of pubic rights of way, etc.). City-owned utilities, like the City of Redding's electric utility, are not subject to that tax. Beginning with its 1988 budget, Redding addressed this problem by transferring funds from its utility company into the city's general fund, and setting rates at a level sufficient to cover the transfer.

Designated a Payment in Lieu of Tax, or PILOT, the funds transfer was intended to be as close as possible to the 1% tax that the city could have collected if its utility had been a private company. In December 2010, by a vote of its city council, Redding increased rates by a little under 8%. Though no portion of the rate increase was specifically designated a fee to cover the PILOT, and no such line item appeared on utility customers' bills, the city council announced that it increased rates at least in part "to obtain funds necessary to maintain such intra-City transfers as authorized by law."

Shortly after the rate hike went into effect, customers sued the city, alleging that the rate increase included a government fee (the amount necessary to cover the PILOT) that, under Proposition 26, was really a tax, which could not be imposed or increased without voter approval. The trial court disagreed and ruled in the city's favor, upholding the PILOT's validity.

Analysis and Holdings:

The Court of Appeal reversed the trial court's finding that the PILOT was not a tax, remanding the matter for further consideration. The court began its analysis by noting that the voters amended the California Constitution by approving Proposition 26 in order to prevent California government entities from avoiding voter-approval requirements for the enactment and increase of taxes by disguising taxes as fees. The court then reviewed earlier cases determining when a "fee" becomes a tax. Under those cases, the court noted a fee is really a tax when it is imposed not to pay for a specific government service, but for general revenue generation, or when a fee that is allegedly intended to pay for a specific government purpose generates more than is reasonably necessary to cover the cost of that service.

With these precedents in mind, the court framed the issue as follows: "the question of whether Redding's PILOT constitutes a tax under Proposition 26 turns on whether:

- the PILOT serves to raise general revenue," (as opposed to paying for a specific program or programs) and
- the PILOT reflects the city's reasonable costs of providing electric service.

Addressing the first part of this question, the court noted that the PILOT approximates the 1% ad valorem tax on utility-company assets that the city could have collected if its utility were instead a private company. Because the PILOT is placed into the city's general fund, and is not earmarked to cover specific government services, the fee appeared to the court to bear the hallmark of a general revenue raising tax The trial court was ordered to analyze this question more closely.

Addressing the second part of the question the court again noted that the PILOT amount is set with reference to the value of the utility company's assets, as though it were a 1% ad valorem tax. Because the PILOT is set without specific reference to the city's cost of providing utility-related government services, the court concluded, it is not apparent that the fee does no more than cover "the reasonable and necessary" costs to the city of providing those services. The court held that unless the city can prove that it covers those costs, and no more, the PILOT is a tax, and is subject to voter approval. The court remanded the case to the trial court to answer this question.

Jacks v. City of Santa Barbara

234 Cal.App.4th 925 (February 2015)

Take-Away:

A utility surcharge that a city assesses for general revenue-generating purposes rather than as consideration for the utility company's right to use city property; that is assessed as a flat percentage of each utility customer's usage;

and that exceeds the prevailing rate for franchise fees in the utility company's region is likely to be held to be a tax that is subject to voter approval, even if it is called a franchise fee.

Facts:

In the mid-1960s, Southern California Edison (SCE) and the City of Santa Barbara entered into a franchise agreement; the city allowed SCE to use the city's rights of way and property, and SCE provided the city's residents with electricity. SCE also agreed to pay a franchise fee equal to one percent of its gross annual receipts for electricity sold within the City, though SCE was free to fund that payment however it chose; i.e., from rates charged to city customers, from all of its customers throughout the region, or some other way.

In November 1996, California voters enacted Proposition 218, amending the state constitution to prohibit local governments from imposing "taxes" without voter approval, but without clarifying what is and is not a tax.

In the mid-1990s, the city proposed adding an additional 1% surcharge to each utility user's bill, to raise funds for general governmental purposes; in 1999, SCE agreed. The agreement was conditioned on the Public Utilities Commission's approval, which was granted in 2005. In November 2005, SCE began billing and collecting the additional 1% fee from the City's electricity users (increase the monthly electricity bill for a typical residential customer by about 54 cents) and remitting the revenues to the City. Immediately after, SCE customers filed a class action lawsuit, arguing that the additional 1% fee was a city tax that, under Proposition 218, could not lawfully be imposed without voter approval.

The trial court disagreed with the plaintiff ratepayers and ruled that the additional 1% utility surcharge was not a tax, but a legitimate addition to the franchise fee. The ratepayers appealed.

Analysis and Holdings:

The Court of Appeal reversed, concluding that "the 1% surcharge is [a] tax masquerading as a franchise fee." Because the fee was never approved by the voters, the court held, it was illegal under Proposition 218.

In reaching this conclusion, the court first noted that there is a well-settled understanding of what a franchise fee is: it is a "charge which the holder of the franchise undertakes to pay as part of the consideration for the privilege of using the avenues and highways occupied by the public utility." The court readily found that the original 1% fee is, legitimately, a franchise fee, because it is charged to SCE purely as consideration for its use of Santa Barbara's public property. And because the fee is incorporated into SCE's rate structure and collected from all of its customers, inside and outside the city, it appears that the fee is imposed on SCE as a business, as consideration for what the business receives from the city, not on Santa Barbara's residents as a general revenue-enhancement measure.

But the court found that the additional 1% appeared to be a utility users' tax, because it was assessed as a percentage of each customer's use, and the city required SCE to collect the fee from its customers within the city, rather than from its entire customer base by incorporation into its rate structure. So the fee was charged not to SCE, but to SCE's customers, with SCE merely acting as the city's agent for collection. Under the agreement between the city and SCE, the city, not SCE, would be liable to refund the fee to customers if the additional 1% were later found to be invalid. And the fee was paid not to compensate the city for the use of public property, but to be deposited into the city's general fund for general government purposes. Finally, the court noted, the additional 1% made the total 2% fee greater than the prevailing rate for franchise fees in the region. For all of these reasons, the court concluded that the additional 1% fee was a tax.

And because the tax wasn't submitted to the voters for approval, the court held, it was invalid under Prop. 218.

City of South San Francisco v. Board of Equalization

232 Cal.App.4th 707 (December 2014)

Take-Away: State use tax—rather than local sales tax—applies to transactions consummated at retail stores in California, when the goods sold in those transactions are shipped from out-of-state warehouses.

Facts: Goods were sold in retail stores in the City of South San Francisco. The actual goods sold, however, were stored at an out-of-state warehouse, and were shipped from that location to the consumer back in California. Similar sales, for goods sold locally but shipped from out of state, were entered into in the cities of Alameda, Irvine, Newport Beach, Roseville, San Ramon, and Santa Fe Springs. In each case, the store added a state tax to the transaction, as well as an additional local tax.

The State Board of Equalization (SBE) collected the taxes, retained the state taxes, and distributed the local tax to the county that comprised each city, for the county to pool and redistribute to local governments within the county. The cities argued that the SBE should have distributed the local taxes directly to the cities that imposed them. They filed a petition for writ of mandate to force the SBE to do that.

Analysis and Holdings: The Court of Appeal held that the SBE was correct not to distribute the taxes directly to the cities, because the tax were "use taxes," rather than "sales taxes."

On each sale of goods, state law imposes one of two excise taxes: either a sales tax or a use tax.

A sales tax is imposed on retailers who sell goods in California (Revenue & Taxation Code § 6051). Under § 6006, good are "sold" when, in exchange for

consideration, title in the goods is transferred from the seller to the buyer; under the Commercial Code, title transfers when a seller completes its performance with respect to the delivery. When a retailer has the goods in stock, the title transfers immediately, in the store, the moment the goods are "delivered" to the customer; the California retailer has "sold" the goods in this state, and must therefore pay sales tax. But when goods are shipped from out of state, it is only upon shipping that the seller has "completed its performance with respect to the delivery of goods." And, since the shipping takes place out of state, there is no sale of goods in California for purposes of imposing a sales tax.

The Legislature recognized that imposing an excise tax only on intrastate sales would unfairly disadvantage sellers of out-of-state goods. To correct this problem, it created a use tax, to apply when sales tax does not. A use tax is imposed on consumers when a California retailer sells them goods that are used in this state, and for which no sales tax is required. The law presumes that goods brought into California are purchased for use here. (§ 6246.)

Under the Bradley-Burns Act (Rev. & Tax Code 7200 et seq.), local governments may impose sales or use taxes in addition to those imposed by the state, but must contract with the SBE to administer and collect the tax. Also under the Bradley-Burns Act, in order to impose sales or use taxes, cites must adopt local ordinances that conform with state-law criteria governing when sales or use taxes apply, as determined by the SBE. The SBE has enacted a regulation, Regulation 1803, under which it will treat a local tax as being of the same kind—sales or use—as applied to a given transaction by the state. So if state law imposes a sales tax, the local tax must be a sales tax also; if the state tax is a use tax, then so must the local tax be.

Because the goods at issue in this case were shipped from out-of-state warehouses, the SBE conculded, they were not "sold" in California, as that concept is used under both state tax law and the UCC, so no sales tax applied. But because they were sold (in the non-statutory sense) by a California retailer to be used in this state, state and any local *use* tax applied.

The City of South San Francisco fought this interpretation because local sales taxes are transferred to cities directly, while use taxes are pooled from cities throughout a county and then redistributed, with the effect that cities may get less revenue. The Court of Appeal upheld the SBE's determination that the subject tax was a use tax as a reasonable interpretation of the UCC and state law.

City of San Buenaventura v. United Water Conservation District

___ Cal.App.4th ___ (March 2015)

Take-Away: A three to one differential between pump charges for agricultural users and all others does not violate the state constitutional requirement that a charge be

"proportional," so long as, in the aggregate, the charge allows a water district to collect no more than its actual expenses incurred in operating its pump program.

Facts:

The United Water Conservation District manages the water resources of the Santa Clara River and associated aquifers in Ventura County, and provides water to farms and cities in the area. To do this, it collects and stores water from rainfall, river and stream flow, and pumps the collected water through pipelines to its destination. The district funds these activities through property taxes, delivery charges, and pump charges. Pump charges are applied to "zones" established by the district "for the benefit of all who rely … upon the ground water supplies" within that zone.

One "zone" established by the district encompases the district in its entirety. The money collected from the district-wide pump charges are deposited into a fund to pay for district-wide conservation efforts. As permitted by the California Water Code, the district charges one pump charge for agricultural users and another charge, three times higher, for all others. Another zone, designated Zone B, encompasses areas that, the district determined, benefit from a large water-diversion project known as Freeman. Pump charges in Zone B were the same as in the district-wide zone: one rate for agricultural users, and a rate three times as high for everyone else.

The district determined that the City of Buenaventura benefitted from Freeman and imposed its three-times-agriculture pump charge for water pumped by the city. The city sued, arguing that it didn't benefit from Freeman and, eventually, the parties entered into a settlement that created a separate zone for the city—Zone C—with rates equal to agricultural rates in Zone B. That settlement expired in 2011, Zone C was abolished and incorporated into Zone B. As a result, the city's pump charges immediately tripled. The city sued over the increase.

The city argued that the pump-charge increase violated Proposition 218, which prohibits local governments from imposing fees for property-related services without voter approval and Proposition 26, which prohibits special districts altogether from imposing a fee for general revenue purposes, and permits them to impose a special-purpose fee only with voter approval. The trial court agreed with the city and entered a judgment requiring the district to pay back to the city the increased charge amount.

Analysis and Holdings:

Reversing the trial court, the Court of Appeal held that groundwater pumping is not a property-related service, so a fee for that service does not require voter approval under Prop. 218. The court also held that the fee is not a tax under Prop 26.

In determining that groundwater pumping is not a property-related service,

the court noted that, under well-established precedent, a property-related service is one that is "incident to property ownership." If the service is provided to those who don't own property, or is provided to property owners, but only because they chose to engage in a particular activity (not merely by virtue of their property ownership), then the service is necessarily not "incident" to property ownership. Because the purpose of pumping groundwater is "securing the water supply for *everyone* in the district," the court concluded, it is not provided only to those who own property, and is not provided to property owners merely by virtue of their property ownership. Rather, the court considered the pump fee as a regulatory fee on the commercial activity of pumping water to supply one's own water supply needs. The court also noted that it is the Legislature, not the district, that mandated higher fees for non-agriculture water users than agricultural ones; and, since Prop. 218 governs only property-related fees imposed by local governments, not the state, the imposition of the higher, state-authorized fee did not implicate Prop. 218.

In determining that the ground-water pumping fee is not a tax under Prop 26, the court concluded that it falls within at least one of the proposition's seven enumerated exceptions. The first exception is for payor-specific benefits. Those (like the city) who are permitted to pump water from the district's groundwater, the court held, "receive an obvious benefit—they may extract groundwater from a managed basin"—that is specific to those who pay the fee. The court also concluded that at least part of the fee falls within Prop. 26's third exception, for "issuing licenses and permits, performing investigations, inspections, audits," etc.

Finally, the court concluded, the pump fee isn't transformed from a valid regulatory fee into a tax, because the fee doesn't exceed the district's reasonable costs of providing its service or regulatory activity. The city argued that the fee actually charged to non-agricultural users *must* exceed the district's reasonable costs of allowing such users to pump water, because it can apparently provide the same right to agricultural users at a third of the cost. Rejecting this argument, the court concluded that the fee need not be proportional to each user; the district was required only to ensure that its charges in the aggregate do not exceed its regulatory costs.

Great Oaks Water Company v. Santa Clara Valley Water District

___ Cal.App.4th ___ [2015 WL 1403340] (March 2015)

Take-Away: A groundwater extraction fee, or "pump tax," used to finance a water district's responsibilities, including preventing depletion of the aquifers, is a property-related fee under Prop. 218; but it is also a charge for water service. As such, it is exempt from the state constitutional requirement of voter ratification.

Facts:

In 2005, the Santa Clara Valley Water District sent a notice to well owners that it intended to establish new pump fees. After holding a public hearing, the district established the new fees, with one rate for agricultural users in each of the district's two zones, and other, higher rates for nonagricultural users in those zones.

Under California Constitution Article 13D, adopted in 1996 as part of Proposition 218, a local public may impose certain "fees, and charges" (generally, fees imposed by an agency upon a parcel or upon a person as an incident of property ownership, including a user fee or charge for a property related service) only after meeting three requirements:

- first, the agency must give advance notice to affected owners, and conduct a hearing at which owners could submit protests; if a majority of owners lodged such protests, the charge could not go into effect.
- second, unless the charge was for "sewer, water, [or] refuse collection services," the fee must be ratified by a majority of voters or, at local agency's option, by two-thirds of affected owners;
- third, the charge must be tailored to the benefit conferred on each affected parcel or owner.

Great Oaks, which operated wells in each of the two zones, sued, arguing—among many other things—that the pump charges are property-related fees that were not charged for water services, and that they were imposed illegally in violation of Proposition 218 because the water district failed to comply with the notice-and-hearing and voter-ratification requirements. The trial court agreed, and entered judgment against the district.

Analysis and Holdings:

The Court of Appeal reversed, agreeing that the pump charge was a property-related fee for purposes of Proposition 218, but concluding that the charge was for water service, and thus exempt from the voter-ratification requirement. The court also held that, while the pump charge was subject to the notice-and-hearing requirement, the procedures followed by the district satisfied that requirement.

In concluding that pump fees are property related, the Court of Appeal noted that any charge on the extraction of groundwater typically places a direct burden on an interest in real property and is thus incidental to property ownership. In support of this point, the court noted that the right to pump water is an "appropriative" right—the right to appropriate water—which, courts have long held, is an interest in real property. More importantly, the court concluded that the voters who enacted Proposition 218 understood fees for water service to be "property related."

Because the pump charge was a "property-related" one for water service, the Court of Appeal concluded, it is exempt from the voter-ratification requirement.

Great Oaks argued that a charge for pumping water out of the ground is not a charge for "water service," because the fee is based on the activity of extraction, rather than the mere delivery of water. The court concluded that the distinction was immaterial, because Proposition 218 applies the voter-ratification exemption to "fees or charges *for*…water…*services.*" Since the pump fee is for services intended to benefit all those who benefit from the supply of water within the pump-fee zone, the court concluded, it is necessarily a fee for water service.

6. Municipal Services and Utilities

City of Glendale v. Marcus Cable Associates

231 Cal.App.4th 1359 (December 2014)

Take-Away: Although a city may not charge cable franchisees more than the 5% franchise-fee limit established by federal law, a city that does so cannot be sued for damages to recover the overcharge. Further, a cable franchisee may not circumvent this prohibition by disguising its suit for damages as a suit for injunctive relief in which the injunction is one that would allow reimbursement in an amount equal to its claimed damages.

Facts: Although federal law does not require local governments to create or maintain a local public, educational, and government-affairs (PEG) channel, it does impose regulations that apply when local governments exercise their right to do so. Among other things, federal law limits the fee that a local government may charge a cable franchisee to fund a PEG channel's operating expenses. That fee is limited to five percent of the cable franchisee's gross revenues.

Beginning in 2008, Marcus Cable Associates began operating a cable television franchise in the City of Glendale; as part of that franchise, it carried the city's PEG programming. When federal law was amended to limit franchise fees to 5% and mandate that any fee for other than capital expenses be deducted from the 5% franchise fee, Glendale enacted an ordinance imposing both a 5% franchise fee and a "PEG access fee equal to two (2) percent of the gross revenues of that state video franchise holder which fee shall be used by the city for PEG purposes," for a total fee of 7%.

The city formed a new organization, called the Glendale Financing Authority ("GFA"), whose Board was the city council, and whose administrator was the city manager. The city then entered into a lease with the GFA for the city's PEG-channel equipment and facilities, with the lease payment amount based on the facilities' current appraised value. The city assigned to the GFA all PEG fees that it collected from Marcus, which GFA was then obligated to pay to the city.

The city deposited the payment from GFA into the general fund. Through this arrangement, the city effectively entered into a lease with itself. And by this arrangement, the city purported to transform the 2% "PEG fee," which Marcus alleged it paid for operating expenses, into a payment for capital expenses—the theory being that the payment was intended to reimburse the city a previous expense for the purchase and expansion of its TV facilities.

Marcus paid the 2% PEG fee in addition to the 5% franchise fee, then sued the city for an injunction requiring the city to allow it to deduct the overpaid fees from future franchise-fee payments.

Analysis and Holdings:

The trial court concluded that the lease and payments between GFA and the city was a sham intended to get around the federal 5% fee limit. On appeal, the city did not effectively dispute that the lease arrangement was a sham. But it did argue that the 2% PEG fee was for legitimate capital costs, not operating expenses, such that it could legitimately collect it in addition to the 5% franchise fee, even without the assertedly-sham lease. In 2004, the city built and expanded city TV facilities, using general fund money to do so. It argued that the lease mechanism that it had devised was intended to reimburse itself for those past capital expenditures. But it based the amount of the lease payment on the built facilities' current appraised value, not on the actual capital expenditure that it had born in 2004. The court concluded that, whatever the merits of the city's claimed entitlement to reimbursement for its actual capital outlay for building its TV facilities, "rent" based on the facilities current assessed value is not a capital expense, but rather an operating expense subject to the 5% franchise fee limit.

But although the court agreed that the city had improperly collected more than the 5% franchise fee, it held that Marcus was not entitled to an injunction requiring the city to allow it to withhold future legitimate payments in order to get reimbursement for the overcharge. Under federal law (47 U.S.C. § 555a(a)), a cable franchisee may not sue a government entity for damages; its remedy is limited to injunctive relief. Although Marcus's asserted cause of action was for injunctive relief—an injunction allowing it to recover funds by withholding future payments—the result of granting that relief would be no different than if the court were to award damages. The Court of Appeal held that Marcus was therefore not entitled to the injunction that it sought.

The Court of Appeal reiterated this principle in a second *City of Glendale v. Marcus Cable Associates* case, decided on March 19, in which the court disallowed attorney fee "damages" that the cable company incurred in proving facts at issue in a disputed requests for admission response.

7. Public Contracting

Pittsburg Unified School District v. S. J. Amoroso Construction Co., Inc.
232 Cal.App.4th 808 (December 2014)

Take-Away: A public entity may draw on retention funds to complete a public construction project based solely on its own determination that the contractor has breached the construction contract; it need not wait for the breach to be judicially confirmed.

Facts: In a contract between the Pittsburgh Unified School District and S.J. Amoroso Construction Co. to rebuild a public high school, the parties agreed that they would establish a "retention" fund. The fund would consist of a portion of each payment, converted to securities that would be held in escrow, so that, if the contractor breached the contract "as determined solely by the District," the district could convert the securities to cash and withdraw the funds to pay another contractor to complete the work. Partway into the project, the district wrote to Amoroso to say that the contractor had breached by failing to compete any of the three phases of the project." The district terminated the contract and wrote to the escrow company asking it to convert the securities to cash and transfer the cash to the district so that it could pay another contract to complete the job.

To prevent the district from accessing the retention funds Amoroso applied for a TRO, which the trial court denied. Amoroso appealed.

In affirming the trial court's decision to deny a TRO, the Court of Appeal began its analysis with Public Contract Code § 7107, which governs when a public entity must release retention funds to a contractor (and the amount that may be withheld in the event of a dispute), and Pub. Cont. Code § 22300, under which a public entity has "a right to draw upon the securities in the event of a default by the Contractor" and the escrow agent must, "[u]pon seven days' written" from the public entity to "immediately convert the securities to cash and [to] distribute the cash as instructed by the [public entity]."

Analysis and Holdings: While Amoroso agreed that the district had the right to withdraw retention funds in the event of its default, it argued that it could not do so unilaterally; there must either by agreement by the contracting parties that the contractor has defaulted, or a default must be confirmed by a court. The appellate court rejected this argument, concluding that it is at odds with the Public Contracting Code's plain language, which states that an escrow holder *must* release retention funds to a public entity upon that entity's demand after it deems the contractor to be in default.

The court also rejected Amoroso's argument that the district was barred from unilaterally withdrawing retention funds by Civil Code §1670, under which

"Any dispute arising from a construction contract with a public agency… shall be resolved by … arbitration [or] a court of competent jurisdiction." The court first noted that the dispute here was not about the construction contract, but rather the district's rights under an escrow agreement. While the parties may litigate the underlying question of default under the construction contract—and, if the contractor wins, the district would face substantial penalties for having wrongly accessed the retention funds—the escrow agreement specifically says that escrow must release the funds to the district upon the district's demand. More fundamentally, the Court of appeal declined to read Civil Code § 1670 as being in direct conflict with the later-enacted Public Contract Code.

Finally, the court rejected Amoroso's argument that allowing the district to unilaterally access retention funds violated the Amoroso's right to due process. The court concluded that Amoroso did not have a property interest in the retention funds that would support a due process claim since the right to payment only arose when Amoroso completed the work which it failed to do.

In reaching its holding, the appellate court noted that the purpose of a retention fund is to ensure that a public project gets completed in a timely fashion. It concluded that the Legislature gave public entities the right to access retention funds so that public construction projects can be completed without delay, while providing for hefty penalties on a public entity that accesses the funds without justification.

FTR International, Inc. v. Rio School Dist.

233 Cal.App.4th 838 (January 2015—Certified for partial publication after rehearing, as *East West Bank v. Rio School Dist*., filed April 1, 2015)

Take-Away: Unless there are outstanding stop notices or the contractor fails to complete a project, a public entity may not withhold retention funds. Retention funds cannot be retained merely because there is a good-faith dispute over the amount due under the contract.

Facts: During a school construction project, the contractor submitted approximately 150 proposed change orders (PCO), claiming that some were necessary because the plans provided by the school district were inadequate or misleading. The school district denied most of the PCOs on the grounds that the work was covered under the basic contract, the amounts claimed were excessive, or that a PCO was not timely under the contract. Eventually, the project was completed and the school district filed a notice of completion.

Under the construction contract, the school district retained 10 percent of each progress payment. When the project ended, the district held over a half million dollars in retention funds.

Although the project was completed and all stop notices were released by

subcontractors, the district refused to pay the balance due under the contract, refused to pay any but a small portion of the amounts claimed by the contractor in its PCOs, refused to release any of the retention, and refused to compensate the contractor for damages allegedly caused by delay and disruption. The contractor sued to recover damages for breach of contract, statutory penalties under Public Contract Code section 7107, attorney fees, interest and costs.

The trial court ruled in the contractor's favor.

Analysis and Holdings:

Partly upholding the trial court's judgment, the Court of Appeal noted that, under Public Contract Code section 7107, subd.(c) "[w]ithin 60 days after the date of completion of the work of improvement, the retention withheld by the public entity shall be released. In the event of a dispute between the public entity and the original contractor, the public entity may withhold from the final payment an amount not to exceed 150 percent of the disputed amount." The district withheld the retention funds because there was "a dispute between the public entity and the original contractor." This interpretation was specifically authorized by the earlier appellate opinion *Martin Brothers Construction, Inc. v. Thompson Pacific Construction, Inc.* (2009) 179 Cal.App.4th 1401.

Disagreeing with *Martin Brothers*, the Court of Appeal noted that the purpose of retention funds is to ensure that the original contractor completes a contracted-for public project (and that the public entity has funds sufficient to complete the project if the contractor fails do that), or to pay stop notices. If neither issue is present, the court held, retention funds may not be withheld.

8. Public Property

[None]

9. Regulating Businesses and Personal Conduct

Fyock v. City of Sunnyvale

25 F.Supp.3d 1267 (March 2015)

Take-Away:

A local ban on large-capacity magazines (detachable ammunition feeding devices capable of accepting more than ten rounds) need only survive intermediate scrutiny to be constitutional, and will likely survive a Second Amendment challenge under that test.

Facts:

In 2000, the California Legislature outlawed the manufacture, sale, purchase, and receipt of large-capacity magazines—detachable ammunition feeding devices capable of accepting more than ten rounds. But it didn't outlaw "possession" of the magazines, because the federal Crime Control Act already did that. When the Crime Control Act lapsed in 2004, the ban on possessing large-capacity magazines lapsed with it, leaving a loophole in California. It was illegal to sell, buy, or receive the magazines, but not to possess them. In 2003, the City of Sunnyvale closed that loophole within its city limits by voter initiative, called Measure C. This initiative measure outlawed possession of large-capacity magazines within the city, except with respect to lawfully-owned firearms that could not operate without such magazine.

A group of Sunnyvale residents who owned large-capacity magazines sued in federal court to enjoin Measure C's enforcement, arguing that the magazine ban violated their Second Amendment right to bear arms. The district court declined to issue a preliminary injunction, and the plaintiffs filed an interlocutory appeal.

Analysis and Holdings:

The Ninth Circuit panel began its discussion by making clear that it was not ruling on the merits of the plaintiffs' Second Amendment claims. Because the matter before the court was an interlocutory appeal of the denial of a preliminary injunction, not the appeal of a final judgment, it was deciding only whether the trial court abused its discretion. The specific question in this case was whether the trial court had abused its discretion by finding that Measure C likely did limit Second Amendment rights, but that the law should not be enjoined because it reasonably furthered Sunnyvale's legitimate interest in promoting public safety and reducing crime—particularly mass shootings and shootings of police officers.

In answering that question, the Court of Appeals first found that the district court reasonably concluded that possessing large-capacity magazines may be a Second Amendment right that Measure C burdens.

But because Measure C is not an outright ban on the right to bear arms—its burden on "core" Second Amendment rights was not "severe"—(Sunnyvale residents could still buy, sell, and possess handguns for self-defense, and could even possess large-capacity magazines if necessary to operate a lawfully-owned weapon), the law is constitutional if it can survive intermediate scrutiny. To do this, the law need only advance a compelling government interest. The district court concluded that it did, such that Measure C should not be preliminarily enjoined.

The Ninth Circuit held that the district court exercised appropriate discretion in making that decision. First, it agreed with the district court that Sunnyvale has

a compelling government interest in promoting public safety and reducing crime, including crimes against police officers. So the only remaining question was whether Measure C appropriately advanced that interest; i.e., whether the interest would be better served with Measure C than without it.

Sunnyvale had presented the district court with credible evidence that large-capacity magazines were used disproportionately in mass shootings and shootings of police officers, and it presented studies showing that a reduction in the number of large-capacity magazines in circulation may decrease the use of such magazines in gun crimes of all types. Thus, the Court of Appeal held, Measure C advanced they city's compelling government interest.

Vivid Entertainment v. Fielding

774 F.3d 566 (December 2014)

Take-Away: A regulation of sexual or pornographic speech that is aimed primarily at the speech's secondary effects is constitutional, so long (1) there is a substantial government interest in avoiding those secondary effects; (2) the regulation is narrowly tailored to serve that interest; and (3) the regulation does not unreasonably limit alternative avenues of communication."

Facts: Over the past decade, several adult-film performers contracted HIV. Some of those performers had unprotected sex on camera during periods when, unknown to them, they were likely infected. At the same time, the Los Angeles County Department of Public Health found that more than one in five adult-film performers tested positive for at least one sexually transmitted disease, compared to a 2.4% infection rate for the county's general population. To address this public-health issue, county voters in 2012 adopted Measure B, amending the Los Angeles County Code to require adult-film performers to use condoms. The measure also required adult-film producers to obtain a permit conditioned on performers receiving training about blood-borne pathogens, and to post the permit during filming.

Several adult-film producers and performers sued to enjoin the new law, arguing that it violated their constitutional right to free expression. When the county declined to defend the law's constitutionality, Measure B proponents intervened to offer a defense. The adult-film industry plaintiffs objected, arguing that the proponent-intervenors lacked Article III standing. The trial court allowed the Measure B proponents to intervene, and concluded that the condom-use and permit requirements did not violate the plaintiffs' right to free expression. The adult-film industry plaintiffs appealed to the Ninth Circuit.

Analysis and Addressing the standing issue first, the Court of Appeals concluded that it need not decide whether the intervenors had standing, because standing was not

Holdings: required for the intervenors in this case. In reaching this conclusion, the court noted that Article III standing is required only for a litigant who seeks to "evoke the power of the federal courts." The intervenors here neither initiated the litigation nor filed the appeal; so they did not "evoke" anything, but merely provided argument on a matter raised by a plaintiff who did evoke the court's power, and who indisputably had standing.

Turning to the condom-use and permitting requirements, the court first acknowledged that nearly any regulation of pornography is, to some extent, a regulation of expression. The court also acknowledged that a regulation that entirely bans expression is subject to strict scrutiny, while a regulation that merely imposes parameters around expression, but does not entirely bar it, is subject only to intermediate scrutiny. So before deciding whether Measure B passes constitutional muster, the court analyzed which level of scrutiny to apply.

The adult-film plaintiffs argued that strict scrutiny applied, because their message is unprotected sex, and the freedom from worry about pregnancy and disease that it suggests. The court disagreed, stating that the question is what a reasonable hearer (or viewer) of the expressive activity would understand the message to be—and in the case of pornographic films, the court concluded, that message is general eroticism. Because the requirement that performers wear condoms and obtain a permit places parameters around the expression, but does not entirely bar it, the court concluded, intermediate scrutiny applied.

A speech-limiting statute will survive First Amendment intermediate scrutiny if it: (1) is designed to serve a substantial government interest; (2) is narrowly tailored to serve that interest; and (3) does not unreasonably limit alternative avenues of communication." The court found that the condom-use and permit requirements satisfied these criteria. It was undisputed that the government has a substantial government interest in public health. The condom-use and permit requirements are narrowly tailored to serve that interest because it is more likely that STD transmission will be lower with the regulation than without it. Although Measure B may somewhat impair the erotic message conveyed in pornographic films, it does not divest the films of their erotic content altogether, so the court concluded that the measure still allows alternative avenues for the conveyance of the erotic message.

Nick v. City of Lake Forest

232 Cal.App.4th 871 (December 2014)

Take-Away: Although the ABC has the exclusive right to decide whether to issue a liquor license, a city has the same authority as the ABC to determine whether issuing the license to a business within its jurisdiction will serve the public convenience and necessity. In making that determination, a city has broad

authority to consider whatever factors a reasonable person might rely upon; and the determination will not be disturbed by the court as long as it is neither arbitrary nor made in reliance on factors that are not supported by substantial evidence.

Facts:

The ABC issued a liquor license to a gas station and convenience store (referred to in the appellate opinion as "Nick") in the City of Lake Forest, as well as to other businesses in the area. When a 7-Eleven across the street from Nick applied for a license, the ABC determined that issuing the license would create "an undue concentration" of licenses in the area. The ABC then gave the city notice that the 7-Eleven had applied for a liquor license, triggering the city's right under state law to determine whether issuing the license would "serve the public convenience or necessity," notwithstanding the undue concentration of licensed sellers of alcohol in the same area.

The Lake Forest City Council had previously enacted a resolution delegating to its development director the authority to make an initial "public convenience and necessity" determination. Under the city's municipal code, an aggrieved party could appeal the director's decision to the city's planning commission, then to the city council.

The director determined that issuing a liquor license to the 7-Eleven would serve the public convenience or necessity, and Nick appealed to the planning commission, arguing that its competitor across the street should not be licensed. When the commission also concluded that the license would serve the public convenience or necessity, Nick appealed to the city council. When the city council agreed with the director and the commission, Nick petitioned the Superior Court for a writ of administrative mandamus. When the trial court declined to issue a writ, Nick appealed.

Analysis and Holdings:

The Court of Appeal affirmed the trial court's decision.

Under Business and Professions Code ("Bus. & Prof. Code") § 23958, the Department of Alcoholic Beverage Control ("ABC") may not, generally, issue a liquor license "if the issuance would result in or add to an undue concentration of licenses." But under Bus. & Prof. Code § 23958.4, the ABC may issue a license that would result in an undue concentration of licenses "if the local governing body of the area in which the applicant premises are located ... determines … that public convenience or necessity would be served by the issuance."

There is no state-law definition of "convenience or necessity." In the absence of a definition, the courts have held that it is to be determined by a "standard set by reason and reasonable people, bearing in mind that such a standard may permit a difference of opinion upon the same subject...." So as long a reasonable person could conclude, based on the facts of an individual case, that the issuance of a liquor license would serve the public convenience or

necessity, an administrative finding to that effect cannot appropriately be set aside by the courts. And this is true, the Court of Appeal held, whether the finding is made by the ABC or, if made within the statutory time, by a local governing body.

Pharmaceutical Research and Manufacturers of America v. County of Alameda

768 F.3d 1037 (September 2014)

Take-Away: A local ordinance that requires drug manufacturers that distribute prescription drugs within the jurisdiction to provide for the collection, transportation, and disposal of unwanted medication—no matter which manufacturer made it or where it was made—does not violate the dormant commerce clause.

Facts: Alameda County ("Alameda") enacted an ordinance requiring prescription drug manufacturers who sell, offer for sale, or distribute medications in the county to operate and finance a "Product Stewardship Program." To do this, the manufacturers must provide for the collection, transportation, and disposal of any unwanted prescription drug, no matter which manufacturer made the drug or where it was made.

The ordinance applies equally to manufacturers within the county and those outside of it. Drug manufacturers sued to invalidate the ordinance, claiming that it violates the dormant Commerce Clause by requiring interstate drug manufacturers to conduct and pay for Alameda County's drug disposal program. The district court disagreed and granted Defendants' motion for summary judgment. The plaintiffs appealed.

Analysis and Holdings: Under the U.S. Constitution's commerce clause (U.S. Const. art. I, § 8, cl 3), Congress may regulate interstate commerce. Under the so-called "dormant commerce clause," states (including their counties and cities) may not. This prohibition is driven by concern about economic protectionism: regulatory measures designed to benefit in-state economic interests by burdening out-of-state competitors.

To determine whether a state or local regulation fosters economic protectionism, and thereby impermissibly regulates interstate commerce, the Supreme Court has required a two-part inquiry:

- does the regulation discriminate against interstate commerce in favor of local or intrastate commerce, or directly regulate interstate commerce? and
- is the burden that the regulation imposes on interstate commerce 'clearly excessive in relation to the putative local benefits.'

The Ninth Circuit concluded that Alameda's ordinance did neither and concluded that the ordinance did not violate the dormant commerce clause.

In addressing the discrimination issue, the court first noted that the county's ordinance applies to all manufacturers that make their drugs available in Alameda County, no matter what state or city they're based in. Because the ordinance treats all businesses exactly the same, the court concluded, it does not discriminate based on location.

The drug manufacturers also argued that the fee the ordinance imposes is like a tariff, and tariffs have been held to discriminate against out-of-state commerce. Alternatively, they argued, the ordinance discriminates against out-of-state manufacturers because they can't vote in local elections and there is a restraint on their right to participate in the political process to protect their interests. The court rejected these arguments. As to the tariff argument, it noted that an illegal tariff is one that protects local business against outside competition. That Alameda's fee applies across the board to all manufacturers, local and out-of-state alike, makes clear that it does not protect local business against non-local competition. As to the political restraint argument, the court noted that consumers and businesses inside Alameda are affected to the same extent as those from out-of-state. Because local businesses affected by the measure can advocate about it on behalf of themselves and others similarly situated, the court concluded, there is no political restraint.

To determine whether an ordinance purports to directly regulate interstate commerce, the Supreme Court has held, "the critical inquiry is whether the practical effect of the regulation is to control conduct beyond the boundaries of the State." The plaintiff drug manufacturers stipulated that (1) no one who doesn't distribute prescription drugs in Alameda is covered by the ordinance; and (2) no one is required to comply with the ordinance outside the county. Given these stipulations, the court concluded, the ordinance doesn't purport to regulate out-of-state or interstate commerce.

Turning to the second prong of the two-part dormant commerce clause test, the court noted that the manufacturers provided no evidence that Alameda's ordinance will have any effect at all on interstate commerce. The manufacturers argued that the ordinance necessarily burdened interstate commerce to an extent that was clearly excessive in relation to any public benefit, because the ordinance conferred no public benefit at all, since the county could just as easily have paid for and run the drug-disposal program itself. The court replied that the fact that the county could have paid for the program itself had no bearing on whether the program is publicly beneficial.

T-Mobile South v. City of Roswell, Ga.

135 S.Ct. 45 (October 2014)

Take-Away: The Telecommunications Act's requirement that a city's denial of a cellular-service operator's cell-tower-siting application must be in writing and supported by substantial evidence means that the written denial must also include a statement of the city's reasons, or a statement of the city's reasons must be included in a document issued at the substantially the same time as the denial.

Facts: T-Mobile applied to the City of South Roswell, Georgia for permission to site a cell tower on a roughly 3-acre vacant parcel in a residential area. The city's planning commission determined that the tower met all criteria imposed by local law, and recommended that the city council approve T-Mobile's application. After a two-hour-long public hearing, the council unanimously denied the application because, it concluded, the proposed tower would be aesthetically incompatible with the natural setting, too tall, and would adversely affect the neighbors and the resale value of their properties.

Two days after the council voted to deny T-Mobile's application, it sent the company a letter officially notifying it of the denial. The letter said only that the application was denied, but did not state the city's reasons, which had been stated orally at the council meeting. Twenty-six days after sending the denial letter, the city published the detailed minutes of the council meeting at which the application was denied.

T-Mobile sued, alleging that the city's denial wasn't supported by substantial evidence. The district court granted the company's summary judgment motion on the basis that the city's denial letter did not include detailed reasons for its decision. The trial court did not make a specific finding that there was insufficient evidence to support the council's decision, but merely that the denial letter failed to describe the evidence supporting the decision. The Eleventh Circuit reversed, holding that the city's reasons for denying a tower-siting application need not be included in the same document as the denial itself but may instead by included in a separate document, and that the city council meeting minutes was a sufficient separate document to satisfy this requirement. In reaching this holding, the Eleventh Circuit acknowledged that it was supporting the minority view—the majority of other circuits had concluded, as the trial court had, that a city must set forth the "substantial evidence" supporting its denial in the denial letter itself.

Analysis The Supreme Court reversed, but agreed with much of the Eleventh Circuit's reasoning. In doing so, it purported to apply the Telecommunication Act of

and Holdings: 1996's plain language. That Act says that that "[a]ny decision by a State or local government or instrumentality thereof to deny a request to place, construct, or modify personal wireless service facilities shall be in writing and supported by substantial evidence contained in a written record." The court concluded that a city's denial

- must be in writing; and
- must be supported by substantial evidence contained in a written record;

but the written denial and record supporting the denial need not be in the same document. The court reached this conclusion for the simple reason that the Telecommunications Act includes no statement that the denial and the evidence supporting it must be included in a single writing; as long as both things are done—whether together or separately—the requirements are satisfied.

In this case, the city denied T-Mobile's application in writing, and also created a written document (the published council minutes) that included the reasons for its denial. So, the Supreme Court agreed with the Eleventh Circuit, the city had done both of the things that the Telecommunications Act requires.

But the court disagreed with the Eleventh Circuit's conclusion that publication of the council's minutes *26 days after the written denial* was sufficient. The court held that the writing that includes the city's reasons supporting its written denial must be issued "essentially contemporaneously" with it.

American Tower Corp. v. City of San Diego

763 F.3d 1035 (August 2014)

Take-Away: Under the Permit Streamlining Act, a local government must approve or disapprove a project within sixty days after determining that the project is exempt from CEQA. If the government fails to act within that time period, the project is deemed approved—but only if the government has given all notices required by law. Surrounding property owners whose values might be adversely affected have a state-constitutional right to notice and a hearing before a government agency approves an application to site a cell tower. Unless the agency notifies them that the application will be deemed granted if not timely acted upon, "notifications required by law" have not occurred, and the "deemed approved" rule is not triggered.

Facts: In the 1990s, the City of San Diego granted American Tower Corp (ATC) conditional use permits to operate three cell-tower facilities. Each of the three CUPs specified that they expired after ten years unless renewed; and, when the CUPs expired, ATC would be required to return the land to its original condition.

Before the CUPs expired, ATC applied to the city to renew them. Shortly thereafter, the city declared each project exempt from CEQA. More than six months later—much later than 60 days after it declared the projects exempt from CEQA—the city denied the applications. ATC then sued the city in federal court raising federal statutory and constitutional claims, as well as a pendant state claim under the California Permit Streamlining Act (PSA).

At trial, ATC and the city agreed that

- the City published a Notice of Application for the cell-tower projects and deemed the projects exempt from CEQA;
- the City failed to hold a hearing or act on the CUP applications within sixty days from the date that the facilities were deemed exempt from the CEQA, as required by Gov't Code § 65950(a)(4) (a provision of the PSA);
- that the City subsequently published a Notice of Public Hearing and held a hearing for each project; and
- neither the notice of application, nor the subsequent notices of public hearing included a statement that the projects would be deemed approved if not acted on within 60 days.

Analysis and Holdings:

The district court began its analysis by quoting the PSA's plain language that a "public agency …shall approve or disapprove the project within…sixty days from [its] determination …that the project is exempt from [CEQA]." (Gov't C. Section 65950). And, under Gov't C Section 65956, if the agency fails to act within the required time frame, "the failure to act shall be deemed approval of the permit application …." But, the court noted, "there's a catch:" under Cov't C. Section 65956(b), a "permit shall be deemed approved only if the public notice required by law has occurred." In order for a project to be deemed approved, then, two things must occur:

- the government agency must have failed to act within sixty days, and
- "the public notice required by law" must have been given.

ATC argued that the city's denial of its CUP applications was ineffective because it had already, by failing to act within the requisite timeframe, approved them. The district court agreed that the city failed to timely act, but concluded that, because "the public notice required by law" had not "occurred," the permit applications had not been deemed approved, and the city was within its rights to deny them.

In reaching this conclusion, the district court acknowledged that there was no statutory notice that had not been given in this case. But it concluded that California's constitutional due process guarantee required that neighbors be given "notice and an opportunity to be heard" before any substantial or significant deprivation of their property rights, and placement of cell towers on

adjacent property may create such a deprivation. Because the neighbors abutting the cell tower placement sites, whose property rights might be adversely affected, had not been told that the city's failure to act within sixty days would result in the CUPs being deemed approved, they were never put on notice that their property rights were about to be adversely affected, nor given an opportunity to be heard on that subject. Thus, the court concluded, "the public notice required by [California constitutional] law" had not "occurred."

11. Protecting the Environment

Sierra Club v. County of San Diego

231 Cal.App.4th 1152 (October 2014)

Take-Away: When adopting a general plan, a local government should not commit to environmental mitigation measures that, due to lack of funding or other resources, it cannot as a practical matter carry out.

Facts: San Diego County updated its general plan, committing itself to later preparing a climate action plan ("CAP") that would include "more-detailed greenhouse-gas emissions-reduction targets and deadlines," coupled with "comprehensive and enforceable [greenhouse gas] reduction measures that will achieve" specific results by 2012. But the CAP that the county actually adopted included no enforceable measures aimed at achieving specific results. Instead, it included "recommendations" that, the CAP document itself stated, do not ensure any specific result. Moreover, the county provided no funding for any of the recommended programs, relying instead on hoped-for cooperation from local agencies, with no assurance that the agencies would participate in the county's programs. The county acknowledged that, rather than decreasing greenhouse gas emissions, the updated general plan would more likely lead to increased emissions after 2020, with no plan in the CAP to mitigate that increase.

The general-plan update was preceded by a program environmental impact report (PEIR); the county prepared no EIR for the CAP, arguing that it was covered by the general-plan update PEIR.

The Sierra Club sued to force the county to enforce the general-plan's requirement that the county adopt a CAP with specific, effective, and enforceable greenhouse gas emissions targets. In doing so, the Sierra Club argued that the county violated CEQA by failing to prepare an EIR for the CAP, which would have allowed for meaningful public input and corrective action to address plan defects before it was adopted. The trial court agreed, and ruled in the Sierra Club's favor.

Analysis and Holdings:

In upholding the trial court's decision, the Court of Appeal first noted that the CAP failed to do what the county's own general plan unambiguously requires. In place of the required "comprehensive and enforceable greenhouse gas reduction measures," the CAP adopted "recommendations," with no enforcement requirements. The recommendations were rendered largely meaningless, the court found, by relying for their implementation on unfunded programs—some administered by persons who might choose not to participate in them. Since a general plan is an enforceable law that an adopting agency must comply with (and because the greenhouse gas emission reductions called for in it are mandated by state law), the court held, the county's failure to comply with its general-plan's mandate was unlawful.

The court also held that, before adopting a general-plan-compliant CAP, the county must prepare an EIR. First, the court noted, CEQA Guidelines, section 15183.5, subd. (b)(1)(F) says that a plan for the reduction of greenhouse gas emissions should be adopted following environmental review. The court rejected the county's argument that the required environmental review took place as part of the program EIR that preceded the general-plan update. The county admitted that the CAP's details weren't available during the program EIR process, and therefore could not have been considered as part of it. Moreover, the court concluded, the CAP was a plan-level project, similar in significance to the general plan itself. And because a plan-level project must undergo environmental review as a matter of law (CEQA Guidelines, section 15183.5 subd. (b)(1)(F)), the failure to issue an EIR was unlawful.

Cleveland National Forest Foundation v. San Diego Association of Governments

231 Cal.App.4th 1056 (November 2014) *Review Granted, March 11, 2014*

Facts:

The San Diego Association of Governments certified an EIR for its 2015 transportation plan, which a variety of environmental groups, as well as the Attorney General challenged. The challenges asserted that the EIR was inadequate because it failed to analyze inconsistencies between the transportation plan and the state's greenhouse gas (GHG) emissions goals; failed to discuss the plan's GHG emissions impacts after 2020; failed to adequately address GHG mitigation measures; failed to analyze a reasonable range of project alternatives; and failed to analyze and mitigate the plan's impact on air quality, agricultural lands, and particulate-matter pollution.

The Court of Appeal concluded that each challenge was meritorious.

To be Decided:

The Supreme Court has granted review to decide whether the environmental impact report for a regional transportation plan must include an analysis of the plan's consistency with the greenhouse gas emission reduction goals reflected in

Executive Order No. S–3–05 in order to comply with the California Environmental Quality Act).

CREED-21 v. City of San Diego

234 Cal.App.4th 488 (January 2015)

Take-Away: A project that will have no significant effect on the environment is exempt from CEQA—even if it was originally envisioned as part of a larger project that would have been subject to CEQA, which project later became exempt because it was necessitated by emergency.

Facts: The City of San Diego determined that a 135-foot length of hillside storm-drainpipe needed replacement, to protect houses built at the top of the hill. As part of the replacement, the city would install new cutoff walls and a new headwall, and would remove and replace the existing landscaping. The removal and replacement of existing landscaping would "cause temporary impacts to sensitive vegetation." Due to the project's effect on vegetation, the city prepared to consider mitigation efforts. The primary mitigation measure was completing all required work with hand tools, rather than heavy machinery, in order to minimize any effects to the surrounding vegetation.

The storm drain failed before the work could be performed, undermining the uphill homes. The city then declared an emergency exemption from CEQA and did all required work, with the exception of replanting the hill. No one disputed that the work was necessary to respond to a genuine emergency, or that the project was exempt from CEQA for that reason.

As the city was preparing to perform the emergency work, it issued a new biological report, noting that the area of affected vegetation would be about a 1/15th of an acre; that the area that would later have to be replanted would be only that area already disturbed by the emergency work; and that the change from machines to hand tools would eliminate any significant impact on sensitive vegetation near to that area. When it came time to replant the part of the hillside disturbed by the work, the city determined that the replanting was not subject to CEQA because it would have no negative environmental impact, being merely the replanting of vegetation missing from an already-disturbed area, with no impact of surrounding vegetation.

CREED-21 sued the city, arguing that, because the pre-emergency work would have required some level of environmental review under CEQA, any post-emergency work, however minor, should be assessed using the pre-emergency facts. The trial court agreed, ruling that the post-emergency revegetation plan was not exempt from CEQA, because the project as

envisioned before performance of the pre-emergency work was not exempt.

Analysis and Holdings:

Reversing the trial court, the Court of Appeal noted that it is a "project" that is subject to CEQA review. A "project," the court held, is the work that is contemplated; so the concept is necessarily forward looking. Because the only work that was contemplated in this case was the revegetation of a small area of alredy-disturbed hillside, that, and only that, was the "project." The work performed as part of a previously-completed project—which all parties agreed was exempt from CEQA review under the emergency exemption—was irrelevant.

Because there was substantial evidence to support the city's finding that the contemplated project—the replanting the hillside—would have no adverse environmental impact, the court upheld the city's finding that no CEQA review was necessary.

Saltonstall v. City of Sacramento

183 Cal.Rptr.3d 898 (February 2015)

Take-Away:

Although CEQA requires government agencies to consider project alternatives as a part of an environmental review, the Act does not require agencies to consider alternatives that do not accomplish a proposed project's overriding purpose, or that would involve the same environmental impacts created by alternatives already considered.

Facts:

The Sacramento Kings have been playing in an arena that is the NBA's second smallest by one measure, and the smallest by another. The NBA decided that it would allow the team to be moved to another city unless a larger arena could be built by 2017.

With a view toward keeping the team in the Sacramento, the city council approved a preliminary, nonbinding term sheet for development of a new entertainment and sports center in the city's downtown. Although the city exercised its power of eminent domain to acquire property for the contemplated project, the term sheet specifically noted that it was bound to complete a full environmental review, and free to decide not to proceed with the project based on that review.

The city conducted an environmental review, issued a proposed Environmental Impact Report (EIR), held the required public meeting on the EIR, mediated with those who opposed it, and then certified the EIR. A person opposed to the project then sued, arguing that :

- the city improperly committed to the arena-building project before the EIR process was complete;
- the city's environmental review was inadequate because the City did not study remodeling the existing arena as a project alternative;

- the city's consideration of the project's effect on Interstate 5 traffic was inadequate because it failed to impose mitigation measures;
- the EIR was inadequate because it failed to consider crowd safety.

The trial court rejected each of the plaintiff's arguments, as did the Court of Appeal.

Analysis and Holdings:

Although the Court of Appeal agreed that an agency may not approve a project without first completing a meaningful environmental review, it concluded that Sacramento had not violated that principle. Although it approved a "term sheet" setting forth the terms under which it would facilitate the new arena project, that document specifically said that the city would not approve the project unless doing so was environmentally appropriate, which it would determine after completing a full environmental review. And although the city had acquired property and property rights necessary to make the arena project feasible, that was not a violation of CEQA under CEQA Guidelines § 15004, subdivision (b)(2)(A), which says that "agencies may designate a preferred site for CEQA review and may enter into land acquisition agreements when the agency has conditioned the agency's future use of the site on CEQA compliance."

Rejecting the claim of the EIR's inadequacy due to its failure to consider remodeling the existing suburban arena, the court first noted that remodeling that area would achieve few, if any, of the project's stated purposes, which were to revitalize the downtown area. The court also noted that the city had extensively considered building a new arena right next to the existing one, and found that it would have been impractical due to the location on a flood plain—a problem equally applicable to the existing arena. And remodeling the existing arena would result in an environmental impact similar to that of building a new one next to do, such that an extensive consideration of remodeling the existing arena would be essentially meaningless. While an agency is required to meaningfully consider viable alternatives, the court held, it is not required to consider every possible alternative, including those that are not viable and do not achieve a project's purpose.

The court noted that the EIR concluded that there would be substantial and unavoidable additions to traffic due to the new arena project, which would result in the worst level of traffic congestion on a CalTrans scale. But the city concluded that none of the possible mitigation measures appeared likely to have any real effect, and therefore rejected them. Because the city acknowledged the environmental impact of increased I-5 traffic, meaningfully considered mitigation measures, and reasonably concluded that those mitigations were unlikely to work, the court concluded that CEQA's mandate that agencies

meaningfully consider a project's environmental impact had been satisfied.

The court rejected the argument that the city violated CEQA by failing to consider crowd safety concerns because "crowd safety" is not an environmental issue.

Berkeley Hillside Preservation v. City of Berkeley (Logan)

60 Cal.4th 1086 (March 2015)

Take-Away: A project that is categorically exempt from CEQA review may nonetheless be subject to such review, but only if "unusual circumstances" pose a reasonable possibility of an adverse environmental impact, or the project actually will have an adverse environmental impact.

Facts: Under CEQA Guidelines Section 15303, "new, small facilities or structures," including "one single-family residence or a second dwelling in a residential zone," and "in-fill development" projects are categorically exempt from CEQA review. A Berkeley couple applied to the city for a permit to demolish an existing house and replace it with a two-story 6,478 square-foot house with a detached 3,3394 square-foot ten-car garage. Although the city's zoning adjustments board heard public concerns about the proposed project's environmental impact, it found that the project was categorically exempt from CEQA review under Guidelines Section 15303. The city council agreed, and approved the project without CEQA review.

A group of neighbors and community group petitioned the Superior Court for a writ of administrative mandate. The court agreed with the city that the project was categorically exempt from CEQA review under Guidelines Section 15303.

The petitioners then appealed. The Court of Appeal noted that, notwithstanding the general categorical exceptions for single-family homes and in-fill development, a project is nonetheless subject to CEQA review if there are "unusual circumstances" making such review necessary. The appellate court then concluded that there was substantial evidence supporting a fair argument that the project could have adverse environmental impacts. The court then held that "the fact that a proposed activity may have an effect on the environment is *itself* and unusual circumstance," reversed the trial court, and required that the project undergo CEQA review.

The city appealed.

Analysis and Reversing the Court of Appeal, the California Supreme Court first agreed that "unusual circumstances" might make am otherwise categorically exempt project subject to CEQA review. But under the plain language of the "unusual

Holdings: circumstances" regulation (Guidelines Section 15300.2), those circumstances can't be the environmental impact of the project itself; otherwise the unusual circumstances exception would swallow the categorical exemption rule. The court also noted that the commonsense exception—that a project posing no credible possibility of adverse environmental impact isn't subject to CEQA review—would make categorical exemptions unnecessary and meaningless if they applied only when a project was already exempt because it had no environmental impact.

Rather, the Supreme Court concluded CEQA review is required only if

- there is some unusual circumstance with respect to the project shown to pose a reasonable possibility of an adverse environmental impact (for example, its unusual size, location, or other factor); or
- it is shown that an otherwise categorically exempt project will have a significant environmental effect.

It is not enough, in other words, to merely show that a project *could* have an adverse environmental impact; it must be shown that it *will* have such an impact, or that actual unusual circumstances exist.

A reviewing court determining whether there are unusual circumstances that take a project outside of a categorical exemption must apply the "substantial evidence test." If substantial evidence supports the agency's finding of the existence or nonexistence of unusual circumstances, that decision will not be disturbed on appeal.

But, once it is established that unusual circumstances exist, a lead agency (and a reviewing court) need only determine whether there is a "fair argument" that there is a "reasonable possibility" that those circumstances will produce "a significant effect on the environment, triggering CEQA review.

12. Code Enforcement

[None]

13. Liability and Litigation

[None]

Revenue And Taxation Update (Propositions 26 And 218 / *Shapiro* Case)

Thursday, May 7, 2015 General Session; 10:45 – Noon

Michael G. Colantuono, City Attorney, Auburn and Grass Valley

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Notes:

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The Law of Municipal Revenues: Current Developments

by

Michael G. Colantuono, Esq.

City Attorneys Department Annual Conference
League of California Cities
Monterey, California
May 7, 2015

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I. INTRODUCTION

This paper presents an overview of a range of current developments in the law of local government revenues. It is drafted in late March 2015. It is not intended as an overview of the basic structure of California law regarding municipal revenues, such as the requirements of Propositions 13, 62, 26 and 218. Those can be found in CEB's The California Municipal Law Handbook (2014) and in the League of California Cities' The California Municipal Revenue Sources Handbook (2014).

II. CLASS ACTION CHALLENGES TO MUNICIPAL REVENUES

Since the California Supreme Court's decisions in *Ardon v. City of Los Angeles* (2011) 52 Cal.4th 241 and *McWilliams v. City of Long Beach* (2013) 56 Cal.4th 613, the class action remedy has been available to challenge municipal revenues. A water rates case in Santa Barbara County (*Nesbitt v. Montecito County Water District*, Sta. Barbara Superior Court Case No. 1415836) brought by a large water user (and owner of a private polo field) and Howard Jarvis Taxpayers Association's challenge to Pasadena extra-territorial water rates (*Warren v. City of Pasadena*, Los Angeles Superior Court Case No. BC 550394) indicate that the traditional litigants of municipal revenues have made use of this device.[1]

More ominous for the local fisc, however, is the arrival of some of the State's most prominent plaintiff's class-action firms. Girardi & Keese in concert with a San Diego firm filed *Ruiz v. City of Santa Ana*, Orange County Superior Court Case No. 30-2014-00736828[2] to challenge Santa Ana's application of its telephone users tax to the call-detail portion of cell phones after the IRS abandoned that portion of the base of the Federal Excise Tax on Telephony (FET) and the adoption of a voter-approved ordinance to restore that tax base — the issue in *Ardon* and *McWilliams.* The firm has filed or threatened similar suits against Norwalk and Rancho Palos Verdes in Los Angeles County and Alameda and Palo Alto in the Bay Area. Plainly, the plaintiffs' bar has awakened to new business opportunities.

Ardon and *McWilliams* construe the Government Claims Act to preempt local claiming ordinances which bar class claims. The Government Claims Act prevents such claims against the State by reference to detailed State claiming statutes. (Gov. Code,

[1] My colleague Holly Whatley and I represent the local governments in each of the four cases mentioned in this paragraph.

[2] My colleague Holly Whatley and I represent Santa Ana in this case.

§ 904, subd. (a).) Thus, this problem might be fixed legislatively. The League of California Cities made some efforts to pursue a solution and has the issue on its agenda still. However, opposition from staff of the Assembly Judiciary Committee, in which the plaintiffs' bar has invested substantial interest over the years, has made that infeasible to date.

While continued efforts by municipal advocates and those who depend on local governments for employment, contracts, and services are well worth pursuing; change does not seem likely in the short run. Thus, local governments would do well to audit their revenue portfolios, identify weaknesses, and shore those up where possible, even if that means taking an updated ordinance to the voters.

Telephone taxes have been fertile ground for class action and quasi-class action suits. Los Angeles alone has a complete case load of such disputes, unsurprising given that it accounts for a substantial fraction of the State's telephony market. Notable recent cases include *J2 Global Communications, Inc. v. City of Los Angeles* (2013) 218 Cal.App.4th 328 (service of e-fax provider that converts faxes sent to a landline to an email involved taxable telecommunications under city ordinance)[3] and *Sipple v. City of Hayward* (2014) 225 Cal.App.4th 349 (carriers had standing to seek refunds for customers without complying with local refund-first requirements).[4] Because the telecommunications market changes rapidly and its vendors resist taxation of their services, and because Proposition 218 requires voter approval of any change in the methodology of applying a tax, litigation will likely continue. (Cal. Const., art. XIII C, § 2 [requiring voter approval of local tax increases]; Gov. Code § 53750, subd. (h) [defining "increase"].) Rigid ordinances taxing a protean market place are a formula for disputes. If telephone taxes are a significant part of your clients' revenue portfolios, they would do well to update their ordinances at the polls when possible and to draft carefully to avoid over-specificity and other drafting techniques which tend to compound the problem.

[3] My colleague Holly Whatley represented Los Angeles in this case.

[4] My colleagues Holly Whatley, Amy Sparrow, Ryan Thomas Dunn and I represent several dozen of the respondent cities in this case.

III. PROPERTY TAXES

Although Proposition 13 was approved in 1978 and intensely litigated[5] Californians still contest its meaning and its wisdom. While a comprehensive review of current property tax litigation would be of more interest to County Counsels than City Attorneys (as Counties administer the tax), a few developments are of more general interest.

SPLIT ROLL. Interest continues in a split roll to allow higher taxation of non-residential property while maintaining the 1% cap and purchase-price assessment methods of Article XIII A, sections 1–2 for residential property. While the California Teachers Association has long advocated this proposal, news reports suggest a proposal is being development for the November 2016 groups by an array of progressive interests in the state. More modest proposals have attempted to address the lag of reassessment of the value of commercial property, as compared to occupant-owned residential property, as businesses have found a variety of ways to transfer property without triggering reassessment. Last year nearly saw approval of A.B. 2372 (Ammiano, D-San Francisco & Bocanegra, D-San Fernando) to modestly tighten regulation of such corporate transfers. The Howard Jarvis Taxpayers Association was neutral on the bill which may have contributed to progressive opposition to it, which viewed it as too modest a fix and likely to be used to undermine more substantial changes at the polls next year.

PARCEL TAXES. Other evidence of this conflict can be seen in *Borikas v. Alameda Unified School District* (2013) 214 Cal.App. 135 (statutory authority for school parcel taxes requires "uniform" taxation and thus bars different formulas for residential ($x per unit) and non-residential units ($x per square foot).) Although this case turns on the statutory authority for school district parcel taxes, similar language appears in the authorizing language for many special district parcel taxes, too. Still further, the legislative debate about a split roll has direct relevance to cities.

DOCUMENTARY TRANSFER TAXES. Notable, too, is *926 North Ardmore Avenue, LLC v. County of Los Angeles*, Cal. S. Ct. Case No. S222329 which tests this question:

[5] This litigation is detailed in my May 2013 paper for the City Attorneys Department: *A History of Local Government Revenues Under California Law: Proposition 13 Through Proposition 26*. It may be found on my website at http://chwlaw.us/papers/History_of_Props_13_%20218_26.pdf .

"Does Revenue and Taxation Code section 11911 authorize a county to impose a documentary transfer tax based on the change in ownership or control of a legal entity that directly or indirectly holds title to real property? The Answer Brief in the Supreme Court was due April 24, 2015 as this paper was drafted.

MELLO-ROOS AND OTHER SPECIAL PARCEL TAXES. Even Mello-Roos taxes — long a staple of real estate development pro formas — have become controversial of late. *City of San Diego v. Shapiro* (2014) 228 Cal.App.4th 756 involved a charter-city ordinance authorizing a special hotel bed tax. Under that ordinance, the taxing district was defined as all properties presently — or subsequently — developed with hotels. As no voters could lawfully live in property zoned for such commercial uses, the ordinance followed the lead of the Mello-Roos Community Facilities District Act (Gov. Code, § 53326) and assigned the right to vote required by Proposition 13 (Cal. Const., art. XIII A, § 4) and Proposition 218 (Cal. Const., art. XIII C, § 2) to the property owners. The Fourth District, in very broad terms, stated that the Constitution entrusts the right to vote on taxes to the electorate not to property owners, and overturned a trial court judgment validating an assessment under the ordinance. It noted by footnote 32 the implications of its ruling for uninhabited Mello-Roos districts, but found it unnecessary to decide the question. This has raised concerns regarding the formation of such districts.

I think a good argument can be made that Government Code section 53326 survives *Shapiro* as applied to a rationally drawn Mello-Roos district in which fewer than 12 registered voters reside. First, the ordinance at issue in *Shapiro* was unusual in that it sought to tax present and future hotels, rather than taxing present hotels and providing for annexation to the taxing district upon land use approvals of new hotels. Second, the tax closely mimics the underlying transient occupancy tax and was to fund a visitor-drawing convention center expansion. Thus, at the level of equities it seems very much like the kind of tax of general application to be resolved by voters rather than property owners. Third, the San Diego tax does not fit well into the U.S. Supreme Court precedent allowing land-owner voting under *Salyer Land Co. v. Tulare Lake Basin Water Storage Dist.* (1973) 410 U.S. 719, which allows such voting for limited-purpose entities that provide services to property funded by property owners, such as the irrigation water at issue there. All these facts suggest an ordinary Mello-Roos district on a greenfield site to fund infrastructure for development of that site involves very different issues than San Diego's effort to fund its Convention Center.

Until new authority resolves the ambiguity on this subject, I suggest cities that form greenfield CFDs take care to document that absence of a meaningful electorate in the territory and to emphasize the factors which underlie the *Salyer Land* rule: the services to be provided are of particular concern to landowners and the landowners will fund those services via property taxes. It might also be worth noting that, when the land develops and a significant electorate exists, that electorate will then have authority over any change or renewal of the tax and would have authority, consistent with bond covenants, to reduce or discontinue it.

Nevertheless, of course, *Shapiro* creates a risk for non-resident Mello-Roos districts and may complicate obtaining a clean bond opinion to facilitate sale of debt backed by special taxes imposed in such districts.

Also of interest is *Building Industry Assn. v. City of San Ramon*, Contra Costa Superior Court Case No. MSC14-00603 which challenges a city-wide Mello-Roos special tax to fund supplemental municipal services on the ground that the services funded do not differ in kind and extent from those provided previously and therefore do not satisfy the requirements of the Mello-Roos statute. Cross-motions for summary judgment are to be heard April 23, 2015.

IV. TRANSIENT OCCUPANCY TAXES

Just as the protean nature of the telecommunications industry has complicated collection of utility users taxes on telephony, information technology is disrupting the lodging industry, too. Concerns regarding sharing economy services such as Air BnB, Home Away, and VRBO have drawn legislative attention in many cities (and litigation in San Francisco) and in the Legislature.

There are no complex legal issues associated with taxing "sharing economy" lodging sales — it is well within a city's power to tax this use. There are administrative issues, however, such as identifying participants in the industry. Some cities (often in desirable resort locations which forbid this use) regularly monitor Air BnB, VRBO, Home Away and other sites looking for listed properties in the city and send form letters informing owners and occupants of the City's taxes and other rules. These uses also raise land use, health and safety, and community character issues and have been

attacked as displacing rental units from the affordable housing market in favor of tourist uses in places like San Francisco.[6]

Of course, any amendment to a TOT tax ordinance to reach this use will likely require voter approval under Proposition 218. (Cal. Const., art. XIII C, § 2; Gov. Code § 53750, subd. (h) [defining tax "increases" which require voter approval]; *AB Cellular LA, LLC v. City of Los Angeles* (2007) 150 Cal.App.4th 747 [change in administrative methodology of UUT on telephone was "increase" requiring voter approval under Proposition 218].)[7]

There has also been substantial litigation testing whether on-line resellers of hotel rooms like Priceline.com, Expedia.com, etc., are "operators" within the meaning of the common language of many local bed tax ordinances. This has produced litigation including *Priceline.com Inc. v. City of Anaheim* (2010) 180 Cal.App.4th 1130 [City's use of contingent-fee counsel did not violate due process] and *City of Anaheim v. Superior Court* (2009) 179 Cal.App.4th 825 [pay-first-litigate-later rule did not apply to Priceline's suit for judicial review of Anaheim's deficiency determination].[8] The various suits brought to challenge deficiency assessments by Anaheim, Santa Monica, Los Angeles and other cities with substantial bed tax revenues were coordinated in the Second District, which systematically ruled against the cities, concluding online resellers were not "operators" within the meaning of the tax ordinances in issue. Most were unpublished until San Diego's. That case is now pending in the California Supreme Court as *In re Transient Occupancy Tax Cases*, Cal. S. Ct. Case No. S218400 and involves two questions: are the on-line resellers subject to the tax ordinances? And, was it permissible for the Second District to rely on its prior, unpublished decisions involving other cities to resolve San Diego's claim? The City's reply brief is due May 22, 2015. The League of California

[6] I recently testified on these issues before a Joint Informational Hearing of the Assembly Committees on Local Government and on Revenue & Taxation. An outline of that testimony appears at http://chwlaw.us/wp-content/uploads/Testimony-re-Air-BnB-Policy-Issues-03-18-2015.pdf .

[7] My colleague Amy Sparrow and I represented Los Angeles in this case.

[8] This case strikes me as wrongly decided. It was immediately distinguished by another panel of the Second District in *Chodos v. City of Los Angeles* (2011) 195 Cal.App.4th 675 and by the First District in *Chiatello v. City and County of San Francisco* (2010) 189 Cal.App.4th 472. A more recent Second District decision distinguishes it, too. *Water Replenishment District of Southern California v. City of Cerritos* (2013) 220 Cal.App.4th 1450. No case has followed it on this issue.

Cities and the California State Association of Counties will file an amicus brief for the City in this case.[9]

Most bed taxes ordinances are based on the same model ordinance and tax the "privilege of occupancy," with the tax paid by a "transient" or "lodger" and collected by an "operator" of a hotel. The online resellers dispute that they are "operators" because they do not operate the hotels. However, the ordinances can be read to treat anyone who collects "rent" from a "lodger" for the "privilege of occupancy" to be an "operator" obliged to collect and remit the tax. This ambiguity could easily be clarified by ordinance; however, voter approval may well be required under the authorities discussed above. The online resellers can be expected to fund a "no" campaign against such tax extensions, however, and the cities which are the major beneficiaries of hotel bed taxes in California have not yet attempted ballot measures.

Most cities will await the outcome of the San Diego case before deciding how to address these issues. In the meantime, and if San Diego is not successful, the options would seem to include:

- Seek voter approval of an amended ordinance that plainly taxes on-line resales and, perhaps, home-sharing;
- Forego this revenue;
- Enforce notice provisions of the existing ordinance, such as those which require the amount of bed tax paid to appear on hotel invoices. This may lead to voluntary compliance with the bed tax given the commercial needs of hotels and resellers to conceal the wholesale price the resellers pay.

V. TAXPAYER STANDING

Code of Civil Procedure section 526a, the taxpayer standing statute, provides, in relevant part:

> An action to obtain a judgment, restraining and preventing any illegal expenditure of, waste of, or injury to, the estate, funds, or other property of a county, town, city or city and county of the state**, may be maintained** against any officer thereof, or any agent, or other person, acting in its

[9] My colleague Ryan Thomas Dunn and I will write that brief.

> behalf, **either by a citizen resident therein, or by a corporation, who is assessed for and is liable to pay**, or, within one year before the commencement of the action, has paid, **a tax therein**. (Emphases added.)

A welter of cases has been litigated recently to test who has standing to bring such actions. *Reynolds v. City of Calistoga* (2014) 223 Cal.App.4th 865 involved a non-resident's effort to challenge the City's use of special sales tax funds approved for flood protection and watershed improvement. He was neither a resident nor a property owner in Calistoga, but alleged he paid sales taxes there and that he held a lien on property there to secure debt. The Court of Appeal affirmed the trial court's decision sustaining the City's demurrer, noting that the sales tax is legally (if not economically) incident on the seller and there was no evidence he had paid property tax.

Thompson v. Petaluma Police Department (2014) 231 Cal.App.4th 101 reversed a trial court judgment invalidating Petaluma's vehicle impoundment program on due process grounds. The court found standing for the plaintiff because, although he did not reside there, he owned a business there and paid property tax. (*Id*. at p. 105.)

Wheatherford v. City of San Rafael, Cal. S. Ct. Case No. S219567 is a suit by the plaintiff's counsel in *Thompson* asserting the same theory against San Rafael. The plaintiff is a City resident who rents an apartment and does not directly pay property tax. The Court of Appeal affirmed the trial court's order dismissing the case, finding that residency and payment of sales tax was insufficient to confer standing under Code of Civil Procedure section 526a. The Supreme Court granted review of the standing issue. As this paper is written, the plaintiff's reply brief is due April 10, 2015.

VI. WATER RATES AND PROPOSITION 218

Proposition 218, adopted in 1996, places in the Constitution Proposition 62's statutory requirement for voter approval of general taxes (Gov. Code § 53720 et seq.), provided detailed rules for assessments on property to fund services and facilities that specially benefit property, and created a new class of "property related fees" which require both a majority protest proceeding in which silence equals consent and — except for water, sewer and trash fees — an election in which the approval of a majority of property owners or two-thirds of voters must approve the fee. (Cal. Const., art. XIII C, § 2; art. XIII D, § 4; art. XIII D, § 6.) Until *Bighorn-Desert View Water Agency v. Verjil* (2006) 39 Cal.4th 205, water retailers had successfully argued that ordinary water rates based on the volume of water consumed were not property related fees subject to Proposition 218. Although the early years of implementation of Proposition 218

involved substantial assessment litigation,[10] of late, water rates have been the primary area of dispute.

GROUNDWATER AUGMENTATION CHARGES. Two days before *Bighorn*, the Sixth District had decided that groundwater augmentation charges imposed on those who pump groundwater to fund replenishment efforts were not property related fees, relying on *Apartment Ass'n of Los Angeles County, Inc. v. City of Los Angeles* (2001) 24 Cal.4th 830 [fee on landlords to fund housing code enforcement not property related because imposed on those who choose to enter the rental housing market, not on property owners per se]. In light of *Bighorn*, however, the Sixth District granted rehearing sua sponte and reversed itself, concluding that —because some of the groundwater pumpers subject to the contested fee used water for rural residential purposes, such fees were property related just as metered fees on urban consumers are. *Pajaro Valley Water Mgmt. Agency v. AmRhein* (2007) 150 Cal.App.4th 1364 ("*AmRhein*").

The Pajaro agency had not complied with Proposition 218 in setting its fees. It therefore settled the *AmRhein* case by repealing the fee and then set out to reimpose its groundwater fees in compliance with Proposition 218. It took a conservative approach and conducted both a majority protest proceeding under article XIII D, section 6, subdivision (a) and a property-owner election (using weighted ballots) under section 6, subdivision (c). The lawyer who won a million-dollar-fee award in *AmRhein* sued again, asserting every conceivable challenge. The kitchen-sink complaint made for ponderous briefs but produced a very helpful decision providing citable authority on a plethora of useful points, including:

- The charge is a fee for "water service" exempt from the election requirement of article XIII D, section 6, subdivision (c) because "water service" has a very broad definition including the provision of piped water service to coastal farmers at the expense of inland groundwater users who benefited from the less-taxed basin.
- The Proposition 218 Omnibus Implementation Act of 1997 is good authority to construe the Constitution, including the definition of "water" provided by Government Code section 53750, subdivision (m). The Court distinguished its earlier decision in *Howard Jarvis Taxpayers Ass'n v. City of*

[10] See the paper noted in footnote 1 above.

Salinas (2002) 98 Cal.App.4th 1351,[11] which had refused to apply that definition when deciding a property-tax-roll fee measured by the impervious coverage of land to fund stormwater services was a property related fee subject to Proposition 218.

- Notice of a protest hearing under article XIII D, section 6, subdivision (a) can be given to property owners alone and need not be given to tenants liable for the fee under private land leases notwithstanding reference to such tenants in article XIII D, section 2, subdivision (g)'s definition of "property ownership."
- Debt service, general administration and overhead, and planning for future services were all permissible uses of a water fee notwithstanding the requirements of Article XIII D, section 6, subdivision (b)(1)–(3) that fees not exceed service cost and be used only to fund such cost and subdivision (b)(4)'s prohibition on fees for future service and subdivision (b)(5)'s prohibition on fees for general governmental services.
- The American Waterworks Association's M-1 Manual's cost-accounting process complies with Proposition 218's requirements for cost-justification of fees. (*Id*. at p. 600.)
- Parcel-by-parcel cost analysis is not required despite the language of article XIII D, section 6, subdivision (b)(3)'s statement that "the amount of a fee or charge imposed upon any parcel or person as an incident of property ownership shall not exceed the proportional cost of the service attributable to the parcel." Instead, class-by-class cost analysis is permitted provided the classes are rationally drawn. (*Id*. at p. 601 [citing *California Farm Bureau Federation v. State Water Resources Control Bd*. (2011) 51 Cal.4th 421, 438 [allowing class-by-class cost-justification of fees under Proposition 13].)

The very recent decision of *City of San Buenaventura v. United Water Conservation District* (2015) ___ Cal.App.4th ___, 2015 WL 1212205 (2d DCA, filed Mar. 17, 2015) distinguishes *AmRhein* and rather thoroughly rejects its reasoning. It adopts the original rationale of the Sixth District in that case, concluding groundwater charges — at least on municipal water utilities like Ventura's — are regulatory fees rather than property related fees. Thus, they are subject to Proposition 26, but not Proposition 218. The

[11] I represented Salinas in this case.

Proposition 26 analysis of the case is very generous to the Water District, too, and allows a three-to-one ratio of fees on municipal and industrial water users as compared to fees on farmers, finding it "fair and reasonable" as a matter of fact. As this paper is written, petitions for rehearing and review are due April 1 and April 27, respectively.[12] It is discussed further below in regards to Proposition 26.

Other groundwater disputes are pending, such as that described in the *Water Replenishment District of Southern California v. City of Cerritos* (2013) 220 Cal.App.4th 1450 [pay-first-litigate-later rule applied to cities which won writ invalidating WRD's fees but had not obtained a final judgment] and *Great Oaks Water Co. v. Santa Clara Valley Water District* (2015) ___ Cal.App.4th ___, 2015 WL 1403340 (6th DCA filed Mar. 26, 2015) ("*Great Oaks*"), which is discussed further below.

Last year's AB 2403 (Rendon, D-So. Gate) codified one of *Griffith*'s holdings, amending the Proposition 218 Omnibus Implementation Act's definition of "water" to add the words "from any source," suggesting that water fees may be used to obtain water from storm water recapture programs, recycled water from sanitation plants, etc.

RETAIL WATER RATES. Proposition 218 disputes have involved retail water rates, too. *City of Palmdale v. Palmdale Water District* (2011) 198 Cal.App.4th 926 invalidated tiered water rates because the District increased the steepness of the tiered rate curve (i.e., the jumps in prices for each tranche of increasingly inefficient water use) without a basis in its rate-making record to do so. Just how much record support is required may be known soon as the Fourth District is poised to decide *Capistrano Taxpayers Association v. City of San Juan Capistrano*, 4th DCA Case No. G048969.[13] That City's record provides a basis for the calculation of upper-tier rates tied to the cost of water from various sources, but sells far less water in those tiers than it produces from those more-expensive sources. Thus, the question is whether a mathematically precisely allocation of proven costs to each tier is required or whether it is sufficient to have such an allocation for a class of customers (residential, e.g.) and to make policy-driven allocations among tiers for that class to achieve water conservation goals.

[12] I and my colleagues David Ruderman and Michael Cobden are counsel for the City of Ventura in this case.

[13] I represent San Juan Capistrano in the case, together with my colleague Jon R. diCristina.

The City also defends its upper-tier rates as fines exempt from cost justification under Article XIII C, section 1, subdivision (e)(4) [Proposition 26] and on the basis that *Bighorn* applies Proposition 218 only to water service in amounts required for ordinary, residential use of property and consumption of more water than the City allocates to efficient use is a supplemental water service, not a property related service. Also in issue is the City's funding of future recycled water service from domestic rates. Oral argument portends loss for the City at least on the demands of Proposition 218 for record-justification of fees. Decision is imminent as this paper is written, as the case was argued and submitted on January 21, 2015. As the fees in question were succeeded by new rates in 2014, the case may not be a good candidate for Supreme Court review.

A very helpful decision for water retailers is *Morgan v. Imperial Irrigation District* (2014) 223 Cal.App.4th 892. This was a farmer's challenge to IID's rates, which again raised a myriad of issues. The case holds:

- Farmers not entitled to separate rate protest under article XIII D, section 6, subdivision (a) even though they constitute a distinct rate class. This is an important victory because separate protests would make it very hard to impose fees if each rate class could object to any perceived benefit to another.
- Although part of the decision applied deferential substantial evidence review to contested facts on appeal, another applies the independent judgment standard of appellate review. In my judgment, the correct standard is the independent judgment standard of review because rate cases are tried in traditional mandate under Code of Civil Procedure section 1085 and are limited to a closed administrative record under *Western States Petroleum Assn. v. Superior Court* (1995) 9 Cal.4th 559 ("*Western States*"). Moreover, the general standard of judicial review of rate-making under Proposition 218 is de novo under *Silicon Valley Taxpayers Ass'n, Inc. v. Santa Clara County Open Space Authority* (2008) 44 Cal.4th 431 ("*Silicon Valley*"). Indeed, the reason the *Morgan* court was presented with factual disputes about the rate-making record on appeal appears to be that the parties did not cite *Western States* and the trial court allowed extra-record evidence to impeach IID's record. Further, the doctrine of "constitutional facts" requires probing appellate review of factual disputes on which constitutional rights turn, lest important constitutional concerns be immunized from appellate review and devolve into disparate standards around the State. (E.g., *Bixby v. Pierno* (1071) 4

Cal.3d 130, 139 fn. 4 [appellate courts review de novo factual matters on which constitutional rights turn to avoid ceding the scope of those rights to lower tribunals]. However, one of the many troubling aspects of the *Ventura* decision is its adoption of *Morgan*'s substantial evidence review standard while conflating it with the independent judgment standard: "'[W]e exercise our independent judgment in reviewing the record,' but 'we do not take new evidence or decide disputed issues of fact.'") (*Ventura, supra*, 2015 WL 1212205 at p. *7.) Cities which succeed in the trial court will be happy to have the benefits of substantial evidence review; those who lose will prefer de novo review. My judgment is that de novo review is better for our clients as a general rule given the complexity of rate-making records and cases, which are often beyond the institutional competency of trial courts and more suited to the Court of Appeal's greater resources of time and staff. The *San Juan Capistrano* water rates case, for example, was tried by the Orange County Superior Court on a law and motion calendar.

- *Morgan* allowed IID to maintain the secrecy of protests to protect data regarding each farmer's water consumption, citing the Public Records Act provision allowing non-disclosure of records reflecting utility consumption.
- *Morgan* held that rates can be less than cost if subsidized from non-rate revenue because article XIII D, section 6, subdivision (b)(3) only provides that rates may not exceed the proportional cost of service; it does not require that rates equal that cost.

VII. PROPOSITION 26

GROUNDWATER AUGMENTATION CHARGES. There has been substantial litigation over fees imposed by groundwater management agencies on those who produce groundwater — including water retailers such as cities. The Court of Appeal applied Proposition 218 to such rates in 2007 in *Pajaro Valley Water Management Agency v. AmRhein* (2007) 150 Cal.App.4th 1364. In 2013, it upheld that agency's renewed effort to impose such fees, concluding that, although they were subject to Proposition 218, they were exempt from the election requirement of Article XIII D, section 6, subdivision (c) as "water" fees. (*Griffith v. Pajaro Valley Water Management Agency* (2013) 220 Cal.Ap.4th

586.)[14] On March 17, 2015, however, the Ventura panel of the Second District disagreed, reversing Ventura's trial court judgment against its groundwater agency, concluding the fees were subject to Proposition 26 rather than Proposition 218. *City of San Buenaventura v. United Water Conservation District* (2015) ____ Cal.App.4th ____, 2015 WL 1212205 (*Ventura*).[15]

Ventura is a puzzling decision. The City challenged groundwater augmentation charges under Propositions 13, 218, and 26, as well as United Water Conservation District's principal act, Government Code § 54999.7 ("the *San Marcos* legislation") and the common law of utility rate-making. Its concerns were the 3:1 ratio of fees on municipal and industrial groundwater use as compared to groundwater use in agriculture, UWCD's use of flat rates across its district despite a rate-making record demonstrating that some groundwater basins receive far more benefit from its recharge activities, and its poor accounting which treated groundwater rate proceeds as discretionary "general funds." The trial court ruled for the City under Proposition 218, awarding a refund of $1.3 million and several hundred thousand dollars in attorneys' fees. The Court of Appeal reversed, disagreeing with *AmRhein* and concluding Proposition 26 applies, rather than Proposition 218, and that Proposition 26 allows the 3:1 ratio of M&I to agricultural fees: "The District need only ensure that its charges in the aggregate do not exceed its regulatory costs." (*Id*. at p. *15). This essentially reads out of Proposition 26 its requirement that:

> The local government bears the burden of proving by a preponderance of the evidence that a levy, charge, or other exaction is not a tax, that the amount is no more than necessary to cover the reasonable costs of the governmental activity, and that the manner in which those costs are allocated to a payor bear a fair or reasonable relationship to the payor's burdens on, or benefits received from, the governmental activity

(Cal. Const. art. 13C, § 1, subd. (e) [final, unnumbered para.].)

Ventura is good news for agencies subject to Proposition 26, as it is a very lenient application of that measure. On the other hand, its reasoning may not withstand review

[14] My colleague Michael R. Cobden and I represented the Pajaro Valley Water Management Agency in this case.

[15] My colleagues David J. Ruderman, Michael R. Cobden and I are counsel for Ventura in this case.

by other courts and the *Great Oaks* decision discussed below is flatly inconsistent with it (but does not cite it). Moreover, it is not good news for cities which retail water as it liberates water wholesalers and groundwater regulators from much of the burden of Proposition 26. Still further, the Groundwater Sustainability Agencies to be created under 2014 legislation applicable to most major groundwater basins in the State, will also have power to impose fees under Proposition 218 or Proposition 26, as *Ventura* reads the statutes governing those agencies. (*Id.* at p. *14.) Those agencies and their rate-making power are discussed further below. Ventura will seek rehearing of the case, pointing out the need to reconcile it with *Great Oaks*. Its City Council authorized a petition for review on March 31, 2015.

Great Oaks Water Co. v. Santa Clara Valley Water District (2015) ___ Cal.App.4th ___ 2015 WL 1403340 ("*Great Oaks*") arises on facts quite like those of *Ventura* but reaches very different conclusions. Great Oaks won a multi-million-dollar refund (but not attorneys' fees due to its for-profit interest in the outcome) in Santa Clara Superior Court which concluded the SCVWD's groundwater replenishment charges were subject to voter approval under Article XIII D, section 6, subdivision (c) because they were property related fees not for "water service." The Court of Appeal found the fees were for "water service" and that the fees complied with the requirements of the SCVWD's principal act. It remanded the petitioner's claims regarding substantive compliance with the rate-making principles of article XIII D, section 6, subdivision (b). It is diametrically opposed to the reasoning of *Ventura*, but does not cite it, likely because it succeeded it by only nine days.[16]

First, the opinion is a treasure-trove of good law on rate-making, rate-making litigation, administrative mandamus, etc. It includes helpful discussions of:

- Standards of review and burdens of proof under Proposition 218 (and likely Proposition 26).

- The meaning of "property related service" sufficient to trigger Proposition 218 as to fees for such services.

[16] Plaintiff's counsel indicates that petitions for rehearing and review are likely in *Great Oaks*.

- A very broad definition of "water" services which both trigger Proposition 218 and its exemption from the election requirement of Article XIII D, section 6, subdivision (c).

- Further discussion of a possible "regulatory fee" exemption from Proposition 218 that could assist defense of tiered, consumption-based water rates like those at issue in the *San Juan Capistrano* case discussed above.

- Dicta suggesting there might be an exhaustion requirement in these cases.

- A detailed and helpful discussion of the distinction between compliance with claiming procedures under the Government Claims Act, Government Code sections 810 et seq. (as to which a substantial compliance argument applies), and "variance" between claims and subsequent litigation theories (which is fatal unless the variance can be found to be non-substantive).

- A helpful explanation that judicial review of legislative action is always subject to the deferential "arbitrary, capricious and entirely lacking in evidentiary support" standards whether or not plead in mandamus, tried in mandamus, etc. Of course, claims under Propositions 218 and 26 are subject to independent judicial review.

- Some helpful dicta on remedies in Proposition 218 cases, suggesting that they include a partial refund and prospective, equitable remedies to ensure future compliance.

- A nice discussion of the *Western States* rule that mandate review is limited to the agency's record and that, while this doctrine can be waived by an agency's resort to other evidence in the trial court, extra-record evidence cannot be used to impeach the agency's decision even in this circumstance.

- Brief mention of the argument that fees which recover capital costs are "capacity charges" under Government Code 66013 and therefore subject to a 120-day validation statute of limitations under Government Code 62022 (the Court remands this claim but notes the defense is partial, not a complete defense).

- Proposition 218 requires 45 days' notice prior to the hearing at which a fee or charge is adopted (art. XIII D, § 6, subd. (a)); it does not prohibit agencies from holding earlier hearings regarding a fee or charge.

- Agencies have no obligation to notify prospective fee payors of their rights to protest under article XIII D, § 6, subdivision (a). Such notice is required for assessments under article XIII D, section 4, subdivision (c).

- The hearing notice of a proposed charge required by article XIII D, section 6, subdivision (a) can identify a range of possible rates. The notice effectively establishes the maximum rate that may be set, and *Morgan v. Imperial Irrigation District* (2014) 233 Cal.App.4th 892 allows agencies to adopt a lower rate.

- When the amount of a fee or charge is calculated on the basis of an unknowable variable — such as consumption — Proposition 218 does not require that the notice disclose the amount each payor will pay, but only how the charge will be calculated — such as the rate per unit and the unit of measure. (See also, *AmRhein, supra*, 150 Cal.App.4th at p. 1388, fn. 15 [same].)

- The setting of fees and charges, as well as the ultimate expenditure of resulting revenues, are quasi-legislative actions that may only be reviewed by traditional mandate under the "arbitrary and capricious" standard to the extent statutory claims are made (such as the plaintiff's claim SCVWD had violated its principal act). De novo review is required under Proposition 218. (*Silicon Valley, supra*; art. XIII D, § 6, subd. (b)(5); see also art. XIII C, § 1, subd. (e) [final, unnumbered para.] (Prop. 26))

- "Even when extra-record evidence has been received [in an action not subject to Proposition 218 challenging a quasi-legislative action], 'the determination whether the decision was arbitrary, capricious or entirely lacking in evidentiary support must be based on the "evidence" considered by the administrative agency.' . . . Certainly the District's actions could not be invalidated based solely or primarily on the basis that expert witnesses, testifying after the fact, expressed disagreement with the District's approach to the issues at hand." (*Great Oaks, supra*, at p. 62.)

As noted above, 2014 legislation calls for the creation of **Groundwater Sustainability Agencies** to manage groundwater in the 400+ groundwater basins identified in the Department of Water Resources Bulletin No. 118. (Wat. Code, § 10720 et seq.) Each of these is entitled to impose fees to recover its cost to plan for management of its basin to reduce use to the safe yield and to fund regulation to accomplish that management. (Wat. Code §§ 10730, 10730.2.) Cities which rely on groundwater supplies to supply water to their residents and property owners will be subject to these fees. Those imposed under Water Code section 10730.2 "to fund the costs of groundwater management" are expressly subject to Proposition 218. Those imposed under section 10730 "to fund the costs of a groundwater sustainability program" have no such express requirement. *Ventura* finds this telling and applies Proposition 26 to groundwater augmentation charges. *Great Oaks* does not consider the Groundwater Sustainability Agency statute, but squarely holds fees imposed on groundwater use are subject to Proposition 218. This conflict may induce the California Supreme Court to grant review in one or both cases. In the meantime, those who impose groundwater fees would do well to comply with Proposition 218 and to document in their rate studies compliance with that measure and Proposition 26, as well.

WHOLESALE WATER RATES. Other disputes between wholesale water agencies and those they serve are pending, too, including *Newhall County Water District v. Castaic Lake Water Agency*, pending in the Second District Court of Appeal as case number B257964.[17] There, Castaic charges for its services among its four customers (two of which it wholly owns) based on total water consumption — including groundwater use and use of Castaic's imports. This seemed designed to punish Newhall for its greater groundwater rights as compared to the retailers Castaic owns and to incentivize it to use Castaic's imports rather than groundwater. Newhall prevailed at trial, convincing Los Angeles Superior Court Judge James Chalfant that Castaic had violated Proposition 26's demand that rates be proportion to Newhall's benefits from and burdens on Castaic's service. Castaic appealed and, as this paper is written, Newhall's Respondent's Brief is due May 31, 2015.

ELECTRIC RATES. Although gas and electric service charges are exempt from the property-related fee provisions of Proposition 218 (art. XIII D, § 3, subd. (b)), they are

[17] I represent Newhall in this case, along with my colleagues David J. Ruderman and Jon R. diCristina.

not exempt from Proposition 26.[18] Two recent disputes regarding electrical services have produced appellate decisions.

Jacks v. City of Santa Barbara (2015) 234 Cal.App.4th 925[19] involved a 2 percent franchise fee imposed by the charter city of Santa Barbara on Southern California Edison. Under a 1989 decision of the Public Utilities Commission, when an investor-owned utility is subject to a fee which significantly exceeds the "aggregate" of other such fees in its service area, it is required to recover the cost of that fee only from customers in the city imposing the fee and to show the fee as a separate line item on each customer's bill. Jacks argued this made 1 percent increase in Santa Barbara's fee a utility users tax requiring voter approval. The trial court concluded the increase was subject to Proposition 26, rather than Proposition 218, and grandfathered by it.

The Court of Appeal reversed, concluding the 1 percent increment was actually a de facto utility users tax requiring voter approval. Its reasoning is troubling because it turns on the economic incidence of the fee (who actually bears the burden to pay it in a given transaction) rather than the legal incidence (on whom the City imposed it as a matter of law). That is a very troubling precedent given the efforts by litigants to challenge revenue measures they do not pay because they are voters who ought to have been permitted to vote on them. Such a case is pending before the Fourth District as *Inland Oversight Committee v. City of Rancho Cucamonga*, Case No. E060022 (fully briefed and awaiting argument as of August 29, 2014).[20] Similar challenges to nearly all of the City of San Diego's assessment districts are pending in the Superior Court and Fourth District Court of Appeal, each claiming standing on these same terms.[21]

[18] In addition, *Jacks v. City of Santa Barbara*, discussed above, points out they are not exempt from the requirements of Article XIII C for voter-approval of taxes. (*Jacks, supra*, 184 Cal.Rptr.3d at p. 544, fn. 4 [criticizing *Citizens for Fair REU Rates v. City of Redding* (2015) 233 Cal.App.4th 402 for stating Proposition 218's exemption of electric service charges too broadly].)

[19] My colleague Ryan Thomas Dunn and I filed an amicus brief for the League of California Cities in this case. We also filed the City's petition for rehearing and will file its petition for review.

[20] My colleague Ryan Thomas Dunn and I filed an amicus brief for Rancho Cucamonga in this case on behalf of the San Diego Tourism Marketing District Corporation, the non-profit entity which operates San Diego's TMD.

[21] My colleague Ryan Thomas Dunn and I are co-counsel with the City of San Diego City Attorney's office in some of these cases and, with Jennifer L. Pancake, we represent the San Diego Tourism Marketing District Corporation in another.

Santa Barbara's petition for rehearing was denied, with no change in the Court of Appeal's petition, on March 27, 2015. Its petition for review is due April 7, 2015.

Chapman v. City of Los Angeles, Los Angeles County Superior Court Case No. BS153395 is a recently filed case raising a similar challenge to transfers from the Los Angeles Department of Water to the City's general fund.[22]

Citizens for Fair REU Rates v. City of Redding (2015) 233 Cal.App.4th 402 ("*Redding*")[23] holds that the City's payment in lieu of taxes (PILOT) established by budget resolution in 1988 and implemented in every succeeding budget was not grandfathered as to Proposition 26 because it was renewed with each budget, including the first budget adopted after the November 2010 adoption of Proposition 26. Therefore, the Court reversed the City's trial court victory on this theory and remanded for trial to determine whether the City could justify the PILOT in all or part based on the costs of services provided to the electric utility by the City's general fund. The case seems wrong, not least because it is a canon of construction that legislation which readopts previous legislative provisions without change (such as the parts of a law not changed by an amending statute) is viewed to continue earlier legislation and not to enact new legislation. (E.g., Gov't Code § 9605; *State Dept. of Public Health v. Superior Court of Sacramento County* (2015) 60 Cal.4th 940, 962 [statutory amendments "reaffirm," but do not reenact unchanged provisions].)

The language of *Redding* is not precise, but it does distinguish between Redding's adoption of its PILOT by budget action from action by "ordinance," suggesting PILOTs adopted by ordinance —or, one would assume, charter provision — are grandfathered as to Proposition 26: "The PILOT's regular appearance in Redding's budgetary process does not mean it was a permanent or continuing transfer compelled by ordinance or other non-discretionary authority." (*Redding*, 182 Cal.Rptr.3d 722, 733–734.)

The Court of Appeal denied the City's petition for rehearing, with modest changes in its opinion, on February 19, 2014. The City's petition for review, and the League of California Cities' request for depublication, are pending as this paper is written. Decision on both requests is due mid-summer 2015.

[22] My colleague Holly O. Whatley is co-counsel with the Los Angeles City Attorney's office in this case.

[23] My colleagues Amy C. Sparrow and Michael R. Cobden and I represent Redding in this case.

Several cities sought Public Utilities Commission assistance to compel invest-owned utilities (IOUs) regulated by the PUC to enforce those cities' franchise fee ordinances as the Cities had adopted them and not pursuant to one of two competing methodologies established by the IOUs to simplify their task of complying with those many franchises. The IOUs responded by petitioning the PUC to initiate a rule-making to adopt a state-wide standard for such compliance. The IOUs are the primary litigants there, as each contests for its own methodology. The cities initially involved in the dispute are participating, too. The rulemaking is given PUC docket number R14-03-016.

OTHER PROPOSITION 26 AUTHORITIES. The first published decision involving Proposition 26 is *Brooktrails Township Community Services District v. Board of Supervisors of Mendocino County* (2013) 218 Cal.App.4th 195, 197. In that case, the pro per litigant in *Paland v. Brooktrails Township Community Services District* (2009) 179 Cal.App.4th 1358 [minimum monthly water account charge did not violate Proposition 218's prohibition on fees for future services (art. XIII D, § 6, subd. (b)(4)] pursed repeal of the charge to which he objected by initiative, which was approved on the same ballot as Proposition 26. The District sought to invalidate the initiative repeal of its charge by arguing that the increase in water rates on customers necessary to make up for the lost revenues amounted to a special tax in violation of Proposition 26. The Court of Appeal noted that Proposition 26 did not take effect until the day after that election and was not retroactive as to local government, although it is partly retroactive as to State fees. (*Brooktrails, supra*, 218 Cal.App.4th at p. 206.) It thus provides a useful authority that Proposition 26 is not retroactive as to local governments.

Griffith v. City of Santa Cruz (2014) 207 Cal.App.4th 982 challenged the City's rent registration fees on landlords. The same pro per plaintiff who brought *Griffith v. Pajaro Valley Water Agency, supra,* brought this action challenging those fees under Propositions 218 and 26. The Court of Appeal found the Proposition 218 claim controlled by *Apartment Assn. of Los Angeles County, Inc. v. City of Los Angeles* (2001) 24 Cal.4th 830 [housing code compliance fee on landlords was not property related fee subject to Proposition 218]. It resolved the Proposition 26 claim for the City (which did not raise the non-retroactivity defense), finding an informal cost analysis performed by City staff was sufficient to bear the City's burden to prove it allocated its costs in proportion to Griffith's benefits from and burdens on the City's rent registration program. (207 Cal.App.4th at p. 906.) It is a helpful discussion of what is required to cost-justify a fee under Proposition 26.

Schmeer v. County of Los Angeles (2013) 213 Cal.App.4th 1310[24] upheld the County's plastic bag ban ordinance. Among the plastic bag industry plaintiffs' claims was that a mandatory 10-cent fee on customers who ask for paper bags violated the proportional cost requirement of Proposition 26. The Court of Appeal interpreted Proposition 26 to implicitly limit its reach to fees which fund government. As the 10-cent fee in issue here was paid to retailers and retained by them to fund their cost of complying with the ordinance, the Court found Proposition 26 inapplicable. Thus, in addition to the seven stated exceptions to Proposition 26's definition of the "taxes" which require voter approval (art. XIII C, § 1, subd. (e)(1)–(7); there is an eighth, implied exception — fees must fund government to trigger Proposition 26. There is a ninth, too — fees must be "imposed" rather than meaningfully voluntary.

A number of cases are pending under the provisions of Proposition 26 governing State fees. (Cal. Const., art. XIII A, § 3, subd. (b).) These include:

- Cases pending in the Third District Court of Appeal seeking to overturn trial court conclusions that the Air Resources Board fees imposed under AB 32, the greenhouse gas measure, are not subject to Proposition 26 because, although the fees were adopted after the effective date of Proposition 26, AB 32 preceded that date and, as to state fees, Proposition 26's applies to "any change in state statute." (Cal. Const., art. XIII A, § 3, subd. (a).) The provisions for local government are triggered when a fee is "imposed." (Cal. Const., art. XIII C, § 1, subd. (e).)

    - *Cal Chamber of Commerce v. CARB*, 3rd DCA Case No. C075930
    - *Morning Star Packing Co. v. CARB*, 3rd DCA Case No. C075954

    These cases are being tried jointly and, as this paper is written, the Reply Briefs are due April 8, 2015.

The Howard Jarvis Taxpayers Association is challenging fees imposed on parcels in rural areas of the state protected by Cal. Fire — State Responsibility Areas — to fund fire services. HJTA claims these fees are taxes requiring two-thirds approval in each legislative chamber under Proposition 26.

[24] My colleague Jon R. diCristina and I filed an amicus brief in this case on behalf of the League of California Cities and the California State Association of Counties.

- *HJTA v. California Department of Forestry*, Sacramento County Superior Court Case No. 34-2012-00133197

HJTA's motion to certify the plaintiff class is to be heard on June 12, 2015 by Judge Shellyanne Chang.

VIII. SOLID WASTE FEES

The *Jacks v. City of Santa Barbara* case described above has implications for franchise fees charged to private waste haulers which have franchises to serve cities. *Jacks*' reasoning relied heavily on the fact that Santa Barbara placed the franchise fee on Southern California Edison in its general fund and used it for general fund purposes. (*Jacks, supra*, 184 Cal.Rptr.3d 539, 544.) This reasoning would easily apply to most other franchise fees, which are also used for general fund purposes.

There has been trial court litigation of solid waste fees set by franchised haulers in which plaintiffs have claimed Proposition 218 applies to such fees, as well as to franchise fees and fees imposed to fund the waste-reduction mandates of AB 939. The first case to reach the Court of Appeal was decided on other grounds. (*Torres v. City of Montebello* (2015) Cal.App.4th 382.) The case was a resident's writ of mandamus action to invalidate a solid waste franchise agreement signed by the Mayor Pro Tem after the Mayor, who had voted against the franchise award, refused to do so. The City Attorney advised that the Mayor could be viewed as "absent from the City" empowering the Mayor Pro Tem to sign the franchise under Government Code sections 40601–40602. The Court of Appeal concluded refusal to sign is not "absence" and the contract was void as not having been signed by the Mayor as section 40602 requires.

IX. DEVELOPMENT IMPACT FEES

The California Supreme Court has a pending case involving development impact fees to fund affordable housing. *California Building Industry Association v. City of San Jose*, Case No. S212072. The Court's website summarizes the issue in the case this way: "What standard of judicial review applies to a facial constitutional challenge to inclusionary housing ordinances that require set asides or in-lieu fees as a condition of approving a development permit? (See *San Remo Hotel L.P. v. City & County of San Francisco* (2002) 27 Cal.4th 643, 670.)" The case will be argued April 8, 2015 in Los Angeles and decision will be due 90 days thereafter.

X. ASSESSMENTS

CASE AUTHORITIES. We have not had recent developments in assessment law. The basic authorities have been the following since 2011:

Silicon Valley Taxpayers Association v. Santa Clara County Open Space Authority (2008) 44 Cal.4th 431 established the independent judgment standard of judicial review of assessment decisions; and analyzed the more restrictive definition of "special benefit" stated in article XIII D, section 2, subdivision (i); but did little to clarify the obligation to allocate special benefit among benefited parcels according to the "proportional special benefit conferred on [each] parcel" under section 4, subdivision (a).

Dahms v. Downtown Pomona Property et al. (2010) 174 Cal.App.4th 708 provided very deferential review of a property and business improvement district (PBID) assessment. Among other things, that decision allowed the exemption of residential property from the assessment for supplemental security, streetscape maintenance and marketing services; discounted assessments for non-profits; and the use of foot-frontage as well as lot and building size to apportion benefit. Subsequent decisions have been less deferential.

Town of Tiburon v. Bonander (2009) 180 Cal.App.4th 1057 invalidated a utility underground assessment based on the Court's view that the zone boundaries were inappropriate. This is independent judicial review with teeth. The case did find no general benefit from utility undergrounding and allowed the court to look outside the agency record when evaluating the assessment methodology. *Great Oaks, supra,* is a useful case to argue this last holding was wrong.

Beutz v. County of Riverside (2010) 184 Cal.App.4th 1516[25] invalidated a park benefit assessment finding that a flat, district-wide assessment for parks was not imposed in proportion to benefit as parcels closer to parks received greater benefit. It did allow maintenance and operation of the parks to be fully funded from the assessment because the general benefit portion of the service was covered by non-assessment revenues used to acquire and improve the parks. It ruled the assessing agency must also prove special benefit and proportional allocation even if the challenger does not raise these points. *Morgan* and *Great Oaks* hold to the contrary in the

[25] My colleague Amy C. Sparrow and I represented Riverside County in this case.

context of property-related fees, stating the challenger bears the burden to identify a flaw in a challenged revenue measure. The decision also questions the use of program cost to allocate benefit amount parcels. This leaves one to wonder, given our capitalist economy, how else ought we to value benefits than by the cost to confer them?

Golden Hill Neighborhood Ass'n v. City of San Diego (2011) 199 Cal.App.4th 416 invalidated a assessment district formed under the 1972 Lighting and Landscaping Act, finding the engineer's report inadequate because it did not state the basis for allocating votes to City-owned parcels, which the City cast in favor of the assessment. The decision provides helpful guidance for engineer's reports, articulating how to identify special benefit and to allocate program costs in light of those benefits.

STATUTES. Although there have been no published cases construing Proposition 218's assessment requirements since 2011, there have been some statutory developments. Last year's AB 2618 (J. Perez, D-Los Angeles) updated the property and business assessment district (PBID) statute, Streets & Highways Code section 36600 et seq. to reflect these cases described above. It states that "special benefit":

> means, for purposes of a property-based district, a particular and distinct benefit over and above general benefits conferred on real property located in a district or to the public at large. **Special benefit includes incidental or collateral effects** that arise from the improvements, maintenance, or activities of property-based districts even if those incidental or collateral effects benefit property or persons not assessed. Special benefit excludes general enhancement of property value.

(Strs. & Hwys. Code, § 36615.5, emphasis added.) This language may be useful by analogy in other assessment contexts.

Last Year's local government omnibus act, SB 1462 (Local Government Comm.) also made a number of non-controversial refinements to the PBID statute. Further proposes to refine the statute are in discussion for this year's omnibus bill, SB 184, but have not yet appeared in print as this paper is written.

ADVICE REGARDING ASSESSMENTS. Pending further authorities that clarify the special benefit and proportionality requirements of Proposition 218 for assessments, I have these recommendations:

- You should ensure your clients have a strong engineer's report written with Proposition 218 in mind. A warmed over report that predates the decisions outlined above is not likely to pass legal muster.

- Engineers' reports should be reviewed by a lawyer. This means a request for proposals, and a contract, should ensure the consultants know to include in the scope time for legal review and work to respond to legal comment. It will do your client little good if legal comments cannot influence the report because the consultant is "out of scope" and unwilling to implement them when they are received or there is no time to do so.

- Keep an eye out for further legal developments.

XI. INITIATIVE REPEAL OF WATER RATES

Proposition 218's article XIII C, section 3 authorizes initiative reduction or repeal of government revenue measures. Earlier cases made clear such initiatives were permissible but could not exceed the scope of the rate-making power afforded the legislative body. (*Bighorn-Desert View Water Agency v. Verjil* (2006) 39 Cal.4th 205; cf. *Howard Jarvis Taxpayers Assn. v. City of San Diego* (2004) 120 Cal.App.4th 374 (charter amendment could not require 2/3-voter approval of general taxes because article XIII C, § 2, subd. (b) provided for majority approval). *Bighorn* deferred the difficult question that would arise if voters used that power to lower rates below the level demanded by law or repealed an increase necessary to comply with law — such as bond covenants and statutes requiring some special districts to set water rates high enough to allow provision of a safe and adequate water law:

> In holding that section 3 of article XIII C of the state Constitution authorizes initiative measures that reduce public agency water service charges, we are not holding that the authorized initiative power is free of all limitations. In particular, we are not determining whether the electorate's initiative power is subject to the statutory provision requiring that water service charges be set at a level that "will pay the operating expenses of the agency, ... provide for repairs and depreciation of works, provide a reasonable surplus for improvements, extensions, and enlargements, pay the interest on any bonded debt, and provide a sinking or other fund for the payment of the principal of such debt as it may become due." (Stats.1969, ch. 1175, § 25, p. 2286, 72B West's Ann. Wat.-Appen., supra, ch. 112, p. 203.) That issue is not currently before us.

(*Bighorn-Desert View, supra*, 39 Cal. 4th at p. 221.)

That issue has now been decided in *Mission Springs Water District v. Verjil* (2013) 218 Cal.App.4th 892,[26] which affirmed a trial court ruling denying Howard Jarvis' Taxpayers Association's SLAPP motion and granting declaratory relief to the petitioner water district, allowing it to block from the ballot a measure which would set rates too low to satisfy bond covenants and to meet the legal obligations of the District. The proponents offered no evidence that the rates they proposed would be sufficient and the District provided ample evidence, including its rate-makers' analysis and a declaration of its General Manager demonstrating those rates would not suffice.

Thus, an agency confronted with an initiative that would set rates too low to meet a utility's legal obligation should consider this option. I should note, however, that I was entirely unable to persuade the Fresno Superior Court or the Fifth District Court of Appeal to follow *Mission Springs* in two suits I litigated there last year. Laws do not enforce themselves, it seems, and water rate initiatives can be politically contentious.

XII. CONCLUSION

The law of municipal revenues is developing rapidly and this year has been particularly active in the appellate courts with *Redding*, *Jacks*, *Ventura*, *Great Oaks* and the impending decision in *San Juan Capistrano*. At least one or two of those cases seems a likely candidate for Supreme Court review, joining the *Ardon*, *CBIA v. San Jose* and *Wheatherford*, which are already pending there. We may have more to discuss at the annual meeting in September!

[26] I filed an amicus brief in this case on behalf of the Association of California Water Agencies, the California Association of Sanitation Agencies, the California Association of Counties and the League of California Cities.

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Demystifying How The ADA Applies To Public Facilities And Services

Thursday, May 7, 2015 General Session; 2:15 – 4:15 p.m.

Gregory W. Stepanicich, City Attorney, Fairfield and Mill Valley, Town Attorney, Ross
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Notes:

BEST BEST & KRIEGER LLP
ATTORNEYS AT LAW

New Developments and Trends Under the ADA

Alison D. Alpert, Esq.

League of California Cities
Spring Conference
Demystifying How The ADA Applies To Public Facilities And Services
Presentation Date: May 7, 2015

While most city personnel are familiar with the Americans Disabilities Act, they are not always prepared for the far reaching impacts that this law has on virtually all of the facilities and operations of a city. City personnel are sometimes surprised by new court decisions giving broad application to the law, and applying it to situations and facilities not previously considered. Three areas that are currently developing and may be overlooked are the requirements to make on-street parking accessible, accessibility of temporary events, and effective communications under the ADA. While standards for accessible parking in lots is well known and clear standards exist, many cities have not addressed what is required to be done with on-street parking where it exists. Likewise, many cities have not considered their temporary events and the requirements to make them accessible. Effective communications with disabled individuals are generally addressed by cities for the most common situations (i.e. council meetings, etc.), but effective communications under the ADA is a broad concept and cities may not recognize all of their obligations. Below, within each of these three areas, issues are highlighted to help cities recognize the scope of their obligations under the ADA.

ACCESSIBLE ON-STREET PARKING- *FORTYUNE* V. *CITY OF LOMITA*

Cities have been complying with standards for accessible parking in lots for more than 20 years. However, no standards exist for on-street accessible parking and the requirement to add on-street accessible parking has been unclear until a recent Federal case in the Ninth Circuit Court of Appeals. On September 5, 2014 in *Fortyune v. City of Lomita*, 766 F.3d 1098 (9th Cir. 2014), the Ninth Circuit, found in favor of Robin K. Fortyune, regarding accessible parking for persons with disabilities within the public right-of-way. It is important to note that the City of Lomita has requested that the United States Supreme Court review that decision. However, as it currently stands, this decision will impact cities throughout California and the United States. The basic summary of the *Fortyune* case is as follows:

- Fortyune sued the City of Lomita for not having accessible parking in the public right-of-way (on-street parking).

- Title II of the ADA requires government entities to ensure that all city/agency programs are accessible to the disabled.

- The Ninth Circuit (the same court) has previously determined that sidewalks are city programs and therefore must be accessible to persons with disabilities.

- The *Fortyune* decision holds that parking in the public right-of-way is a program by the City and therefore, must be accessible.

- However, the *Fortyune* decision does not specify how accessible parking is to be designed except to say the plaintiff was suing over diagonal parking, not parallel. Therefore, the decision as it stands is specific to diagonal parking. Parallel parking may have additional safety concerns.

Background

The 2010 ADA Standards for Accessible Design (ADAAG) specify the minimum number of required accessible parking spaces per total number of parking spaces provided in a parking facility. These guidelines only specifically address parking lots and parking structures. However, current ADA Title II regulations guard against discrimination or exclusion of disabled individuals from the benefits of the services, programs, or activities of a public entity, by establishing that public agencies are required to operate their services, programs and activities so that they are accessible to disabled individuals.

In *Fortyune vs. City of Lomita*, the court held that under Title II and its implementing regulations on-street diagonal parking was required to be accessible, despite the lack of a current specifications or detailed guidelines on how to make the parking accessible. Therefore, under the decision a public entity must make accessible on-street diagonal parking, or other accessible accommodations, to individuals with disabilities. Though disabled parking is routinely provided, the existing design standards only govern parking within facilities, not on-street parking. *Fortyune* is the first case to find an obligation under the ADA, even in the absence of corresponding design standards, to provide accessible on-street parking.

The plaintiff in *Fortyune* was a paraplegic who alleged that he experienced "great difficulty, discomfort, and even fear for his safety" because of a lack of accessible on-street parking. The City moved to dismiss the complaint, arguing that, without specific regulations targeting on-street parking, the City could not have any obligations under the ADA. The Ninth Circuit found that, despite the lack of accessibility standards, on-street parking is a normal function of a city and therefore must be made accessible. In essence, the decision in *Fortyune* interprets the ADA as requiring a general obligation to make all public services accessible, and therefore it is not limited to circumstances in which there are specific guidelines which provide detailed guidance.

The U.S. Department of Justice is responsible for developing regulations to implement the ADA. As part of this duty, the Department of Justice adopts specific technical and scoping standards for the design and construction of public facilities. All public facilities that have been constructed or altered since 1992 — when the ADA regulations first became effective — must be built and constructed in conformance with these standards.

In addition to guaranteeing equal access to disabled citizens, the standards also provide a benefit to cities and other public agencies by essentially creating a safe harbor for compliance with the ADA. In most instances, a public facility's obligations under the ADA are clear. For example, the standards require that parking lots have a designated minimum number of disabled parking spaces, that each disabled space be served by an access aisle, and that all disabled spaces be located nearest to the facility they serve. A city that operates a parking lot is able to ensure compliance with the ADA by following these standards.

However, the standards do not necessarily translate to parking that is provided on a street. On a street, the parking may be intended to serve various facilities throughout the area. Additionally, the existing standards for parking lots do not address parallel parking. Without

enforceable standards, it is not clear what steps must be taken to provide adequate service under the ADA.

The Department of Justice is likely to eventually provide some guidance on this issue. The Department must adopt standards that are consistent with guidelines established by the Access Board, an independent federal agency that is charged with developing accessible design criteria for the built environment. The Access Board consists of 25 members. Twelve members are from federal agencies, and the other 13 are from the public at large. Half the public members must have some form of disability.

Since the adoption of the ADA in 1990, the Access Board and the Department of Justice have sought to develop specific standards for an increasing variety of public facilities. The Access Board developed the original ADA Accessibility Guidelines in 1991, and adopted an updated version in 2004. The updated version addressed a number of facilities for which no previous requirements existed, including recreation facilities, such as swimming pools, boating facilities and amusement rides. The Access Board's 2004 ADA Accessibility Guidelines (ADAAG) were adopted by the Department of Justice in 2010.

The Access Board is currently in the process of developing additional guidelines for public rights-of-way, and the draft guidelines contain proposed requirements for on-street parking. The draft requirements are limited to public parking that is "marked or metered," and therefore do not impose design standards on all public streets. In the draft guidelines, the number of required disabled spaces is based on the total number of parking spaces on each block perimeter. And there are design specifications for accessible parallel parking. Depending on the size of the adjacent right-of-way, parallel parking may be required to have an adjacent access aisle if the sidewalk is altered or newly constructed. Where the right-of-way is not large enough to accommodate an access aisle, or where the sidewalk is not altered, accessible parallel parking must be at the end of the block face.

The Access Board's process for developing guidelines for public right-of-way began in 1999 and draft guidelines were originally proposed in 2002. Public comments on the guidelines were closed in 2012, and final adoption is imminent. However, the guidelines will not become enforceable standards unless and until they are adopted by the Department of Justice, and there is no timetable for the Department of Justice's action.

Until there are enforceable standards adopted for on-street parking, the ADA's requirements in this area will remain murky. The Ninth Circuit's holding on the motion to dismiss was limited to determining that local governments were required to provide accessible on-street parking in the absence of regulatory design specifications for on-street parking facilities. At this procedural stage of the litigation, the Court did not consider whether the defendant city's on-street parking facilities actually violated the ADA. Further, *Fortyune* does not provide any insight into whether any particular on-street parking design satisfies the requirements of the ADA.

The City of Lomita has filed a Petition for Writ of Certiorari with the United States Supreme Court, seeking review of the Ninth Circuit's opinion. The City has attempted to argue that on-street disabled parking should not be required until design standards are established. The

League of California Cities and the League of Oregon Cities have submitted an Amici Curie Brief in Support of the Petition.

Both before the Ninth Circuit and before the Supreme Court, the City of Lomita has argued that cities should not be required to install accessible on-street parking until enforceable standards are adopted. The City has argued that requiring accessible on-street parking without standards denies the City due process. The City has also argued that lower courts will not be able to establish a proper remedy because no standards can be identified for compliance. The Plaintiff has argued that on-street parking is a city program and therefore it must be accessible, regardless of whether technical specification have been adopted. The Plaintiff has argued that the ADA is violated if a plaintiff is excluded from participation in or denied the benefits of city programs regardless of whether standards for accessible design have been developed.

Interestingly, the Ninth Circuit did not apply a program access standard, looking at parking, but simply held that accessible on-street parking is required, without looking at the City's other parking facilities. Generally, to state a claim under Title II of the ADA, a plaintiff must show he was excluded from participation in or denied the benefits of a public entity's services, programs, or activities. *Duvall v. County of Kitsap*, 260 F.3d 1124, 1135 (9th Cr. 2001); see generally 42 U.S.C. §§ 12131-12134. Where an individual is allegedly excluded due to inaccessibility of a public agency's facilities, the DOJ's implementing regulations only establish two standards that may apply.

First, if the facility was in existence at the time the ADA became effective, and the facility has not been altered, the "program access" standard applies. 28 C.F.R. § 35.150. Program access does not require each public facility to be accessible, but requires that each governmental service, program, or activity be made accessible when viewed in its entirety. Second, if the facility is newly constructed or altered, the facility must comply with specific design standards adopted by the DOJ. 28 C.F.R. § 35.151.

The regulations do not expressly contemplate the situation in the present case. Assuming that all of the City's on-street parking facilities are newly constructed or altered, compliance with an established design standard is impossible. There are no design standards for on-street parking facilities. However, the DOJ issued a Technical Assistance Manual which explains how cities should apply the ADA in these circumstances:

> In such cases the technical requirements of the chosen standard should be applied to the extent possible. If no standard exists for particular features, those features need not comply with a particular design standard. However, the facility must still be designed and operated to meet other title II requirements, including program accessibility.

1994 Supplement to TA Manual, ii-6.2100 (citation omitted). The Ninth Circuit referenced this language from the Technical Assistance Manual to conclude that on-street parking is subject to the ADA. However, the Ninth Circuit never considered how this standard should be applied to the facts of the present case. While the design standards do contain technical requirements for parking spaces on sites, there is no standard requiring that accessible parking *be located* on streets. Therefore, if the Ninth Circuit was going to impose any obligation for accessible on-

street parking, it should have analyzed this case under the second part of the DOJ's framework: whether the program access standard requires cities to provide accessible on-street parking.

Under the regulations cities only have two methods of complying with the ADA. They can strictly comply with design standards *if* design standards exist or they can comply with the program access standard. By establishing a blanket rule that cities must provide accessible on-street parking without applying the program access standard, the Ninth Circuit has created a conundrum for cities. There is no way to comply with standards that do not exist.

Cities will be closely watching the Supreme Court to determine if review is granted. If not, cities will be left to determine how they can best comply with the ruling and which standards to attempt to use. The Ninth Circuit has suggested cities would look to the existing ADAAG standards for parking lots and draft guidelines for Public Rights-of -Way for guidance.

2010 ADA Standards and Draft Guidelines

The 2010 ADAAG, Section 208. Parking Spaces, clarifies the minimum number of parking spaces and the following section provide guidance on the design of the parking spaces in parking lots. This standard could be adapted to use for public rights of way. The standards are as follows and the Department of Justice has available technical assistance on creating accessible parking:

Table 208.2 Parking Spaces

Total Number of Parking Spaces Provided in Parking Facility	**Minimum Number of Required Accessible Parking Spaces**
1 to 25	1
26 to 50	2
51 to 75	3
76 to 100	4
101 to 150	5
151 to 200	6
201 to 300	7
301 to 400	8
401 to 500	9
501 to 1,000	2 percent of total
1,001 and over	20 plus 1 for each 100, or fraction thereof over 1,000

2010 American's with Disabilities Act Standards for Accessible Design, www.ada.gov

The United States Access Board published draft guidelines on Public Rights-of-Way also provide guidance on the design and number of spots for on-street parking which could be used by cities. The draft guidelines provide the following parameters requiring marked on-street parking spaces that comply with ADA guidelines be provided on the block perimeter in accordance with Table R214.

R214 Requirements

Table R214 Accessible Parking Spaces	
Total Number of Marked or Metered Parking Spaces on the Block Perimeter	**Minimum Required Number of Accessible Parking Spaces**
1 to 25	1
26 to 50	2
51 to 75	3
76 to 100	4
101 to 150	5
151 to 200	6
201 and over	4% of total

Recommendations

Based on the decision in *Fortyune*, cities must review their current on-street parking. Attempts should be made to develop a plan, like cities have done with sidewalks, to make their "parking program" accessible, if steps have not already been taken. Arguably, a city's parking program may be broader than just on-street parking if the city also maintains parking lots, and accessible parking in lots may assist a city in demonstrating that its "parking program" is accessible. Cities should look to the ADAAG draft guidelines available at http://www.access-board.gov/guidelines-and-standards/streets-sidewalks/public-rights-of-way/proposed-rights-of-way-guidelines and to the 2010 Standards available at http://www.ada.gov/regs2010/2010ADAStandards/2010ADAstandards.htm. to assist in the development of their accessible parking plan and the design specification to be applied.

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Robin K. Fortyune vs. City of Lomita, 766 F.3d 1098 (9th Cir. 2014).

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ACCESSIBILITY OF TEMPORARY EVENTS

Public agencies are generally aware of their obligations to construct permanent facilities in compliance with the Title II regulations and ADAAG standards for new construction. 28 C.F.R. § 35.151. However, cities must also consider the accessibility of temporary events which must also be accessible. ADAAG Section 201.3 specifically provides that its specification apply to temporary new construction, with very limited exceptions. In Advisory 201.3 a list of temporary buildings and facilities covered include bleachers, stages, platforms and exhibit areas. Facilities which are constructed, even on a temporary basis, must be accessible and should comply with the design standards for accessibility. Additionally, cities must consider the program accessibility of temporary events. City sponsored events must be accessible to disabled members of the community even when they do not involve construction. Those events which are not city sponsored but which occur on city streets or in city parks or other facilities must also be accessible. While the primary responsibility to make those events accessible rests with the organization which is putting on the event, cities also have an obligation and are likely to face claims and litigation for events which are not accessible which are conducted on city property. The ADAAG standards do not address all barriers that may be faced on temporary events, but provide guidelines which are helpful even in those circumstances.

Individuals with disabilities must be able to enjoy the same goods, services and benefits as other members of the public. Some common areas that should be addressed for temporary events include the following:

- Accessible parking-particularly if lots and streets are being closed
- Accessible portable bathrooms and any other public amenities offered
- Accessible routes to the goods, services and activities being offered
- Accessible routes from parking, public transportation and drop-off areas
- Accessible communications about the event
- Assistive listening devices and sign language interpreters at events
- Accessible transportation from off-site parking

Streets And Sidewalks: Blocked By Temporary Events

In *Cohen v. City of Culver City* (9th Cir. 2014) 754 F.3d 690, the Ninth Circuit held that a city may violate the ADA if it allows third parties to obstruct disabled access points (e.g., sidewalk ramps). The plaintiff in *Cohen*, an elderly man who used a cane and suffered from dementia, walked through an outdoor car show on city streets. A vendor's display blocked a curb ramp that provided access to the sidewalk. The plaintiff tripped while trying to walk around the display and step up on the sidewalk. He filed an action alleging violations of the federal ADA and seeking damages. The District Court granted the city's motion for summary judgment. The Court of Appeals reversed.

Title II of the ADA requires local government to provide equal access to city programs, e.g., sidewalks, to disabled persons. To prove an ADA violation, the plaintiff must prove he or she is a qualified individual with a disability; he or she was excluded from, or denied access to,

an agency program; and the exclusion or denial was by reason of the disability. 28 CFR § 35.150 governs existing facilities, requiring, for example, agencies to implement a plan to install disabled access curb ramps at intersections. 28 CFR § 35.151 requires that facilities public agencies begin to build or alter after January 1992 be readily accessible unless it would be structurally impracticable.

The District Court reasoned that the plaintiff could have accessed the sidewalk by a nearby curb ramp and thus was not denied access to the sidewalk. The District Court relied on precedents concerning public agencies' obligations when they modify existing facilities. (28 CFR § 35.150.) However, the Ninth Circuit found those cases were not instructive because the city was in compliance with the ADA, but allowed elimination of the disabled access it had built. The Court reasoned that 28 CFR § 35.151 was more applicable than section 35.150 because the matter involved alteration of existing sidewalks. "When the City has already built a direct route that is accessible to disabled persons, it is reasonable to require the City not to force disabled persons to look for and take even a marginally longer route."

The City allowed the sidewalks to be used by private vendors but failed to take action to ensure continued ADA compliance (e.g., to prevent blockage or to provide temporary signage directing pedestrians to the nearby ramp). Thus, the Court held the jury could conclude that the City violated the ADA, including provisions requiring facilities to be readily accessible and to be kept free of obstructions.

Bleachers/Seating

In another recent case, the Ninth Circuit ruled that the ADA does not require a public entity to structurally alter existing bleacher seating at high school football games where the seating was constructed prior to the effective date of the ADA standards (1992) and there are alternative ADA accessible seating locations. In *Daubert v. Lindsay Unified School District*, Lindsay High School offered bleacher seating within its football stadium – constructed before 1992 and unaltered since then – without constructing additional wheelchair access. Nonetheless, the Ninth Circuit found the school complied with the ADA by offering accessible field-level locations where patrons in wheelchairs could have an unobstructed view of the football games.

The ADA requires public agencies to provide disabled access to all of their services, programs and activities, but it does not require public agencies to retrofit or upgrade existing facilities if there are other suitable means of providing access. This requirement is meant to shield public agencies from the costs of retrofitting, but it is not always clear whether an alternative method will provide a legally sufficient level of access. In particular, many school districts do not have the funding available for the potentially substantial costs necessary to construct additional stadium/bleacher improvements and therefore face uncertainty as to whether they are in violation of the ADA.

As the first published case addressing whether a public agency must retrofit its bleacher seating, *Lindsay Unified* clarifies school districts' and other agencies' obligations under the ADA when hosting community events. Because the court found that Lindsay Unified School District complied with the ADA, other government agencies can use this case as a blueprint for providing access to events that occur within small, local stadiums.

Even though the existing bleacher seating was inaccessible to wheelchair users, Lindsay High School provided field-level seating locations with several key features, including:

- an unobstructed view of the event,
- the opportunity to sit with other friends and family,
- an accessible route allowing for unassisted ingress to and egress from the locations, and
- unassisted access to concessions and other amenities of the event.

By considering these key features, public agencies can develop a plan to provide access to events that is consistent with *Lindsay Unified* and thus will likely satisfy the requirements of the ADA.

As a final caveat, *Lindsay Unified* only applies to bleacher and stadium seating that was constructed prior to the enactment of the ADA (i.e., prior to January 26, 1992) and that has since never been altered. Any newly constructed or altered seating arrangement must strictly comply with ADA design standards, regardless of any alternative seating arrangement.

EFFECTIVE COMMUNICATIONS

Title II of the ADA provides: "[N]o qualified individual with a disability shall, by reason of such disability, 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." 42 U.S.C. § 12132. Under Title II, when viewed in their entirety, a public entity's services, programs and activities are to be readily accessible to and usable by individuals with disabilities ("program accessibility"). (28 C.F.R. § 35.149.) The ADA implementing regulations require public agencies to take appropriate steps to ensure that communications with applicants, participants and members of the public with disabilities are as effective as communications with others. 28 C.F.R. §35.160(a) to effectuate the mandate of making programs, services and activities accessible. These appropriate steps include the provision of "appropriate auxiliary aids and services where necessary to afford an individual with a disability an equal opportunity to participate in, and enjoy the benefits of, a service, program or activity…." 28 C.F.R. §35.160(b)(1). The key to communicating effectively is to consider the nature, length, complexity, and context of the communication and the person's normal method(s) of communication. The rules apply to communicating with the person who is receiving the covered entity's goods or services as well as with that person's parent, spouse, or companion in appropriate circumstances.

Effective communication may require the provision of auxiliary aids and services that are necessary and the type of auxiliary aid that is appropriate will depend on the length and complexity of the communication involved. When "determining what type of auxiliary aid and service is necessary, a public entity shall give primary consideration to the requests of the individual with disabilities." 28 C.F.R. §35.160(b)(2); *see Duffy v. Riveland* (9th Cir. 1996) 98 F.3d 447. The public entity shall honor the choice of the individual with disabilities unless it can demonstrate that another effective means of communication exists or that use of the means chosen would not otherwise be required. Appendix A to the ADA Title II regulations provides that "[d]eference to the request of the individual with a disability is desirable because of the range of disabilities, the variety of auxiliary aids and services, and different circumstances requiring effective communication." 28 C.F.R. Pt. 35, App. A.

Among the auxiliary aids listed for individuals with hearing disabilities are: "Qualified interpreters, notetakers, transcription services, written materials, telephone handset amplifiers, assistive listening devices, assistive listening systems, telephones compatible with hearing aids, closed caption decoders, open and closed captioning, telecommunications devices for deaf persons (TDD's), videotext displays, or other effective methods of making aurally delivered materials available to individuals with hearing impairments." 28 C.F.R. §35.104(1). For people who are blind, have vision loss, or are deaf-blind, auxiliary aids include providing a qualified reader; information in large print, Braille, or electronically for use with a computer screen-reading program; or an audio recording of printed information. Generally a companion may not be relied upon to interpret, except in limited circumstances. A "qualified" reader means someone who is able to read effectively, accurately, and impartially, using any necessary specialized vocabulary. *See*, *Vandermolen v. City of Roosevelt Park* (W.D. Mich. 1997) 1997 W.L. 853505 (holding that provisions of tape recordings of minutes of City Council meetings

would be a sufficient accommodation if accommodation was required). Public entities may not charge the individual to cover the costs to provide auxiliary aids.

Generally, whether effective communication has been achieved is a highly fact-specific inquiry, based on the circumstances of any individual situation. *See Bircoll v. Miami –Dade County*, 480 F.3d 1072, (11th Cir. 2007); *see also Loye v. County of Dakota*, 647 F.Supp. 2d 1081, 1090-1094 [communication deemed effective based on one's ability to understand and respond to the messages being exchanged]. A public entity is not required to make a modification that would fundamentally alter the nature of its service, program or activity or result in undue financial and administrative burdens. 28 C.F.R. § 35.150(a)(3). In determining whether a particular aid or service would result in undue financial and administrative burdens, a cities should take into consideration the cost of the particular aid or service in light of all resources available to fund the program, service, or activity and the effect on other expenses or operations. A finding of undue burden must be made as to the reasons for reaching that conclusion, by the head of the public entity or his or her designee. This undue burden "defense" does not excuse the public entity from taking any other action to ensure the accessibility of benefits and services. As set forth in the Preamble to the Title II Regulations, unlike Title III (which applies to private businesses) which requires only readily achievable barrier removal, Congress intended the Title II "undue burden" standard to be significantly higher. "…[T]he program access requirement of Title II should enable individuals with disabilities to participate in and benefit from the services, programs, or activities of public entities in all but the most unusual cases. The decision of an undue burden requires a written statement of the reasons after considering all of the resources available for use in the program, service or activity."

In *Memmer v. Marin County Courts* (9th Cir. 1999) 169 F.3d 630, the court considered whether the municipal court system had provided reasonable accommodation to a visually impaired litigant during her civil trial. The municipal court system had offered a Spanish-language interpreter who worked with the court and was familiar with court proceedings. The plaintiff refused this assistance, demanding instead to use an individual known to be disruptive and a vexatious litigant, which the court allowed, but with limitations. The court found that the interpreter offered by the municipal court was a reasonable accommodation for a visually impaired individual. The court relied on two important principles: First, the plaintiff bears the burden of establishing an ADA violation and therefore must establish the existence of specific reasonable accommodations that she was not provided, and, second, that since plaintiff's suit was for monetary damages (against everyone involved in her matter), she had to show intentional discrimination. The court concluded plaintiff failed on both grounds and that the municipal court was not required under the ADA to make "substantial modifications" in the way it runs its court system.

The DOJ, in a 1996 policy letter[1], explained that entities subject to Title II or Title III of the ADA that use the Internet to provide information regarding their programs, goods or services must provide effective communication to individuals with disabilities unless doing so would result in a fundamental alteration to the program or service or in an undue burden. The letter explained that the Internet provides valuable information and people with disabilities should have access to it as effectively as people without disabilities. However, the letter also recognized

[1] *See*, http://www.usdoj.gov/crt/foia/tal712.txt.

that entities might be able to provide information from a website through other alternative accessible means, such as in large print-format or in Braille.

However, in *Martin v. Metropolitan Atlanta Rapid Transit Authority* (N.D. Geo. 2002) 225 F. Supp.2d 1362, 1377, where plaintiffs sought injunctive and declaratory relief due to numerous alleged acts of noncompliance with the ADA, the plaintiffs, who were visually impaired, alleged a failure to provide them with scheduling and route information in accessible formats violated the ADA. On its website, the Metropolitan Atlanta Rapid Transit Authority (MARTA) provided the general public with extensive information on routes and schedules for its fixed route services, but it was not formatted in such a way that it was uniformly accessible to persons who were blind. "The information could not be read by persons who are blind but capable of using text reader computer software for the visually impaired." MARTA submitted evidence that the information was available by telephone, that customers could request alternative formats by telephone, and that it was in the process of developing accessible formatting for its website. The court nevertheless held that "this is not the equivalent to what MARTA provides to the general public. MARTA can do a better job of making information available in accessible formats to the visually impaired…" Therefore, the court held that MARTA was "violating the ADA mandate of 'making adequate communications capacity available, through accessible formats and technology, to enable users to obtain information and schedule service'."

While Title II and its implementing regulations and standards do not currently contain specifications for accessible websites, cities must ensure that communications with disabled members of the public are equally effective as communications with the public in general and provide program access. In addressing information which is provided to the public, alternative formats may sometimes be equally effective. However, as demonstrated by the decision in *Martin*, because of the unique qualities of the Internet, it would be difficult to equal its effectiveness through any other means. Website access is available seven days a week and 24 hours a day. Materials are also readily accessible for downloading and printing. There is no practical other means to provide this level of communication with the public, except through the Internet.

In addition, standards requiring website accessibility have been proposed under Title II, but the Department of Justice has never taken final action to adopt any standards. Therefore, while no regulatory provision yet specifically requires that websites of cities be modified to make them accessible, to meet their obligation to provide equally effective communications and provide program access, any City-constructed website should be accessible to the public.

Cities should review all of their communications with the public to ensure that they are equally effective. Not only do public council meetings need to be addressed, but communications at special events, routine communications and emergency communications must be equally effective. The key for cities is to consider the possible nature, length, complexity, and context of the communication in determining what auxiliary aid or service may be required. For example, for complex and important communications like an interview or public hearing, sign language interpreters may be required. For routine and on-the-spot unplanned communications, like asking for a permit or city form, exchanging written notes may be sufficient. Cities must also ensure that public notices and written materials, provide notice that alternate formats are

available, and be ready to make information available in alternate formats. As technology advances, cities should also be aware of the options available including video relay service and video remote interpreting.

LITIGATION STRATEGIES IN DEFENDING ADA TITLE II LAWSUITS

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I. OVERVIEW -- TITLE II OF THE ADA

A. General Standard.

"Except as otherwise provided in § 35.150, no qualified individual with a disability shall, because a public entity's facilities are inaccessible to or unusable by individuals with disabilities, 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 public entity." 28 CFR § 35.149.

Title II of the ADA is intended to protect disabled individuals from being excluded in participating in a public entity's services, programs or activities.

Services, programs, and activities are broadly construed by courts to cover virtually everything a public entity does. *Barden v. City of Sacramento*, 292 F.3d 1073, 1076 (9th Cir. 2002) ("Rather than determining whether each function of a city can be characterized as a service, program, or activity for purposes of Title II, however, we have construed 'the ADA's broad language [as] bring[ing] within its scope 'anything a public entity does.'")

B. Obligations for Existing Facilities.

1. Program Accessibility.

"A public entity shall operate each service, program, or activity so that the service, program, or activity, **when viewed in its entirety**, is readily accessible to and usable by individuals with disabilities.

This paragraph does not—

(1) Necessarily require a public entity to make each of its existing facilities accessible to and usable by individuals with disabilities;

(2) Require a public entity to take any action that would threaten or destroy the historic significance of an historic property; or

(3) Require a public entity to take any action that it can demonstrate would result in a fundamental alteration in the nature of a service, program, or activity or in undue financial and administrative burdens." 28 CFR § 35.150.

This standard is commonly referred to as the "program accessibility" requirement. To determine whether existing facilities comply with the ADA's program accessibility requirement, courts "look at the accessibility of the facilities as a whole." *Chaffin v. Kan. State Fair Bd*., 348 F.3d 850, 861 (10th Cir. 2003); *Ass'n for Disabled Ams. v. City of Orlando*, 153 F.Supp.2d 1310, 1320 (M.D. Fla. 2001). Showing that particular access barriers exist is not sufficient to establish liability, but each barrier can be considered a building block for a finding that the program, when viewed in its entirety, is not readily accessible. *Pascuiti v. New York Yankees*, 87 F.Supp.2d 221, 224 (S.D. N.Y. 1999). Courts then consider whether the individual elements that are not accessible add up to a wholesale exclusion of disabled individuals from that service, program, or activity. *Chaffin*, 348 F.3d at 861. Assessing program accessibility is "fact specific, and to an extent is a subjective inquiry." *Greer v. Richardson Indep. Sch. Dist*., 2010 WL 3025530, *3 (N.D. Tex. Aug. 2, 2010).

Courts must also consider the possible mitigation of access barriers through alternatives. A public entity is not required to make structural changes in existing facilities when other methods are effective in achieving compliance. 28 CFR § 35.150. For example, a paratransit service or a program allowing requests to remove particular barriers.

2. Self-Evaluation and Transition Plan.

"In the event that structural changes to facilities will be undertaken to achieve program accessibility, a public entity that employs 50 or more persons shall develop, within six months of January 26, 1992, a transition plan setting forth the steps necessary to complete such changes. A public entity shall provide an opportunity to interested persons, including individuals with disabilities or organizations representing individuals with disabilities, to participate in the development of the transition plan by submitting comments. A copy of the transition plan shall be made available for public inspection." 28 CFR § 35.150.

"If a public entity has responsibility or authority over streets, roads, or walkways, its transition plan shall include a schedule for providing curb ramps or

other sloped areas where pedestrian walks cross curbs, giving priority to walkways serving entities covered by the Act, including State and local government offices and facilities, transportation, places of public accommodation, and employers, followed by walkways serving other areas.

The plan shall, at a minimum --

(i) Identify physical obstacles in the public entity's facilities that limit the accessibility of its programs or activities to individuals with disabilities;

(ii) Describe in detail the methods that will be used to make the facilities accessible;

(iii) Specify the schedule for taking the steps necessary to achieve compliance with this section and, if the time period of the transition plan is longer than one year, identify steps that will be taken during each year of the transition period; and

(iv) Indicate the official responsible for implementation of the plan." 28 CFR § 35.150.

3. Ninth Circuit Ruling – No Private Right of Action to Enforce Transition Plan Regulations.

In *Lonberg v. City of Riverside*, 571 F.3d 846, 851-852 (9th Cir. 2009), the Ninth Circuit held that the ADA did not provide a private right of action or remedy based on a violation of a transition plan regulation:

"[N]othing in the language of § 202 indicates that a disabled person's *remedy* for the denial of meaningful access lies in the private enforcement of section 35.150(d)'s detailed transition plan requirements. The existence or non-existence of a transition plan does not, by itself, deny a disabled person access to a public entity's services, nor does it remedy the denial of access…We do not suggest that section 35.150(d) is invalid or an otherwise improper exercise of agency discretion. We simply conclude that under *Sandoval*, it is not enforceable through § 202's private right of action because the obligations it imposed are nowhere to be found in § 202's plain language."

The Ninth Circuit noted that the issue the district court needed to decide was not whether the City of Riverside had complied with the transition plan regulations, but whether it had complied with its obligation to remove access barriers pursuant to the program accessibility requirement.

C. Obligations for New Construction and Alterations.

1. New Construction.

"Each facility or part of a facility constructed by, on behalf of, or for the use of a public entity shall be designed and constructed in such manner that the facility or part of the facility is readily accessible to and usable by individuals with disabilities, if the construction was commenced after January 26, 1992." 28 CFR § 35.151.

There is an exception when a public entity can demonstrate that it is "structurally impracticable" to meet accessibility requirements such as when the unique characteristics of terrain prevent the incorporation of accessibility features. Id.

2. Alterations.

"Each facility or part of a facility altered by, on behalf of, or for the use of a public entity in a manner that affects or could affect the usability of the facility or part of the facility shall, to the maximum extent feasible, be altered in such manner that the altered portion of the facility is readily accessible to and usable by individuals with disabilities, if the alteration was commenced after January 26, 1992." 28 CFR § 35.151.

3. Standards.

New construction and alterations	Applicable standards
Before September 15, 2010	1991 ADA Standards or UFAS.
On or after September 15, 2010 and before March 15, 2012	1991 ADA Standards, UFAS, or 2010 ADA Standards.
On or after March 15, 2012	2010 ADA Standards.

The draft accessibility standards for public rights of way have still not been adopted.

II. POTENTIAL EXPOSURE

In 2010, Caltrans reached a settlement agreement with wheelchair users to spend over $1 Billion to repair sidewalks and curb ramps.

On April 1, 2015, the City of Los Angeles reached a settlement agreement with disabled residents to spend over $1 Billion to repair city sidewalks. Among other things, the settlement calls for the City of Los Angeles to spend over $30 Million a year for 30 years to install curb ramps and fix sidewalks and crosswalks. The amount to be spent each year gradually increases to $63 Million to adjust for rising costs.

III. LITIGATION STRATEGIES

A. General.

1. Mooting Plaintiff's ADA Claim.

The ADA is limited to prospective injunctive relief. Remove that relief by fixing the alleged access barriers and the ADA claim becomes moot and there is no longer federal court jurisdiction even if it is undisputed that the barriers existed at the time of the plaintiff's encounters.

Under federal law, even if the defendant fixed the alleged barriers in direct response to the plaintiff's lawsuit, the plaintiff is not deemed a "prevailing party" and thus is not entitled to attorney's fees. Federal law does not recognize the catalyst theory for purposes of awarding attorney's fees. *Buckhannon Board & Care Home, Inc. v. W. Va. Dep't of Health & Human Resources*, 532 U.S. 598, 605 (2001).

2. Case Citations:

"Mootness is a jurisdictional defect that can be raised at any time by the parties or the court *sua sponte*." *Parr v. L&L Drive-Inn Restaurant*, 96 F.Supp.2d 1065, 1087 (D. Haw. 2000). A case is moot "when the issues presented are no longer 'live' or the parties lack a legally cognizable interest in the outcome." *Clark v. City of Lakewood*, 259 F.3d 996, 1011 (9th Cir. 2001). "Past exposure to illegal conduct does not in itself show a present case or controversy…if unaccompanied by any continuing, present adverse effects." *Renne v. Geary*, 501 U.S. 312, 320-321 (1991). "This requisite ensures that the courts are able to grant

effective relief, rather than rendering advisory opinions." *Medical Society of New Jersey v. Herr*, 191 F.Supp.2d 574, 581 (D.N.J. 2002). "If an issue is moot in [the] sense" that is "no longer present an actual case or controversy," then a court has no discretion but must dismiss for lack of jurisdiction." *Morton Intern, Inc. v. Cardinal Chemical Co*., 967 F.2d 1571, 1574 (Fed. Cir. 1992).

"The only remedy available for a violation of the Americans with Disabilities Act under a private right of action is injunctive relief. Accordingly, if no ADA violations exist at the time the court is asked to provide injunctive relief, the ADA claim is moot because there is no basis for relief and there is nothing for the court to order the facility to change." *Gasper v. Marie Callender Pie Shops*, U.S. Dist. LEXIS 96929, *4 (C.D. Cal. 2006).

"Because the ADA only offers injunctive relief, an ADA claim is moot once the defendant has remedied the alleged architectural barrier. *Hubbard v. 7-Eleven, Inc*., 433 F.Supp.2d 1134, 1145 (S.D. Cal. 2006); *Parr v. L&L Drive-Inn Restaurant,* 96 F.Supp.2d 1065, 1087 (D. Haw. 2000); *Indep. Living Res. v. Or. Arena Corp*., 982 F.Supp. 698, 771 (D. Or. 1997). Therefore, for purposes of adjudicating the pending [cross] motions [for summary judgment] concerning plaintiff's ADA claim, the Court need not address any architectural barriers that [defendant] has already remedied." *Oliver v. KFC Corp*., 2008 WL 2756605, *3 (S.D. Cal. 2008).

Martinez v. Longs Drug Stores Corp., 2008 WL 2329712 (9th Cir. 2008) (upholding district court's dismissal of ADA claims as moot because defendant had remedied all alleged barriers); *Pickern v. Best Western Timber Cove Lodge Marina Resort*, 194 F.Supp.2d 1128, 1130 (E.D. Cal. 2002) ("Plaintiff concedes, as she must, that defendant's latest remedial efforts have rendered her ADA claim for injunctive relief moot"); *Wilson v. PFS*, 2007 WL 2429391 (S.D. Cal. 2007) (holding that McDonald's modifications to its restaurants rendered the plaintiff's ADA claims moot).

3. Limiting the Scope of Plaintiff's ADA claim.

In *Oliver v. Ralphs Grocery Co*., 654 F.3d 903 (9th Cir. 2011), the Ninth Circuit held that all alleged access barriers must be identified in Plaintiff's complaint in order to give the defendant fair notice under Rule 8.

In that case, the plaintiff intentionally failed to disclose known barriers to prevent the defendant from mooting his ADA claim by fixing all alleged barriers. The plaintiff identified some barriers in his complaint, others in a proposed amended complaint, others in an ENE statement, and still others in his expert report. Consequently, the Ninth Circuit adopted a bright-line rule that all barriers must be set forth in the complaint:

"Plaintiff's counsel later explained that his delays in identifying the barriers at the facility were part of his legal strategy: he purposefully 'forces the defense to wait until expert disclosures (or discovery) before revealing a complete list of barriers,' because otherwise a defendant could remove all the barriers prior to trial and moot the entire case…[F]or purposes of Rule 8, a plaintiff must identify the barriers that constitute the grounds for a claim of discrimination under the ADA in the complaint itself; a defendant is not deemed to have fair notice of barriers identified elsewhere." *Id*. at fn. 7, 909.

After *Oliver*, a good strategy is to ask for a short deadline to amend pleadings at the scheduling conference before Plaintiff has the opportunity to conduct a site inspection with his expert. Once that deadline has passed, it is a lot more difficult for the plaintiff to amend his complaint to allege new access barriers found by his expert because he has to meet the "good cause" standard under Rule 16(b) rather than the liberal "leave to amend shall be freely given" standard under Rule 15(a).

4. <u>Standing</u>.

The legal requirement of "standing" can be also be used to further limit the scope of an ADA claim.

To show standing, "a plaintiff has the burden of proving: (1) that he or she suffered an 'injury in fact,' (2) a causal relationship between the injury and the challenged conduct, and (3) that the injury likely will be redressed by a favorable decision." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-561 (1992).

To satisfy the "injury in fact" element of standing in a disabled access case, "an ADA plaintiff must demonstrate that he is 'likely to return to patronize the accommodation in question.'" *Wilson v. Kayo Oil Company*, 535 F.Supp.2d 1063, 1067 (S.D. Cal. 2007).

In determining whether a plaintiff has satisfied the "intent to return" requirement, courts typically look at past patronage, proximity of the subject property to the plaintiff's home, and business or personal connections to the area. *Chapman v. Pier 1 Imports (U.S.), Inc*., 870 F.Supp.2d 995, 999 (E.D. Cal. 2012); *Camarillo v. Carrols Corp*., 518 F.3d 153, 158 (2nd Cir. 2008).

Generalized plans to visit or "some day" intentions are insufficient to establish standing. *See, e.g., Lujan v. Defenders of Wildlife*, 504 U.S. 555, 564 (1992) ("'some day' intentions – without any description of concrete plans, or indeed even any specification of when the some day will be – do not support a finding of the 'actual or imminent' injury that our cases require"); *Moslki v. Kahn Winery*, 405 F.Supp.2d 1160, 1168 (C.D. Cal. 2005) (holding that general plans to return in ADA barrier cases are insufficient to confer standing); *Wilson v. Kayo Oil Company*, 535 F.Supp.2d 1063, 1067, 1070 (S.D. Cal. 2007) ("Concern over ADA litigation abuse is amply warranted…[A]n ADA plaintiff cannot manufacture standing to sue in federal court by simply claiming that he intends to return to the facility").

Typically, serial plaintiffs have a hard time meeting this standard.

5. Burden of Proof.

The plaintiff bears the burden of proof to show that a public entity fails to provide program accessibility when viewed in its entirety. Depending on what the particular program, service or activity is, this can be a huge undertaking.

A good strategy is to use the plaintiff's burden of proof to your advantage. Rather than producing a limited amount of documents in response to a plaintiff's document requests, consider responding that all construction and public documents associated with a particular program, service, or activity are responsive and that the plaintiff is free to request and copy those documents at the planning/building/ public works department during City Hall hours. Also, consider revising your transition plan to incorporate by reference all such documents.

In response to a plaintiff's motion for summary judgment or at trial, you can then point out that the plaintiff has only introduced a small subset of relevant documents and thus has failed to meet his burden to show that the program, service, or activity is not readily accessible **when viewed in its entirety**.

In addition, since there are no specific guidelines for existing facilities, keep in mind that the plaintiff bears the burden of showing that their current condition makes them inaccessible. The standards for new construction may be relevant, but are not determinative of, program accessibility and should not be viewed as requirements for what must be done to address alleged barriers that existed before the ADA went into effect. *Brown v. County of Nassau*, 736 F.Supp.2d 602 (E.D. N.Y. 2010); *Gathright-Dietrich v. Atlanta Landmarks, Inc*., 435 F.Supp.2d 1217 (N.D. Ga. 2005).

B. <u>Case Examples</u>.

1. <u>Lonberg v. City of Riverside</u>.

(a) Plaintiff's Allegations and Demands.

Originally, Lonberg challenged all city facilities and programs, but subsequently limited his claims to the city's public rights of way ("PROW") based in part on our standing arguments. The city's PROW included hundreds of miles of sidewalks, thousands of curb cuts, and tens of thousands of curb side flares, curb lips etc.

Lonberg wanted an injunction ordering the city to adopt a compliant transition plan, fix all alleged barriers within a few years, and allowing him to monitor and supervise compliance. He also wanted more than $1 Million in statutory damages under the Disabled Persons Act, i.e. $1,000 for each and every encounter with a noncompliant feature over many years. Finally, he requested over $1 Million in attorney's fees including a fee multiplier under the public attorney general statutes.

(b) Transition Plan.

The city's transition plan was drafted before the Ninth Circuit decision in *Barden v. City of Sacramento*, 292 F.3d 1073 (9th Cir. 2002) where the court held that sidewalks themselves are a "service, program, or activity" within the meaning of Title II of the ADA. Under the Ninth Circuit's ruling, public entities have a duty to ensure that their sidewalks are accessible even if they are not connected to a particular service, program, or activity.

The city's transition plan was good, but it was based on programs, not features, and thus did not include a survey of sidewalks, curb ramps etc. unless they were part of a city program.

Although the DOJ found the city's transition plan to be complaint, the district judge found it to be noncompliant because it did not address features in the PROW.

Ultimately, the city prevailed on this issue on appeal when the Ninth Circuit held that there is no private right of action to enforce transition plan regulations. *Lonberg v. City of Riverside*, 571 F.3d 846 (9th Cir. 2009).

(c) Trial -- Program Accessibility

Prior to trial, the city revised its transition plan and surveyed the PROW. The city also fixed as many sidewalks and curb cuts as it could while still being financially responsible.

The trial took place in 2011. After trial, the district court made the following findings of fact:

(1) The city covers 88 square miles and has approximately 5,100 street intersections, 1,100 miles of sidewalk, and 20,000 curb returns.

(2) The city is responsible for the system of streets, sidewalks, roads, and walkways in the PROW.

(3) Plaintiff regularly uses numerous city sidewalks and streets and has encountered physical obstacles making it difficult for him to navigate in his wheelchair.

(4) In 2000, the city prepared three surveys of its streets and sidewalks. The surveys indicated that the city had (i) 5,000 curbs that did not meet new construction standards; (ii) 1,309 curb cuts missing from arterial street intersections; and (iii) 6,011 curb cuts missing from local street intersections.

(5) Plaintiff still encounters obstacles, such as missing curb ramps, excessive cross-slopes, and upraised pavement sections, when traveling the sidewalks of a number of different streets.

The district court made the following conclusions of law:

(1) Plaintiff was not entitled to any injunctive relief whatsoever. Plaintiff failed to meet his burden to show that the city's streets and sidewalks were not accessible when viewed in their entirety. The district court concluded that Plaintiff's evidence was flawed.

- City surveys: The district court found that the city's surveys did not help Plaintiff meet his burden. Even though 5,000 curb ramps were found not to be compliant with new construction standards in 2000, that was not the relevant standard for existing facilities and Plaintiff had not established that any defects constituted barriers. Although Plaintiff had shown that certain deviations from specific standards, such as a running slope of 9.3%, may be barriers to him, those deviations did not automatically apply to the city's survey since the specifications were different. Furthermore, even if the defects were considered "barriers," Plaintiff had not shown how many of those 5,000 curb ramps were still noncompliant in 2011. Likewise, the district court found Plaintiff's reliance on the other city surveys problematic because they were outdated and did not reflect the current condition.

- Plaintiff's surveys: The district court also concluded that Plaintiff's own surveys were flawed because they were limited to less than 2% of the city's curb returns. There was no evidence that the areas surveyed were a statistically valid sample and could be properly extrapolated to the city as a whole.

- Mitigation: Plaintiff failed to adequately address possible mitigation of barriers through alternatives, such as the city's 311 call number, a paratransit service, and a program allowing requests to fix or build additional curb cuts.

- Evidence viewed as a whole: Plaintiff merely introduced individual strands of evidence without showing how they interacted with one another to demonstrate that the City's PROW were inaccessible, when viewed in their entirety.

In the end, the district court dismissed Plaintiff's ADA claim and the entire case with prejudice.

2. Skaff v. City of Sausalito.

Skaff is challenging not only the accessibility of the city's buildings and sidewalks, but also the accessibility of property owned by private entities. Skaff

alleges that the City of Sausalito, as the local building official, is violating the ADA by not requiring private businesses to make their properties accessible.

We are currently in the process of revising the city's transition plan and making fixes to the alleged barriers to moot Skaff's ADA claim. We are also going to file a motion to dismiss his claims relating to private property since there is no private right of action to enforce a city's duties as local building official and he failed to join the private owners who are indispensable parties.

As in the *Lonberg v. City of Riverside* case, we also believe that Skaff will have significant burden of proof problems should the case proceed to trial.

UNDERSTANDING THE APPLICATION OF THE AMERICANS WITH DISABILITIES ACT AND STATE LAW TO CALIFORNIA CITIES.

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The ADA under Title II requires all state and local governments to provide equal opportunity to individuals with disabilities to participate in and benefit from public programs. Simply stated, state and local governments cannot keep persons with disabilities from participating in programs and activities because of their disabilities. Despite this basic principle, the ADA presents many challenges to City Attorneys who are not experts in this specialized area of law. The purpose of this paper and accompanying program is to make the ADA more accessible (understandable) to the City Attorney who is not an expert in this area of law. Hopefully, this will serve to demystify the law so that ADA compliance is less intimidating when issues arise.

This paper does not address the application of the ADA and the Fair Employment and Housing Act to the myriad of issues facing cities in their role as public employers.

I. Background on Title II of the ADA.

The Americans with Disabilities Act ("ADA")[1] is a broad remedial civil rights law enacted to address the historic and pervasive discrimination against people with disabilities in all areas of public life. To achieve these goals, Congress provided "a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities."[2]

Title II of the ADA covers programs, activities, and services of public entities.[3] The language of this statute is brief: "[s]ubject to the provisions of this subchapter, no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of services, programs or activities of a public entity."[4] The ADA requires the Department of Justice (DOJ) to promulgate regulations implementing Title II.[5]

Title II is divided into two subtitles. Subtitle A of Title II is implemented by the Department of Justice's Title II regulation. Subtitle B covers public transportation (which is not addressed in these materials).[6]

[1] 42 U.S.C. §§ 12101-12213 and scattered sections of 47 U.S.C.
[2] 42 U.S.C. § 12101(b)(1).
[3] 42 U.S.C. §§ 12131-12165.
[4] 42 U.S.C. § 12132.
[5] 42 U.S.C. § 12134(a).
[6] Although not addressed in these materials, Subtitle B applies to many cities since it applies all public entities that provide public transportation, whether or not they receive federal financial assistance. The Department of Transportation is responsible for the implementation of this subtitle of Title II.

Subtitle A is intended to protect qualified individuals with disabilities[7] from discrimination on the basis of disability in the services, programs, or activities of all State and local governments. It additionally extends the prohibition of discrimination on the basis of disability established by section 504 of the Rehabilitation Act of 1973[8], as amended, to all activities of State and local governments, including those that do not receive federal financial assistance. By law, the Department of Justice's Title II regulation adopts the general prohibitions of discrimination established under section 504, and incorporates specific prohibitions of discrimination from the ADA.

Title II requires the following of state and local governments:

- May not refuse to allow a person with a disability to participate in a service, program, or activity simply because the person has a disability.
    - For example, a city may not refuse to allow a person with a disability to play in a City-sponsored golf tournament at a City golf course that involves walking the course and carrying their own clubs. Additionally, though, the City would need to provide the golfer with reasonable accommodations. For example, if walking the course would cause the golfer pain, fatigue, anxiety, and a risk of hemorrhaging and developing blood clots, the golfer should be accommodated by allowing the use of a golf cart.[9] Failing to do so would be tantamount to denying access to a City-sponsored activity.
- Must provide programs and services in an integrated setting, unless separate or different measures are necessary to ensure equal opportunity.
- Must eliminate unnecessary eligibility standards or rules that deny individuals with disabilities an equal opportunity to enjoy their services, programs or activities unless "necessary" for the provisions of the service, program or activity.
    - Requirements that tend to screen out individuals with disabilities, such as requiring a driver's license as the only acceptable means of identification, are also prohibited.
    - Safety requirements that are necessary for the safe operation of the program in question, such as requirements for eligibility for drivers' licenses, may be

[7] An individual is considered to have a “disability” if he or she has a physical or mental impairment that substantially limits one or more major life activities, has a record of such an impairment, or is regarded as having such an impairment.

[8] Section 504 of the Rehabilitation Act of 1973 is a federal civil rights law that prohibits discrimination on the basis of disability in programs and activities that receive federal financial assistance. The ADA extended this prohibition on discrimination to cities for all of its programs, services, and activities regardless of whether federal funding is involved.

[9] See, e.g., *PGA Tour, Inc. v. Martin*, 532 U.S. 661 (2001). Although this decision was decided under Title III of the ADA in the context of fundamental alterations of a public accommodation, this author believes the same result would come about under a Title II analysis.

imposed if they are based on actual risks and not on mere speculation, stereotypes, or generalizations about individuals with disabilities.

- Are required to make reasonable modifications in policies, practices, and procedures that deny equal access to individuals with disabilities, unless a fundamental alteration in the program would result.

- Must furnish auxiliary aids and services when necessary to ensure effective communication, unless an undue burden or fundamental alteration would result.

- May provide special benefits, beyond those required by the regulation, to individuals with disabilities.

- May not place special charges on individuals with disabilities to cover the costs of measures necessary to ensure nondiscriminatory treatment, such as making modifications required to provide program accessibility or providing qualified interpreters.

- Shall operate their programs so that, when viewed in their entirety, they are readily accessible to and usable by individuals with disabilities.

Public entities do not have to make reasonable modifications in policies and practices when it would "fundamentally alter" the program.[10] Nor do they have to take action that would make programs accessible to and usable by people with disabilities, if it would "fundamentally alter" the nature of the program or if it would result in "undue financial and administrative burdens."[11] (See Section VI *infra.*)

II. Interrelationship with Title III.

While public entities are not subject to Title III of the ADA -- which covers only private entities -- public entities often have close relationships with private entities that are covered by Title III. The result is that certain activities may be at least indirectly affected by both Titles.

The following are examples outlined in the Title II Technical Assistance Manual.

> *ILLUSTRATION 1: A privately owned restaurant in a State park operates for the convenience of park users under a concession agreement with a State department of parks. As a public accommodation, the restaurant is subject to Title III and must meet those obligations. The State department of parks, a public entity, is subject to Title II. The parks department is obligated to ensure by contract that the restaurant is operated in a manner that enables the parks department to meet its Title II obligations, even though the restaurant is not directly subject to Title II.*

[10] 28 C.F.R. § 35.130(b)(7).
[11] See 28 C.F.R. §§ 35.150(a)(3), 35.164 (1999).

ILLUSTRATION 2: A city owns a downtown office building occupied by its department of human resources. The building's first floor, however, is leased to a restaurant, a newsstand, and a travel agency. The city, as a public entity and landlord of the office building, is subject to Title II. As a public entity, it is not subject to Title III, even though its tenants are public accommodations that are covered by Title III.

ILLUSTRATION 3: A city engages in a joint venture with a private corporation to build a new professional sports stadium. Where public and private entities act jointly, the public entity must ensure that the relevant requirements of Title II are met; and the private entity must ensure compliance with Title III. Consequently, the new stadium would have to be built in compliance with the accessibility guidelines of both Titles II and III. In cases where the standards differ, the stadium would have to meet the standard that provides the highest degree of access to individuals with disabilities.

ILLUSTRATION 4: A private, nonprofit corporation operates a number of group homes under contract with a State agency for the benefit of individuals with mental disabilities. These particular homes provide a significant enough level of social services to be considered places of public accommodation under Title III. The State agency must ensure that its contracts are carried out in accordance with Title II, and the private entity must ensure that the homes comply with Title III.

III. Interrelationship With California Title 24.

Prior to the passage of the ADA, California was considered to have the most comprehensive standards regarding accessibility, as accessibility laws were enacted in California in 1978. The standards are contained in the published California Title 24.

California entities have long struggled to comply with both the ADA and Title 24 accessibility standards because the guidelines differed in many respects. Compliance challenges came about from inconsistencies between federal and state design standards. While some of the inconsistencies were eliminated due to the passage of the 2013 California Building Code, there are still many differences between the 2010 ADA design standards and the 2013 California Building Code.

Although local building agencies can only enforce Title 24 provisions, California law states that a violation of ADA is also a violation of the California Civil Code.[12] Therefore, complying with Title 24 does not preclude a potential violation of the federal ADA standard. Therefore, cities should always take care to comply with both, or if the standards conflict, with the stricter – meaning the standard which provides greater access.

IV. New Construction and Alterations.

Under the ADA, facilities or parts of facilities built by or for the use of public entities must be designed and built so that they are “readily accessible to and usable by” people with

[12] Civil Code § 54(c).

disabilities if construction began after January 26, 1992.[13] When a public entity undertakes alterations to an existing building, it must also ensure that the altered portions are accessible to the maximum extent feasible.[14] The ADA does not require retrofitting of existing buildings to eliminate barriers, but does establish a high standard of accessibility for new buildings. The only situation where full compliance with these requirements is not required is where a public entity can demonstrate that it is structurally impracticable to meet the requirements.[15]

An alteration is a change that affects or could affect the usability of all or part of a building or facility.[16] Alterations of streets, roads, or highways can include activities such as reconstruction, rehabilitation, resurfacing, and widening. (These actions are contrasted with maintenance such as filling potholes, which is not considered an alteration.) Such qualifying alterations would trigger the obligation to provide curb ramps where pedestrian walkways intersect the resurfaced streets. As technology develops, however, it remains unclear whether the application of newly developed varieties of road surface treatments would qualify as an alteration. For example, treatments that serve solely to seal and protect the road surface are generally considered to be maintenance whereas a new layer of asphalt is considered to be an alteration. The analysis will center on whether the actions significantly affect the public's access to or usability of the road.

Prior the 2010 amendments, public entities could choose between two technical standards for accessible design: The Uniform Federal Accessibility Standard (UFAS), established under the Architectural Barriers Act, or the Americans with Disability Act Accessibility Guidelines, adopted by the Department of Justice for places of public accommodation and commercial facilities covered by Title III of the ADA. For new construction and alterations beginning on or after March 15, 2012, public entities must comply with the 2010 Standards for new construction and alterations.

V. Program Accessibility.

A central area of importance under the ADA is the concept of "program accessibility." A program will be viewed in its entirety for purposes of determining compliance with program accessibility. A public entity is not necessarily required to make each of its existing facilities accessible if alternative, accessible locations are available. However, where distance between facilities create barriers to program accessibility, structural changes may be necessary at additional sites in order to achieve program accessibility.

Program accessibility is now measured by reference to the 2010 Standards. If a facility needs to be accessible for program accessibility purposes, it should be brought up to the Standards by the 2012 compliance date.

For example, the 2010 Standards list fixed pool lifts as a feature for accessible swimming pools. Program accessibility applies to all pool-related programs, services, and activities

[13] 28 C.F.R. § 35.151(a).
[14] 28 C.F.R. § 35.151(b).
[15] 28 C.F.R. § 35.151(a)(2)(i).
[16] 28 C.F.R. § 35.151(b)(1).

(swimming programs). This would not typically require that every pool be made accessible. However, where a city has only one existing pool, it must take steps to ensure that its swimming program at that pool is accessible.

1) Facilities For Which Standards Existed Prior to 2010

Safe Harbor Applies: There is a general "safe harbor" under which elements in covered facilities that were built or altered in compliance with the 1991 Standards or the UFAS would not be required to be brought into compliance with the 2010 Standards until the elements were subject to a planned alteration. Therefore, if a facility was built or altered to become compliant with the 1991 Standards, a City does not have to make further changes to those elements even though the new standards have different requirements.

Example: The 2010 Standards lower the mounting height for thermostats from 54 inches to 48 inches. However, if a facility's thermostats are already installed at 54 inches in compliance with the 1991 Standards, a city is not required to lower them to 48 inches. A city, however, must use one standard for every architectural change it makes in this facility. The city cannot use the 1991 Standards for the lobby, and the use the 2010 Standards for the entrance.

2) Facilities For Which No Standards Existed Prior to 2010

Safe Harbor Does Not Apply: For facilities where the 2010 Standards establish specific requirements for the first time, these need to be accessible for program accessibility. The DOJ lists these in the 2010 Regulation at section 35.150(b)(2)(ii). For cities, the most common facilities are play areas and swimming pools.

VI. Exceptions to Program Accessibility Requirements.

A few exceptions exist.

1) Undue Financial or Administrative Burdens

This is not an absolute defense relieving a public entity of all obligations to individuals with disabilities. Although a public entity is not required to take actions that would result in undue financial and administrative burdens, it nevertheless must take any other steps necessary to ensure that individuals with disabilities receive the benefits or services provided by the public entity.

The Department of Justice has opined that program accessibility would in most cases not result in undue financial and administrative burdens on a public entity.[17] In determining whether financial and administrative burdens are undue, all public entity resources available for use in the funding and operation of the service,

[17] 28 C.F.R. § 35.150(a)(3)

program, or activity should be considered.[18] The burden of proving that compliance with program accessibility requirements would fundamentally alter the nature of a service, program, or activity or would result in undue financial and administrative burdens rests with the public entity.[19]

The decision that compliance would result in such alteration or burdens must be made by the head of the public entity or his or her designee and must be accompanied by a written statement of the reasons for reaching that conclusion.[20] The intention is that the determination must be made by a high level official, no lower than a Department head, having budgetary authority and responsibility for making spending decisions.[21]

As an example, a federal district court held that providing hepatitis inoculations for staff and residents, which would cost $4,600 - $6,500 plus $500-1600 each year, was not an undue burden for a residential program with a $4 million annual budget, and one-time cost of $500-1,500 plus $400-600 each year was not an undue burden for school with $1.1 million annual budget.[22]

2) Fundamental Alteration

A public entity is not required to take any action that would result in a fundamental alteration in the nature of its service, program, or activity.

This paragraph does not establish an absolute defense; it does not relieve a public entity of all obligations to individuals with disabilities. Although a public entity is not required to take actions that would result in a fundamental alteration in the nature of a service, program, it nevertheless must take any other steps necessary to ensure that individuals with disabilities receive the benefits or services provided by the public entity.[23]

VII. *Barden v. Sacramento*.

In *Barden v. City of Sacramento*, 292 F.3d 1973 (9th Cir. 2002), the Ninth Circuit determined that sidewalks constitute "programs" under the ADA. This ruling was consistent with the 2000 guide by the Access Board, a federal agency devoted to accessibility for people with disabilities, which stated the following: "A public pedestrian circulation network is both a 'program', i.e., a service delivered by a government to its citizens, and a set of 'facilities,' e.g., the sidewalks, curb ramps, street crossings, and related pedestrian elements that are instrumental in providing the service."[24]

[18] *Id.*
[19] *Id.*
[20] *Id.*
[21] *Id.*
[22] See *Kohl v. Woodhaven Learning Center*, 672 F. Supp. 1226 (W.D. Mo. 1987) .
[23] *Id.*
[24] E.R. 180 (Access Board, Accessible Public Rights of Way Design Guide15, 18 (2000) (Access Board Design Guide)).

Subsequent to this decision, the Fifth Circuit in the *Frame v. Arlington*, 657 F.3d 215 (5th Cir. 2011) determined that sidewalks are "facilities" rather than "programs." That notwithstanding, cities in the Ninth Circuit remain subject to the *Barden* decision. Furthermore, California law since 1971 has required construction of new sidewalks to be accessible.

VIII. ADA Coordinator.

If a local public entity has 50 or more employees, it is required to designate at least one responsible employee to coordinate ADA compliance.[25] A government entity may elect to have more than one ADA Coordinator. Although the law does not refer to this person as an "ADA Coordinator," this term is commonly used in state and local governments.

IX. Notice of ADA Provisions.

A local public entity must provide public notice about the ADA.[26] The target audience for public notice includes applicants, beneficiaries, and other people interested in the state or local government's programs, activities, or services. The audience is expansive, and includes everyone who interacts – or would potentially interact – with the local agency. While the notice need not be overwhelming, it must state at least the basics of the ADA and include the name and contact information for the ADA Coordinator. A model notice from the Department of Justice can be found at http://www.ada.gov/pcatoolkit/chap2toolkit.htm#Anchor-58521. The information must be presented in accessible formats so that it is accessible to all.

X. Grievance Procedure.

If a local public entity has 50 or more employees, it is required to adopt and publish procedures for resolving grievances arising under Title II.[27] Grievance procedures set out a system for resolving disability discrimination complaints in a prompt and fair manner.

Although Title II nor its implementing regulations describe what ADA grievance procedures must include, the Department of Justice has stated that the grievance procedure should include the following:

- a description of how and where a complaint under Title II may be filed with the government entity;
- if a written complaint is required, a statement notifying potential complainants that alternative means of filing will be available to people with disabilities who require such an alternative;
- a description of the time frames and processes to be followed by the complainant and the government entity;

[25] Department of Justice Nondiscrimination on the Basis of State and Local Government Services Regulations, 28 C.F.R. pt. 35, § 35.107(a) (2005).
[26] 28 C.F.R. § 35.107(b).
[27] 28 C.F.R. § 35.106.

- information on how to appeal an adverse decision; and

- a statement of how long complaint files will be retained.

A model grievance procedure from the Department of Justice can be found at http://www.ada.gov/pcatoolkit/chap2toolkit.htm#Anchor-58521.

XI. Self-Evaluation/Transition Plans.

The ADA and subsequent interpretations by the Department of Justice require cities to prepare a plan detailing how they will make their programs, services, and activities accessible to disabled individuals. This begins with a self-evaluation which identifies barriers in programs and activities that prevent persons with disabilities from access.

The transition plan should then set forth the steps necessary to complete modifications identified through the self-evaluation process. It is recommended that the plan identify and prioritize disabled access projects, estimate project costs, highlight an implementation schedule and funding strategy, and grievance and monitoring programs.

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Town Hall On City Attorneys' Department Listserv Issues

Thursday, May 7, 2015 General Session; 2:15 – 4:15 p.m.

Thomas B. Brown, City Attorney, St. Helena
Christi Hogin, City Attorney, Lomita, Malibu & Palos Verdes Estates

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:

City Attorneys' Department

TOWN HALL MEETING

Moderators: Thomas B. Brown, Department President and Listserv Participant
Christi Hogin, First Vice President and Listserv Non-participant

The Department Officers have set aside this time to discuss policy issues related to the City Attorneys' Department listserv and create a forum to develop an informed Department consensus on how to proceed. Your participation is needed.

We understand that there are differing viewpoints and varying degrees of concern/interest in the subject matters. We hope to air those points of view and reach an understanding (if possible) on how to proceed as a Department.

FACTS: The Listserv has over 1,250 participants (as of February 2015).
The Listserv traffic averages 50 (plus or minus) messages per week.
Each person allowed to subscribe and given access to the Listserv must agree to abide by the User Agreement (attached).
Some private law firms that employ attorneys with listserv access represent League members but also represent clients that sue League members.

ISSUE: LISTSERV MEMBERSHIP & CONFIDENTIALITY

MEMBERSHIP POLICY: Listserv access is a benefit of League membership. Attorneys representing League members are eligible to access the Listserv (city attorneys and special counsel). The Department also makes the listserv available to certain categories of former and retired city attorneys. The User Agreement also provides that the listserv "*is not accessible to attorneys…who are members of law firms that have a history of regularly initiating litigation against cities or representing clients whose interests are adverse to cities.*"

The public law profession fosters a point of view and our clients share common interests, which is the foundation of our collegiality. United in common purpose as city attorneys, our Department educates and strategizes together (e.g., Municipal Law Handbook, MCLE programs, substantive committees and guides for Brown Act, PRA, FPPC, Props 218 and 26, etc.). Lawyers have a duty of loyalty to their clients. When a lawyer represents a private client against a city, he or she is duty bound to use all his/her skills and resources to the benefit of the client. Herein lies the issue. Members have been distraught to discover opposing counsel (for private interests) on the listserv. Many of the firms that are valued League Partners and

whose members are actively involved in the Department fall into this category. So this is a sensitive subject but also an important conversation to have.

CONFIDENTIALITY POLICY: As set out in the User Agreement, the listserv is privileged and confidential. Those given access agree not to use information obtained from the listserv "to the detriment of other public agencies, municipalities or other entities eligible to participate as authorized users of the CCA List Serve unless legally obligated to do so."

Listserv posts have made their way into several legal disputes. Recently, a plaintiff's attorney in a wrongful termination suit sought disclosure of listserv emails. Once listserv posts are in the possession of city attorneys some may argue they are public records. The League's view of this issue is that listserv posts are privileged attorney work product and exempt from disclosure.

Is maintaining listserv confidentiality realistic?
Do we need to take any action to fortify its confidential status?

ISSUE: LISTSERV CONTENT

Actual spam and blatant advertising are prohibited by the listserv User Agreement and controlled by League Legal Department staff that moderates all listserv posts. However, there are some misuses of the listserv. Some posts appear to be made in lieu of any efforts to conduct legal research. Some posts appear to be so client specific as to constitute the solicitation of pro bono legal advice. Other posts provide little information or substance. The result can be too many posts to the listserv that are not helpful to the participants and erode the listserv's effectiveness (or discourage members from even participating). We are looking for a self-executing method to address these issues.

Christi's proposal: Divide and identify initiating listserv posts into three categories:

(1) NOVEL LEGAL QUESTIONS – any post must include brief list of sources already checked and section of Muni Law Handbook checked (so we can monitor deficiencies in Handbook).

EX: May a city employee serve as a councilmember in a general law city?
Research: I have checked MLH §3.33 (candidate qualifications), §2.170 (incompatible offices) and §4.140 (employee rights political activity). Also a WestLaw search didn't turn up anything but I thought there was a rule.

(2) ANNOUNCEMENTS OF GENERAL INTEREST OR FOR THE GOOD OF THE ORDER

EX: Second District Court of Appeal just ruled the attorney bills are not subject to disclosure under the Public Records Act, upholding them as privileged communication even if they do not convey legal advice. The decision is attached.

(3) SURVEYS

EX: Has your City banned medical marijuana dispensaries after previously allowing them? I am trying to get a sense for whether this is a trend.

Do we want a volume limit?

Do we want to convene a Task Force to make policy recommendations for September's conference?

USER AGREEMENT FOR CALIFORNIA CITY ATTORNEYS LIST SERVE

This is an email List Serve for the use of California City Attorneys ("CCA") and their attorney staff. The list is moderated by League of California Cities staff and City Attorneys' Department officers. Upon completing the registration process and verification of eligibility, you will become an authorized user of the CCA List Serve. Please read the terms and conditions of this agreement carefully.

Purpose

The purpose of the CCA List Serve is to allow authorized users to post information, provide feedback and interact with others on the legal issues of interest to attorneys representing California cities. The CCA List Serve provides a forum for open discussion and exchange of information and knowledge on legal issues facing municipal attorneys practicing in the State of California. The CCA List Serve is intended to be a confidential forum where attorneys can share their impressions, conclusions, opinions, research and theories and obtain input, comments, support, and constructive criticism from other qualified attorneys with like interests in the subject matter.

User Eligibility and Authorization

Use of the CCA List Serve is a privilege afforded to those authorized users who meet the following eligibility requirements. Those eligible for use are:

• all California city attorneys and their attorney staff

• attorneys who indicate that a substantial portion of their practice involves the representation of cities, in general or in a specialized area of the law such as personnel, finance, land use, etc.

• former city attorneys who represent special districts (with consent of the Department officers)

• retired or former city attorneys who remain actively engaged in the practice of municipal law, representing cities or special districts.

The CCA List Serve is not accessible to attorneys who represent counties or to attorneys who are members of law firms that have a history of regularly initiating litigation against cities or representing clients whose interests are adverse to cities. Any disputes regarding eligibility for use will be resolved by the City Attorneys' Department officers. The City Attorneys' Department officers reserve the right to refuse to authorize an applicant as a user.

Confidentiality

It is the intent that the exchange of information on the CCA List Serve, to the extent legally permitted, is confidential and all CCA List Serve users agree not to use information obtained from the CCA List Serve to the detriment of other public agencies, municipalities or other entities eligible to participate as authorized users of the CCA List Serve unless legally

obligated to do so. The CCA List Serve postings are considered to be privileged attorney work product. Distribution of any CCA List Serve postings, in whole or in part, to persons not members of the CCA List Serve is strictly prohibited, and is a basis for termination of privilege of use from the CCA List Serve. Because emails are transmitted electronically, it is impossible to guarantee confidentiality of posts and users should be cognizant of that fact in generating posts to the CCA List Serve.

Postings

All CCA List Serve users make a commitment not just to obtain information but also to contribute to the discussion on the CCA List Serve. All email responses must include a signature which shall include a name, title, city or other public agency represented, phone number and reply email. All email responses must also quote or include other information sufficient to identify the message to which the posting is responding. Although moderators review all postings, neither the moderator nor the League of California Cities is under any obligation to do so. By seeking user authorization and participating in the CCA List Serve you acknowledge that the moderator and League of California Cities do not control the information available on the CCA List Serve and that opinions, statements, services, or other information or content presented or disseminated on the CCA List Serve are those of the respective authors who are solely responsible for their content. All CCA List Serve users are responsible for their own communications and are responsible for the consequence of posting these communications.

The CCA List Serve moderators may edit all posts for space, and any post may be rejected if deemed inappropriate. CCA List Serve users should take care to ensure that only posts intended for distribution to the CCA List Serve are transmitted to the CCA List Serve.

Termination of Membership

Your participation in this CCA List Serve may be terminated at any time at the sole discretion of the CCA moderators or City Attorneys' Department officers. Causes for termination include engaging in sharing information received on the CCA List Serve to the detriment of another public agency, disseminating irrelevant postings including SPAM advertising, and no longer meeting the eligibility requirements for membership. It is your responsibility to notify the CCA List Serve moderator if your eligibility changes such that you are no longer entitled to membership.

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Municipal Tort And Civil Rights Litigation Update

Friday, May 8, 2015 General Session; 9:00 – 10:15 a.m.

Eugene P. Gordon, Office of the City Attorney, San Diego

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Notes:

League of California Cities
City Attorneys' Department
Spring Conference
May 2015

MUNICIPAL TORT AND CIVIL RIGHTS LITIGATION UPDATE

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1. *Mohamad Harb v. City of Bakersfield,* 233 Cal. App. 4th 606 (2015).

MAY FIRST RESPONDERS TO THE SCENE OF AN ACCIDENT (SUCH AS POLICE OFFICERS, PARAMEDICS AND EMTS) REDUCE THEIR LIABILITY FOR NEGLIGENCE BY ASSERTING THAT IT WAS THE ACCIDENT VICTIM'S OWN FAULT FOR REQUIRING AID IN THE FIRST PLACE?

FACTUAL BACKGROUND

Plaintiff, Mohamad Harb, M.D., was driving home from a 12-hour shift at a medical center when he suffered a hemorrhagic stroke. As a result of the hemorrhage, Harb drove his car over a curb and halfway onto the sidewalk. The impact with the curb twisted the right front wheel, bent the tire rims and caused the right front tire to go flat. A sales manager at a nearby car dealership phoned 9-1-1 and reported the accident.

The 9-1-1 operator dispatched a Bakersfield police officer to the scene, advising her of a non-injury collision that involved a possible DUI. Upon arrival, the officer contacted the sales manager who had made the 9-1-1 call. He told the officer that Harb had exited the vehicle, urinated on the sidewalk, returned to the vehicle and appeared to be attempting to leave. The officer then contacted Harb, removed him from the car, and directed him to sit on the curb behind his car. Although the officer did not detect the odor of alcohol on Harb's breath and did not notice any redness or watering in his eyes, the officer sat down with him and attempted to handcuff him.

A struggle took place and two officers who had arrived about a minute after the arrival of the first officer ran over to assist the officer in cuffing Harb's hand behind his back. It took all three officers to get the handcuffs on Harb. At some point during the affray, one of the officers noticed a small bump on the right side of Harb's head, but testified that he was not aware of Harb striking his head during the encounter. The first officer then called for an ambulance and upon arrival, a paramedic performed an assessment of Harb. Harb's blood glucose was within the normal range and his blood pressure was slightly high, which the paramedic did not consider unusual under the circumstances. Harb was asked questions and gave responses that were confused.

The police conducted two alcohol breath tests on Harb at the scene and both tests results were 0.00.

What happened after the assessment of Harb is the subject of conflicting testimony. The police officers testified that the paramedic who performed the assessment of Harb told them that "there is nothing medically wrong with this guy," and then packed up his gear, rolled the gurney back into the ambulance, closed the doors and left.

In contrast, the paramedic testified he told the officers that the ambulance crew would be transporting Harb to the medical center. When asked why, the paramedic stated it was because Harb needed to go to the hospital. The

paramedic testified he informed the officers that Harb was not drunk and he did not find anything to indicate Harb was on drugs. However, he told the officers that Harb needed to be transported right away. The first officer on the scene told the paramedic that she would take Harb to the hospital.

Twenty-nine minutes after the first officer was dispatched to the scene, the first ambulance left the scene without Harb. Seven minutes later the police called for a second ambulance. During this time a registered nurse who worked with Harb at the medical center happened to pass by the scene and recognized the disheveled Harb who was still handcuffed and sitting on the curb. After speaking with Harb, she told the officers something was wrong with Harb and that he needed to go to a hospital. She asked the police how Harb had gotten a gash on his forehead and was told that it happened when Harb resisted being handcuffed.

A police officer testified that by the time the second ambulance arrived, Harb's condition looked worse. The second ambulance took Harb to the nearby medical center where he was taken to a trauma room. A CT scan showed a large amount of blood in the brain. After the CT scan, Harb's condition deteriorated. He stopped speaking English and tried to climb off the gurney. The CT scan showed bruising around the blood pooling in the brain. The bruising caused swelling, which shifted the midline of the brain and compressed the brain.

Almost four hours after the 9-1-1-call, Harb was taken into an operating room for surgery. Harb survived the surgery and was moved to a convalescent facility. The brain damage he suffered has rendered him unable to care for himself.

PROCEDURAL BACKGROUND

Harb and his wife filed a complaint against the City, the ambulance company, the first police officer, and the first paramedic on scene. The complaint alleged essentially that the Defendants did not transport Harb to the hospital quickly enough after his stroke, and that the delay in getting Harb medical treatment made the consequences of his stroke much worse.

The case was tried to a jury. The evidence was in dispute as to whether the delay in getting Harb to the hospital affected the extent of the brain damage Harb suffered. The jury returned a defense verdict.

Plaintiffs moved for a new trial which was denied by the trial court. Plaintiffs appealed, contending the jury instructions contained two errors and should not have been given.

CALIFORNIA COURT OF APPEAL DECISION

The Court of Appeal held that under the facts of this case, a police immunity instruction (an officer is not liable if exercising due care) and a comparative negligence instruction should not have been given.

The court concluded that the errors in the two instructions were prejudicial. Therefore, the court reversed the judgment in favor of the Defendants and remanded for a new trial.

The first question in the special verdict form asked whether the police officer and the City were negligent. The jury answered "No." The third question in the special verdict form asked whether the police officer and the paramedic were grossly negligent. The jury answered "No." In accordance with the instructions in the verdict form, the jury did not answer any other questions and thus never reached question No. 5 that asked, "Was the plaintiff Mohamed Harb contributorily negligent?"

Government Code Section 820.4—Police Immunity Instruction

Government Code section 820.4 provides in relevant part as follows: "A public employee is not liable for his act or omission, exercising due care, in the execution or enforcement of any law." The court instructed the jury with wording that tracked the language of section 820.4.

Plaintiffs argued that the police immunity instruction should not have been given because it contained confusing language and, moreover, was unnecessary in a negligence case. The court agreed. According to the court, while the instruction was a correct statement of the law in the abstract, it was unnecessary and redundant to the negligence instruction because Plaintiffs were already required to prove the police officer acted negligently.

The Court of Appeal also found that the police immunity instruction, viewed as a whole with the other instructions, was ambiguous because it did not clearly indicate when the immunity applied and when it did not apply.

After reviewing the entire record, the court concluded there was a reasonable likelihood that the jury misunderstood and misapplied the ambiguous police immunity instruction. The error was prejudicial which warranted a new trial.

Comparative Negligence Instruction

Plaintiffs contended the jury should not have been instructed on comparative negligence because Harb's alleged negligent failure to take blood pressure medication to control his high blood pressure occurred before the accident and the Defendants' interaction with him.

Plaintiffs contended any pre-accident negligence by Harb was irrelevant because (1) a tortfeasor takes the plaintiff as he finds him, and (2) Plaintiffs were not seeking to recover damages caused by the stroke, only damages for the delay in treatment caused by the Defendants.

The issue of whether an accident victim's pre-accident negligence is a type of comparative fault under California law is a question of first impression. Other jurisdictions are divided on the issue.

Here, the Court of Appeal explained that in light of California's adoption of the basic principle of tort law that a "tortfeasor takes the plaintiff as he finds him" (*Bowen v. Board of Retirement*, 42 Cal. 3d 572, 580 (1986)) . . . the issue of a plaintiff's comparative fault should not be presented to the jury when the plaintiff's allegedly negligent conduct occurred before the first responders arrived at the scene of the accident.

Conclusion

The court concluded that "where a plaintiff is seeking damages only for the aggravation or enhancement of an injury or condition, California will follow the majority view that a plaintiff's preaccident conduct cannot constitute comparative negligence when that conduct merely triggers the occasion for aid or medical attention. As a result, defendants who render aid or medical attention cannot reduce their liability for the harm resulting from their tortious acts and omissions by attributing fault to the plaintiff for causing the injury or condition in the first place."

2. *Heien v. North Carolina,* 135 S. Ct. 530 (2014).

CAN A TRAFFIC STOP BASED ON A POLICE OFFICER'S MISTAKEN BUT REASONABLE BELIEF THAT STATE LAW WAS VIOLATED EVER SUPPORT THE REASONABLE SUSPICION NECESSARY TO STOP A VEHICLE UNDER THE FOURTH AMENDMENT?

FACTUAL BACKGROUND

A police sergeant in North Carolina was stopped in his patrol car observing traffic on the interstate when he was passed by a vehicle driven by a person whom the officer thought looked "very stiff and nervous." The officer began following the vehicle and when it braked as it approached a slower vehicle, only the left brake light came on. The officer pulled the vehicle over for not having two operative brake lights.

While issuing a warning ticket for the broken brake light, the officer became suspicious of the two occupants in the vehicle. The owner of the vehicle gave the sergeant permission to search it, and a thorough search of the vehicle resulted in the discovery of a sandwich bag containing cocaine. Both men were arrested.

PROCEDURAL BACKGROUND

The owner of the vehicle was charged with attempted trafficking of cocaine. He moved to suppress the evidence seized from the car, contending that the stop and search had violated the Fourth Amendment. The trial court denied the suppression motion, concluding that the faulty brake light had given the officer reasonable suspicion to initiate the stop, and that the owner's subsequent consent to the search was valid.

The North Carolina Court of Appeals reversed. The court held that the initial stop was not valid because driving with only one working brake light was not actually a violation of North Carolina law. The court interpreted the applicable state statute to require a vehicle to have only one working brake light—which this vehicle indisputably did. Thus, according to the court, the stop was "objectively unreasonable," and therefore violated the Fourth Amendment.

The North Carolina Supreme Court reversed. The State chose not to appeal the Court of Appeals' interpretation of the State's vehicle code regarding brake lights, thus, the Supreme Court assumed for purposes of its decision that the faulty brake light was not a violation. However, the court determined that, even assuming no violation of state law had occurred, the officer's mistaken understanding of the vehicle code was "reasonable" and therefore the stop of the vehicle was valid.

The United States Supreme Court granted certiorari.

U.S. SUPREME COURT DECISION

The U.S. Supreme Court affirmed the judgment of the Supreme Court of North Carolina, which held that the stop of the vehicle was lawful. According to the U.S. Supreme Court, it was "objectively reasonable" for an officer in the sergeant's position to think that the faulty brake light was a violation of North Carolina law. "And because the mistake of law was reasonable, there was reasonable suspicion justifying the stop." *Heien,* 135 S. Ct. at 540.

Mistakes of Fact vs. Mistakes of Law

The Supreme Court reiterated that "the ultimate touchstone of the Fourth Amendment is 'reasonableness.'" *Riley v. California,* 134 S. Ct. 2473, 2482 (2014). "To be reasonable is not to be perfect, and so the Fourth Amendment allows for some mistakes on the part of government officials, giving them 'fair leeway' for enforcing the law in the community's protection." *Heien,* 135 S. Ct. at 536 (quoting *Brinegar v. United States,* 338 U.S. 160, 176 (1949).)

The courts have long recognized that searches and seizures based on mistakes of *fact* can be reasonable. *See Illinois v. Rodriquez,* 497 U.S. 177, 183-186 (1990). According to the Court, there is no reason why the result should be any different in a case where the officer is reasonably mistaken of his understanding of the relevant law.

The Officer's Error of Law Was Reasonable

Here, the Supreme Court had little difficulty concluding that the officer's mistake about the brake light law was reasonable. According to the Court, the North Carolina statute could be interpreted to require that both brake lights be in good working order. Such an interpretation, even if mistaken, would not be unreasonable.

The Traffic Stop Did Not Violate the Fourth Amendment

The Supreme Court held that under the facts of this case, reasonable suspicion existed to justify a stop of the subject vehicle. Reasonable suspicion can rest on an officer's mistaken, but reasonable, understanding of the law. Here, according to the Court, because the North Carolina brake light statute was somewhat ambiguous with respect to the number of brake lights required to be operative, it would be objectively reasonable for an officer in the sergeant's position to think that the faulty brake light was a violation of North Carolina law. "And because

the mistake of law was reasonable, there was reasonable suspicion justifying the stop." *Heien,* 135 S. Ct. at 540.

3. *Carroll v. Carman*, 135 S. Ct. 348 (2014).

A. IS THE FOURTH AMENDMENT VIOLATED WHEN POLICE OFFICERS ENTER PRIVATE PROPERTY TO CONDUCT A "KNOCK AND TALK" WITH THE OCCUPANTS AT AN ENTRANCE OPEN TO VISITORS BUT WITHOUT HAVING GONE TO THE FRONT DOOR FIRST?

B. WERE OFFICERS ENTITLED TO QUALIFIED IMMUNITY WHEN THEY CONDUCTED A "KNOCK AND TALK" AT AN ENTRANCE TO A HOUSE THAT WAS OPEN TO VISITORS RATHER THAN GOING TO THE FRONT DOOR?

FACTUAL BACKGROUND

Two state police officers responded to a call regarding a stolen car and two loaded hand guns. The report stated that the suspect might have fled to Plaintiffs' home. The officers drove to Plaintiffs' home and parked their separate patrol vehicles in the first available spot in a gravel parking area on the side of Plaintiffs' property.

As the officers walked toward the house, they noticed "a small structure (either a carport or a shed) with its door open and a light on." "Officer Carroll walked over, looked inside and identified himself." No one was there, however, so the officers continued walking toward the house. As they approached, they saw a sliding glass door that opened onto a ground-level deck. Officer Carroll thought the sliding glass door "looked like a customary entryway," so he decided to knock on it.

As the officers stepped onto the deck, a man came out of the house and "belligerently and aggressively" approached them. The officers identified themselves, explained who they were looking for, and asked the man to identify himself. The man refused to answer. Instead, he turned away from the officers and appeared to reach for his waist. Officer Carroll grabbed the man's right arm to make sure he was not reaching for a weapon. The man twisted away from Carroll, lost his balance, and fell into the yard.

At that point, a woman came out of the house and asked what was happening. The officers explained that they were looking for [a criminal suspect]. The woman identified herself as the wife of the man who was uncooperative with the officers, and told the officers that the subject they were looking for was not there. The officers were given permission to search the house for the subject, but did not find him. The officers then left. Plaintiffs were not charged with any crimes.

PROCEDURAL BACKGROUND

Plaintiffs brought a § 1983 action in federal district court against Officer Carroll. Among other things, Plaintiffs alleged that Officer Carroll unlawfully entered their

property in violation of the Fourth Amendment when he went into their backyard and onto their deck without a warrant and without going to the front door first.

At trial, the jury returned a verdict for Officer Carroll. Plaintiffs appealed, and the Court of Appeals for the Third Circuit reversed. The court held that Officer Carroll violated the Fourth Amendment as a matter of law "because the 'knock and talk' exception requires that police officers begin their encounter at the front door, where they have an implied invitation to go." Here, according to Plaintiffs, a normal visitor would have gone to the front door, rather than into Plaintiffs' backyard or onto their deck. Thus, Plaintiffs contended the "knock and talk" exception did not apply.

The court also held that Officer Carroll was not entitled to qualified immunity because his actions violated clearly established law.

Officer Carroll petitioned for certiorari. The U.S. Supreme Court granted the petition.

U.S. SUPREME COURT DECISION

The Supreme Court per curiam reversed the Third Circuit's determination that Officer Carroll was not entitled to qualified immunity.

"Knock and Talk" Exception to Warrant Requirement

At trial, Officer Carroll argued that his entry was lawful under the "knock and talk" exception to the warrant requirement. That exception allows officers without a warrant "to knock on a residence's door or otherwise approach the residence seeking to speak to the inhabitants just as any private citizen may." *Estate of Smith v. Marasco*, 318 F.3d 497, 519 (3d Cir. 2003). However, when the police come onto private property, ordinarily, "they must restrict their movements to places visitors could be expected to go (e.g., walkways, driveways, porches), and observations made from such vantage points are not covered by the Fourth Amendment." *Id.*

Nevertheless, Plaintiffs contended that a "knock and talk" at the front door is required before officers may go into other parts of the property that are open to visitors. However, case law appears to have rejected Plaintiffs' argument, as appellate cases seem to hold that the Fourth Amendment is not implicated when a police officer, without going to the front door first, walks to a side or rear door accessible to visitors in the reasonable belief that it is a principal means of access to the building.

Qualified Immunity

The Supreme Court expressly left undecided the issue of whether the Fourth Amendment is violated when a police officer conducts a "knock and talk" at any entrance to a house that is open to visitors rather than only the front door. However, according to the Court, it was not "beyond debate" whether an officer violates the Fourth Amendment when he conducts a "knock and talk" at any entrance that is open to visitors rather than only the front door. Therefore, since the law was not clearly established on the issue, the Supreme Court concluded

that the Third Circuit erred when it held that Officer Carroll was not entitled to qualified immunity.

4. *Conway v. Cnty. of Tuolumne,* 231 Cal. App. 4th 1005 (2014).

DID A SWAT TEAM'S ACTIONS IN AN ATTEMPT TO MAKE AN ARREST CONSTITUTE "DISCRETIONARY" DECISIONS THAT WOULD IMMUNIZE THE COUNTY FROM LIABILITY UNDER STATE LAW?

FACTUAL BACKGROUND

George Conway was in the process of moving into a mobile home with his 51-year-old son, Donald Conway, when Donald became angry at two TV technicians who were performing an installation at the new house. Donald came onto the deck of the house holding a handgun. He fired three shots through a door that had been locked by George and both George and the technicians fled to a neighbor's house.

George requested law enforcement assistance in a 9-1-1 call. He told the dispatcher that the gunshots blew the front door off the house and that Donald had pointed the gun at him. A number of sheriff's deputies arrived at the scene and efforts were made to determine whether Donald was still in the house. Attempts were made to communicate with Donald, and a "throw phone," which operates as a listening device, was placed in the house through a broken window. Multiple calls were made to the phone, but George did not answer and nothing was heard from the house. The officers did not hear anyone or see movement in the house after the window was broken.

Based on Donald's criminal history and previous use of deadly force, the sergeant at the scene believed that Donald would attempt to use deadly force against the officers. For that reason, the sergeant asked the SWAT commander and a lieutenant for authorization to deploy two tear gas canisters in an effort to resolve the situation and protect against the loss of life and damage to property. The request was granted. One tear gas canister was deployed, a diversionary device was used and gas filled the home. A few minutes later, the SWAT team broke down the front door by using a battering ram, and went into the house. No one was inside.

Donald was subsequently apprehended. The gas residue could not be removed from the house and it made the home uninhabitable.

PROCEDURAL BACKGROUND

George filed suit against the County, alleging essentially that the County was negligent when it deployed tear gas into the house, causing considerable damage to it, when the officers should have known that Donald was not in the house. The County filed a motion for summary judgment on several grounds, one of which was that the County was entitled to discretionary immunity under Government Code section 820.2. Specifically, the County contended that because the officers at the scene were vested with discretion in how the

suspected felon, Donald, would be arrested, the decision to use tear gas was a discretionary decision for which the County was immune.

In his opposition to the motion, George agued, among other things, that the immunity was unavailable because the SWAT team's decision to raid his home was not a basic policy decision formulated by policymakers, but instead was a ministerial decision not subject to the immunity.

The trial court granted the County's motion for summary judgment, finding the County immune under Government Code section 820.2. George filed a timely notice of appeal.

CALIFORNIA COURT OF APPEAL DECISION

The Court of Appeal affirmed the judgment of the trial court finding the County immune under Government Code section 820.2 from liability for all of George's claims.

Public Entity Liability

Public entities in California are immune from liability except as provided by statute. Section 815, subd. (a). Public employees are liable for their torts except as otherwise provided by statute. Section 820, subd. (a). Public entities are vicariously liable for the torts of their employees. Section 815.2, subd. (a). Public entities are immune where their employees are immune, except as otherwise provided by statute. Section 815.2, subd. (b).

Discretionary Immunity

The traditional immunity for discretionary acts is set forth in the Government Claims Act under section 820.2 which provides as follows: "Except as otherwise provided by statute, a public employee is not liable for an injury resulting from his act or omission where the act or omission was the result of the exercise of the discretion vested in him, whether or not such discretion be abused."

The courts have distinguished between discretionary acts which involve "basic policy decisions" from decisions which are "ministerial" that merely implement a basic policy already formulated. *Johnson v. State of California*, 69 Cal. 2d 782 (1968). The line is drawn between "planning" and "operational" functions of government. *Caldwell v. Montoya*, 10 Cal. 4th 972, 981 (1995). The courts have reserved immunity under sections 820.2 and 815.2, subdivision (b), "only with respect to those 'basic policy decisions' which have been committed to coordinate branches of government, and as to which judicial interference would thus be "'unseemly'". *Caldwell*, 10 Cal. 4th at 981. The court stressed that "immunity applies only to deliberate and considered policy decisions, in which a [conscious] balancing [of] risks and advantages took place." *Johnson*, 69 Cal. 2d at 795, n.8.

Discretionary immunity has been applied to many areas of police work. The court in the instant case compiled a list of discretionary decisions where the courts found that police officers were immune under section 820.2: (1) the decision to pursue a fleeing vehicle; (2) the decision to investigate or not

investigate a vehicle accident; (3) the failure to make an arrest or to take some protective action less drastic than arrest; (4) the decision to use official authority to resolve a dispute; and (5) the decision to remove a stranded vehicle.

On the other hand, according to the courts, there is no basis for immunizing lower-level, or "ministerial," decisions that merely implement a basic policy already formulated. *Johnson*, 69 Cal. 2d at 796. Thus, courts have determined that discretionary immunity does not apply to the following: (1) an officer's conduct of an accident investigation after the officer made the discretionary decision to undertake the investigation; (2) arresting the wrong person while executing a warrant; (3) deciding to arrest an individual when there is no probable cause to do so; and (4) using unreasonable force when making an arrest or overcoming resistance.

Here, while George conceded that the decision to deploy the SWAT team was a discretionary act, he argued that all subsequent decisions made and acts performed that implemented the decision to deploy SWAT were ministerial and therefore not immune from liability. He contended that the decision to deploy tear gas "was merely the means to carry out the decision to deploy the SWAT team." The Court of Appeal rejected George's argument that the County was not immune from liability under section 820.2.

According to the court, there is no legal basis for the assertion "that once law enforcement officials have 'decided' to intervene . . ., any subsequent action by the officials is ministerial." The court reasoned that "each decision must be examined to determine whether it constitutes a discretionary or ministerial decision. In this case, the decision to use tear gas resulted from choices and judgments made in response to changing circumstances; it was not made in blind obedience to orders, [rather] it was based on personal deliberation, decision and judgment."

Conclusion

The court concluded that section 820.2 provided immunity for the officers' actions under the facts of this case. The court was careful to make it clear that its decision was not so broad "so that every action by an officer, no matter how minor, will be subject to immunity as long as the officer states he or she made a choice between two options." Rather, in this case, "given the importance of the decisions involved and the potential impact of liability on these decisions," the court was of the view that immunity under section 820.2 was appropriate.

5. *United States v. Edwards,* 761 F.3d 977 (9th Cir. 2014).

DOES THE POINTING OF A WEAPON AT A SUSPECT, HANDCUFFING HIM, ORDERING HIM TO LIE ON THE GROUND, OR PLACING HIM IN A POLICE CAR *AUTOMATICALLY* CONVERT A VALID INVESTIGATORY STOP INTO AN ARREST?

One Reginald Edwards was stopped by police officers for investigation in connection with a shooting. The officers used considerable force in making the

stop and for that reason Edwards contended that the officers' conduct converted his detention into an arrest requiring probable cause.

FACTUAL BACKGROUND

At 7:40 p.m., police officers responded to a 9-1-1 call from an anonymous caller who reported that a "young black male" was at a street corner shooting at cars passing through the intersection. The caller provided additional details about the suspect during the five-minute call. After a short time, the officers observed Reginald Edwards in the vicinity of the shooting and noticed that he matched the description of the reported suspect. Another male was standing next to Edwards.

Four officers with their weapons drawn approached the two men. An officer commanded both men to kneel on the pavement. Another officer handcuffed Edwards while he was on his knees, and then stood him up and had him spread his legs. The officer then patted Edwards down and discovered a 22-caliber revolver above Edwards' right knee, inside the pant leg.

Edwards was charged with being a felon in possession of a firearm.

PROCEDURAL BACKGROUND

Edwards moved to suppress all of the physical evidence obtained as a result of his initial stop and frisk. The district court denied the motion to suppress.

Edwards filed a timely appeal.

NINTH CIRCUIT DECISION

The Ninth Circuit affirmed the order of the district court denying Edwards' motion to suppress the evidence. The court held that the district court properly determined that the officers' aggressive conduct did not convert Edwards' detention into an arrest. The court also held that the officers had reasonable suspicion based on an anonymous 9-1-1 call to lawfully stop Edwards.

Edwards' Detention Did Not Amount To An Arrest

Edwards contended that the officers' forceful conduct converted his detention before the gun was discovered from an investigatory stop into an arrest. The Ninth Circuit did not agree. According to the court, "the officers' aggressive conduct was reasonable and did not convert Edwards' detention into an arrest." Edwards was the only person in the vicinity of the reported shooting who fairly matched the description of a man who reportedly had been shooting at passing cars just minutes before the police arrived. The officers had sufficient information from the 9-1-1 call "to reasonably believe that Edwards could be the shooter and therefore could be armed and dangerous, possibly having just committed a violent crime. The officers' legitimate safety concerns justified their on-the-spot decision to use intrusive measures to stabilize the situation before investigating further."

Comment

The Ninth Circuit has recently decided several cases involving the issue of whether the force used during an investigatory *Terry v. Ohio* detention was so

aggressive and intrusive that the detention was converted into an arrest requiring probable cause. *Sandoval v. Las Vegas Metropolitan Police Depart.*, 756 F.3d 1154 (9th Cir. 2014) (police officer allegedly pointed a gun at a teenager suspected of making an unlawful entry into a house); *Green v. City and County of San Francisco*, 751 F.3d 1039 (9th Cir. 2014) (multiple police officers pointed their weapons at the female driver of a stopped vehicle mistakenly believed to be stolen).

The leading case in the Ninth Circuit on this body of law is *Washington v. Lambert*, 98 F.3d 1181 (9th Cir. 1996), where the court emphasized that the totality of the circumstances determines whether and when an investigatory stop becomes an arrest. *Id.* at 1185. In looking at the totality of the circumstances, the court will examine "the intrusiveness of the stop, i.e., the aggressiveness of the police methods and how much the plaintiff's liberty was restricted." *Id.* The court will then examine "the justification for the use of such tactics, i.e., whether the officer had a sufficient basis to fear for his safety to warrant the intrusiveness of the action taken." *Id.* at 1185. This "inquiry is undertaken . . . from the perspective of law enforcement," while bearing in mind that "the purpose of a *Terry* stop is to allow the officer to pursue his investigation without fear of violence." *United States v. Guzman-Padilla*, 573 F.3d 865, 884 (9th Cir. 2009).

The Ninth Circuit has repeatedly explained that "because we consider both the inherent danger of the situation and the intrusiveness of the police action, . . . pointing a weapon at a suspect and handcuffing him, or ordering him to lie on the ground, or placing him in a police car will not automatically convert an investigatory stop into an arrest that requires probable cause." *Lambert*, 98 F.3d at 1186.

The *Edwards* case is the most recent case decided by the Ninth Circuit on the subject.

6. *Suarez v. City of Corona,* 229 Cal. App. 4th 325 (2014).

DOES A DETERMINATION BY THE COURT THAT AN ACTION BROUGHT AGAINST A CITY WAS FRIVOLOUS AUTHORIZE AN AWARD OF DEFENSE COSTS AGAINST PLAINTIFF AND PLAINTIFF'S COUNSEL UNDER CODE OF CIVIL PROCEDURE SECTION 1038?

FACTUAL BACKGROUND

Plaintiff was injured when a compressed natural gas tank in a van in which he was a passenger exploded while being fueled at a fueling station owned by the City. Plaintiff sued the City and a number of other defendants. The theory against the City was a dangerous condition of public property under Government Code section 835.

The City Fire Department concluded that the explosion was an accident caused by the rupture of a natural gas tank in the van. Shortly after the accident, the gas company tested the fuel lines at the filling station and did not discover any leaks in the lines.

An engineer retained by Plaintiff inspected the gas tank and the van where the tank had been located at the time of the accident. He found that the cylinder had cracks caused by stress and "a corrosive environment." Tests of the cylinder revealed the presence of sulphuric acid. The engineer concluded that the cylinder ruptured during fueling as a result of exposure to sulphuric acid from contents carried in the cargo area of the van.

After the inspections were completed, the City served Plaintiff with a statutory offer to compromise under section 998. In that offer, the City agreed to waive costs in exchange for a dismissal with prejudice. Plaintiff did not respond to the offer and it expired.

The City then responded to written discovery requests propounded by Plaintiff. The City produced maintenance and inspection reports for the natural gas system and the fire investigation report. The City also provided information that since the natural gas system became operational, the City did not have reports of any prior incidents or claims for damages in regards to any aspect of the gas system. Plaintiff did not proceed with additional discovery with respect to the City and the case was idle for a significant period of time.

The City informed Plaintiff that the evidence did not establish that the City had notice of a dangerous condition, and requested that Plaintiff provide the City with his theory of liability against the City. Neither Plaintiff nor his attorneys responded to this inquiry and they refused to dismiss the City. Plaintiff then took the depositions of two City employees who testified in essence that there was no design defect or issue with the City's operation or maintenance of the filling station, and that the City had never received any complaints about problems or issues with the fueling system. The witnesses were not aware of any valve malfunctions or gas leaks occurring at the time of the accident.

After the depositions, the City again demanded that Plaintiff dismiss the case due to lack of evidence regarding the City's liability or provide the City with Plaintiff's theory of liability. The City also informed Plaintiff and his attorneys the lawsuit against the City was frivolous within the meaning of CCP section 1038 and if it was not dismissed, the City would move for summary judgment and seek recovery of its fees and costs. Plaintiff did not dismiss the lawsuit against the City.

PROCEDURAL BACKGROUND

The City moved for summary judgment on the grounds that there was no dangerous condition, it did not have actual or constructive notice, and design immunity applied. The trial court granted summary judgment to the City, finding that Plaintiff did not raise a triable issue of fact as to whether there was a dangerous condition of the City's property. The City then moved to recover its defense costs under section 1038 on the ground the action was not brought and maintained with reasonable cause.

The court awarded the City approximately $106,000 in fees and costs jointly and severally against Plaintiff and his attorneys. Plaintiff and his attorneys filed a timely appeal.

CALIFORNIA COURT OF APPEAL DECISION

The Court of Appeal reversed that portion of the judgment awarding the City its fees and costs against Plaintiff's *attorneys*. In all other respects, the court affirmed.

Code of Civil Procedure section 1038 provides public entities with "a way to recover the costs of defending against unmeritorious and frivolous litigation." *Kobzoff v. Los Angeles County Harbor/UCLA Medical Center*, 19 Cal. 4th 851, 857 (1998). The statute authorizes the court upon motion to determine whether or not the action was brought "with reasonable cause and in the good faith belief that there was a justiciable controversy under the facts and law which warranted the filing of the [action]. If the court should determine that the proceeding was not brought in good faith and with reasonable cause, … the court shall render judgment in favor of the party [who opposed the action] in the amount of all reasonable and necessary defense costs."

Section 1038 encompasses not only the initial filing of the action but also its continued maintenance if done without good faith and reasonable cause. *Curtis v. County of Los Angeles*, 172 Cal. App. 3d 1243, 1252 (1985).

Reasonable Cause

In order to recover defense costs under section 1038, the court must "determine whether or not the plaintiff … brought the proceeding with reasonable cause and in the good faith belief that there was a justiciable controversy under the facts and law which warranted the filing of the complaint [or its continued maintenance]." "Reasonable cause" is an objective standard and is synonymous with "probable cause." *Carroll v. State of California*, 217 Cal. App. 3d 134, 141 (1990). It asks whether any reasonable attorney would have thought the claim was tenable (*Carroll*, at p. 140.)

Here, the Court of Appeal affirmed the judgment of the trial court that Plaintiff did not have reasonable cause to either bring the action or continue the action. The only claim against the City was based on a dangerous condition of public property under Government Code section 835. However, according to the court, Plaintiff failed to point to any evidence revealing that City property constituted a dangerous condition. The court explained that even if Plaintiff had reasonable cause to initiate his action against the City, the City's information did not reveal the presence of a dangerous condition on public property; therefore, according to the court, "no attorney would have thought [Plaintiff's] claims were tenable after receiving the City's written discovery responses."

Since there was no evidence that Plaintiff had a viable theory of liability against the City, the Court of Appeal concluded that the trial court was correct when it determined that Plaintiff did not have reasonable cause to continue the action. The City made numerous demands on Plaintiff to dismiss the case against it or

provide a viable theory of liability. Plaintiff ignored those demands and "let the case languish against the City." Accordingly, it should have been clear to Plaintiff and his attorneys that reasonable cause did not exist to maintain the action against the City.

Fees And Costs Award Against Plaintiff's Attorneys

Plaintiff's attorneys contended that the trial court erred when it imposed attorney fees and costs against them because section 1038 does not authorize the imposition of defense costs against a party's counsel. The Court of Appeal agreed.

According to the court, there is nothing in the language of the statute that authorizes a court to award defense costs against a plaintiff's counsel. Section 1038 is "clear and unambiguous" in not making any reference to the imposition of defense costs against a party's counsel. "If the Legislature had intended to make attorneys responsible for defense costs under section 1038, we presume it would have stated so."

Moreover, according to the court, the Legislature's use of the term "judgment" in section 1038 in favor of the prevailing party indicates that it did not intend to impose liability on a party's counsel, since a "judgment" cannot lie against an attorney who is not a party to the action and is wholly void. *Moore v. Kaufman*, 189 Cal. App. 4th 604, 615 (2010).

NOTE

The Court of Appeal in *Settle v. State of California*, 228 Cal. App. 4th 215 (2014), recently held that section 1038 does not authorize the imposition of defense costs against plaintiff's counsel. That case is consistent with *Suarz* in holding that the remedy the Legislature prescribed for the recovery of defense costs under section 1038 "may only be rendered against a party to the action."

7. *Cruz v. City of Anaheim,* 765 F.3d 1076 (9th Cir. 2014).

WERE POLICE OFFICERS ENTITLED TO SUMMARY JUDGMENT WHEN THEY SHOT AND KILLED A SUSPECT WHERE, ACCORDING TO THE COURT, IT WAS UNCLEAR WHETHER THE SUSPECT REACHED FOR THE WAISTBAND OF HIS PANTS?

FACTUAL BACKGROUND

A confidential informant told an Anaheim police officer that one Ceasar Cruz was a gang member who sold methamphetamine and carried a gun. Following this lead, the officer determined that Cruz was a discharged parolee whose prior convictions included a felony involving a firearm. Later, the informant told the officer where Cruz could be found, provided a description of his vehicle, and that he was armed with a nine-millimeter handgun. The informant also reported that Cruz was carrying the gun in his waistband and had made it clear that "he was not going back to prison." The officer transmitted this information to several other

Anaheim police officers and they converged on Cruz's location with multiple police vehicles, both marked and unmarked.

The officers noticed that Cruz's vehicle had a broken tail light, so they conducted a traffic stop. After Cruz pulled into a Walmart parking lot, the officers surrounded him with their vehicles. However, Cruz attempted to escape, backing his SUV into one of the marked patrol cars in the process. Cruz eventually stopped, and the officers got out of their vehicles with weapons drawn.

Cruz opened his door and the officers shouted at him to get on the ground as he was getting out from the vehicle. According to four of the officers, Cruz ignored their commands and instead reached for the waistband of his pants. Fearing that he was reaching for a gun, five officers opened fire. They fired about twenty shots in two to three seconds. A bystander witnessed most of the event from the other side of Cruz's vehicle, but he could only see Cruz's feet and the top of his head at the time of the shooting. He was unable to see whether Cruz reached for his waistband.

After the firing stopped, the officers approached Cruz's body and found it tangled in his seat belt and hanging from it. After they cut the body loose, they found no weapon on it. However, a loaded nine-millimeter handgun was found—with the safety on—on the car's passenger seat.

PROCEDURAL BACKGROUND

Cruz's relatives brought an action against the five officers who fired their weapons at Cruz, the Chief of Police, Deputy Police Chief, and the City of Anaheim. The complaint alleged that the actions of Defendants violated the Fourth and Fourteenth Amendments. A wrongful death claim was also brought under California law. Plaintiffs' theory of the case was that the event was an "execution" committed by the Anaheim Police Department with the help of the confidential informant.

The district court granted summary judgment to Defendants on all claims, finding that Plaintiffs had not presented any evidence which refuted the officers' version of the events.

Plaintiffs filed a timely appeal.

NINTH CIRCUIT DECISION

A three-judge panel of the Ninth Circuit, in an opinion written by Chief Judge, Alex Kozinski, reversed the order of the district court granting summary judgment to four of the officers. However, the court affirmed the district court order granting summary judgment to the fifth officer, Officer Michael Brown.

It is not unusual in police shooting cases that the only person most likely to rebut the officers' version of what occurred—the one killed—cannot testify. For that reason, the Ninth Circuit has concluded that in such cases, the court, in ruling on motions for summary judgment, cannot "simply accept what may be a self-serving account by the police officer." *Scott v. Henrich*, 39 F.3d 912, 915 (9th Cir. 1994). Rather, "[t]he judge must carefully examine all the evidence in

the record . . . to determine whether the officer's story is internally consistent and consistent with other known facts." *Id.*; see also *Gonzalez v. City of Anaheim*, 747 F.3d 789, 794-795 (9th Cir. 2014)(en banc). This includes "circumstantial evidence that, if believed, would tend to discredit the police officer's story." *Scott*, 39 F.3d at 915.

Here, according to the court, "there's circumstantial evidence that could give a reasonable jury pause. Most obvious is the fact that Cruz didn't have a gun on him, so why would he have reached for his waistband?" Moreover, Cruz must have known that he was surrounded by officers with guns drawn and that it would have been foolish to attempt to shoot his way out. Thus, according to the court, for Cruz "to make such a gesture when no gun is there makes no sense whatsoever." Accordingly, a jury could doubt that Cruz reached for his waistband and could reasonably conclude that the officers lied. The court did acknowledge, however, that a jury could reach the opposite conclusion. "It might believe that Cruz thought he had the gun there, or maybe he had a death wish, or perhaps his pants were falling down at the worst possible moment."

The court cited other factors that a jury might find implausible in the officers' story. For example, "four of the officers said they saw Cruz reach for his waistband." According to the court, "[a] jury might be skeptical that four pairs of eyes had a line of sight to Cruz's hand" as he stood in the space between the open car door and the SUV. Additionally, although Cruz was left-handed, two officers testified that they saw Cruz reach for his waistband with his right hand. Under those circumstances, the court was of the view that a reasonable jury could doubt that Cruz would have reached for a non-existent weapon with his off hand.

The court also questioned the officers' claim that Cruz had gotten out of his vehicle and "stood in the doorway," but that after he was killed, the officers had to cut him free from his seat belt because he was "suspended" by it. The court asked itself the question of "[h]ow does a man who 'emerged fully' from a vehicle, and 'turn[ed] to face forward,' end up hanging from his seatbelt after he's shot?" The court explained that it is possible, "[b]ut it's also possible that the officers didn't wait for Cruz to exit his car—or reach for his waistband—and simply opened fire on a man who was trying to comply with their instructions to get down on the ground."

The only non-police eyewitness indicated that Cruz's feet did make it out of the car, but that Cruz had difficulty maintaining his balance. The witness described Cruz's movements as "slipping on the ground" or "falling down." According to the court, the version of the eyewitness with respect to whether Cruz had fully emerged from his SUV and was poised to attack differed from that of the officers. Based on the witness's testimony, a jury might find that Cruz was trying to get out of the car, but got caught in his seat belt.

Finally, in determining that a jury could reasonably conclude that the officers had lied, the court believed that the jury might find relevant the uncontroverted evidence that one of the officers who fired at Cruz had recited the exact same

explanation when he shot and killed another unarmed man two years later under very similar circumstances. In both cases, the officers testified, among other things, that the two unarmed men reached for their waistbands while the police had their guns trained on them.

Conclusion

The Ninth Circuit concluded that "[g]iven these curious and material factual discrepancies, the district court erred in ruling that only an unreasonable or speculative jury could disbelieve [the officers]' version of events." As to four of the officers and the *Monell* defendants, the court reversed the decision of the district court granting summary judgment.

However, the court affirmed summary judgment in favor of Officer Brown. Officer Brown was standing behind Cruz's vehicle on the passenger side, so he couldn't see whether Cruz reached for his waistband. He fired because he perceived an immediate threat when he heard gunshots that could have been coming from his fellow officers' weapons, a weapon Cruz was firing or both.

The court expressly declined to make a determination about the credibility of the officers, "because that's not our decision to make. We leave it to the jury."

8. *Allen v. City of Sacramento,* 234 Cal. App. 4th 41 (2015).

DOES A WRONGFUL ARREST OR DETENTION, WITHOUT MORE, SATISFY THE ELEMENTS OF THE BANE ACT (CIVIL CODE SECTION 52.1) THAT AN INTERFERENCE WITH CONSTITUTIONAL RIGHTS BE "BY THREAT, INTIMIDATION, OR COERCION?"

FACTUAL BACKGROUND

Plaintiffs were part of a group of homeless men and women who occupied different public and private properties at night in the City of Sacramento. City police officers informed Plaintiffs that staying overnight at those properties violated the City's camping ordinance and could subject Plaintiffs to arrest and loss of their personal property.

On three occasions in 2009, City police officers detained all persons at the lot, seized and removed Plaintiffs' personal property, and cited Plaintiffs for violating the camping ordinance.

Plaintiffs brought suit against the City for declaratory and injunctive relief challenging the City's enforcement of the camping ordinance. Plaintiffs also asserted a violation of Civil Code section 52.1 in the third cause of action.

PROCEDURAL BACKGROUND

The trial court sustained the City's demurrer to the causes of action for declaratory relief and for an injunction. The court also sustained the City's demurrer to the third cause of action, violation of the Bane Act.

Plaintiffs filed a timely appeal.

CALIFORNIA COURT OF APPEAL DECISION

With respect to the cause of action alleging a violation of the Bane Act, the Court of Appeal affirmed the order of the trial court granting summary judgment to the City. The court concluded that the arrests and confiscation of property did not amount to a "threat, intimidation, or coercion" within the meaning of the Act.

Civil Code section 52.1, also known as the Tom Bane Civil Rights Act, authorizes an action for injunctive and other equitable relief where a person, whether or not acting under color of law, interferes or attempts to interfere, "by threat, intimidation, or coercion," with the exercise or enjoyment by any individual or individuals of rights secured by state or federal law.

Here, Plaintiffs did not allege the use of excessive or unreasonable force by the police. They did not contend that this case was an excessive force case and they did not allege any intimidation by the City. Rather, Plaintiffs alleged that City police officers "threatened" to arrest homeless persons who had gathered at the subject properties and "threatened" to confiscate their property. The officers also allegedly "coercively" violated Plaintiffs' constitutional rights by "forcibly" detaining and citing Plaintiffs for violating the ordinance. Therefore, according to Plaintiffs, the police officers violated the Bane Act.

However, the Court of Appeal did not agree and concluded that the elements of the Bane Act were not satisfied; thus, the police officers were not liable for a violation of the Act. According to the court, there are two distinct elements for a section 52.1 cause of action. First, a plaintiff must show intentional interference or attempted interference with a state or federal constitutional or legal right; second, the interference or attempted interference was by threat, intimidation, or coercion.

The Court of Appeal concluded that the elements of "threat" or "coercion" were not met. Plaintiffs did not allege that any police officer threatened any Plaintiff with violence. According to the Court of Appeal, the alleged threats by the police officers to arrest homeless persons and confiscate their property did not rise to the level of "threats" necessary for a violation of section 52.1.

Neither was the element of "coercion" satisfied by Plaintiffs. Plaintiffs contended that the complaint sufficiently alleged "coercion" because City police officers arrested Plaintiffs "and an arrest is inherently coercive." The Court of Appeal disagreed. The court concluded consistent with *Shoyoye v. County of Los Angeles,* 203 Cal. App. 4th 947, 958 (2012), that a wrongful arrest or detention, without more, is insufficient to satisfy both elements of section 52.1. "Where coercion is inherent in the constitutional violation alleged, as it is in an unreasonably prolonged detention, section 52.1 requires a showing of coercion independent from the coercion inherent in the wrongful detention."

9. *Lisker v. City of Los Angeles,* No. 13-55374, 2015 WL 1260810 (9th Cir. March 20, 2015).

DOES THE DOCTRINE OF ABSOLUTE WITNESS IMMUNITY WHICH SHIELDS POLICE OFFICERS FROM LIABILITY FOR THEIR TESTIMONY EXTEND TO THEIR PRE-TRIAL ACTIONS?

FACTUAL BACKGROUND

Dorka Lisker was murdered in her home. She had been stabbed multiple times in the back and suffered a blow to the head. Her seventeen-year-old son, Plaintiff Bruce Lisker, was at the house when paramedics and police officers arrived. He was taken to the police station where he was interviewed by Detective Andrew Monsue.

During the interview, Lisker claimed that he arrived at his parents' home that morning. When no one answered the front door, he stated that he walked through a muddy area into the backyard, looked through a living room window, and saw a pair of feet on the floor. He then went to a sliding glass door and saw that the feet belonged to his mother, who was lying motionless on the floor. Lisker said that he attempted to enter the house through the kitchen window, but the screen on the window was nailed shut. He retrieved pliers from his car, removed the screen, and entered the house. Inside, he found his mother on the living room floor with two knives in her back. He called the paramedics who arrived with the police.

Detectives Monsue and Howard Landgren were assigned to investigate the Lisker homicide. They maintained a "Murder Book" which contained their notes, investigative reports, and photographs of the crime scene. A follow-up investigative report in the Lisker file stated that the detectives attempted to look into the house through all the backyard windows on the day of the murder and also ten days later during a reconstruction of the crime scene. However, the report stated that the detectives "could not see inside the house" without putting their faces against the glass due to "glare from the sun, coupled with the patio being partially covered with a roll-up canvas cover." A note in the file stated that the suspect "could not have seen [his] mother lying on the floor."

The follow-up report also stated that the detectives observed footprints in the mud along the east side of the house. The footprints "only led in the direction of the kitchen window and there were no footprints leading away from the side of the house." The report noted that bloody footprints were found throughout the house, and that the prints had a "wave-like sole design."

Lisker was charged with the murder of his mother. Detective Monsue testified at a juvenile detention hearing, a preliminary hearing, and at trial. Detective Landgren testified at the preliminary hearing and at trial. Both detectives claimed that the day of the murder had been "a very bright, sunny day, clear skies, very, very bright." Each claimed to have been unable to see through the back windows of the house because of glare from the sun and other obstructions. The

detectives also claimed that the shoeprints along the side of the house and inside the house closely resembled the shoes that Lisker had been wearing.

The prosecution argued that Lisker was guilty because the only footprints found in and around the house belonged to him, and because Lisker had lied during his interview with Detective Monsue about seeing his mother through the windows in the back of the house. The jury found Lisker guilty of second degree murder, and he was sentenced to sixteen years to life.

Lisker filed a federal habeas corpus petition in federal district court, alleging due process violations among other things. At an evidentiary hearing on the petition, Lisker presented evidence that it had been overcast on the morning of the murder, not bright and sunny. The court also found that the view of Dorka Lisker's body from outside the house would have been unobstructed.

Lisker also presented witnesses who testified that there were in fact two sets of prints in the mud outside the house, not one, and that one set of patterns did not match Lisker's shoes.

The district court found Lisker's due process rights had been violated because falsified evidence had been admitted at trial. The court granted the petition and the State dismissed the case because the evidence was stale. Lisker was released after spending twenty-six years in custody.

PROCEDURAL BACKGROUND

Lisker filed a § 1983 action seeking monetary damages from the City of Los Angeles and the two Los Angeles Police Department detectives for fabricating reports, investigative notes, and photographs of the crime scene during the homicide investigation.

Lisker voluntarily dismissed some of his claims and the court granted partial summary judgment to Defendants on other claims. The only claims remaining for trial were the falsification of evidence and *Monell* claims. The district court rejected the Defendants' claim of absolute witness immunity for the alleged pre-trial fabrications.

Defendants filed a timely Notice of Interlocutory Appeal from the denial of absolute immunity.

NINTH CIRCUIT DECISION

The Ninth Circuit affirmed the district court's denial of summary judgment on witness immunity grounds. The court concluded that the doctrine of absolute witness immunity, which shielded the two detectives from suit for their testimony, did not extend to their pre-trial actions.

Witnesses, including police officers, are absolutely immune from liability for testimony at trial. *Briscoe v. LaHue,* 460 U.S. 325, 345-346 (1983). The immunity also extends to preparatory activities "inextricably tied" to testimony, such as conspiracies to testify falsely. *Franklin v. Terr,* 201 F.3d 1098, 1102 (9th Cir. 2000).

However, the courts have determined that immunity for pre-testimony conduct "is not limitless." *Paine v. City of Lompoc,* 265 F.3d 975, 981 (9th Cir. 2001). In addressing questions of witness immunity, the courts have distinguished conspiracies to testify falsely from "non-testimonial" acts, such as tampering with evidence or preventing witnesses from testifying. *Id.* at 981-982. Thus, conspiracies to testify falsely are held to be immune while manufacturing a false tape-recorded interview or providing hush money to a would-be witness would not. *Spurlock v. Satterfield,* 167 F.3d 995,1001-1004 (6th Cir.1999).

Here, the court explained that the notes and reports in the Murder Book are analogous to the type of documentary and physical evidence, such as falsified videotaped interviews and forensic reports that fall outside the protection of absolute immunity. According to the court, the non-testimonial evidentiary value of the material in the Murder Book distinguishes it from pre-trial activity aimed exclusively at influencing testimony. Therefore, the court concluded that the material in the Murder Book fell outside the protection of absolute witness immunity.

The court also concluded that the allegedly falsified reconstruction of the crime scene and the photographs taken of the scene did not fall within the protection of witness immunity, because "a pretrial, out-of-court effort to…fabricate physical evidence…is not "inextricably tied"—or tied at all—to any witness' own testimony," even "[i]f a potential witness does happen to be involved." *Paine,* 265 F.3d at 982.

UPDATE

1. *Sheehan v. City and County of San Francisco,* 743 F.3d 1211 (9th Cir. 2014).

In this case, the Ninth Circuit overturned an order of the district court granting summary judgment to police officers who made a warrantless forcible entry into a room to take custody of a mentally ill woman. According to the Ninth Circuit, it is for the jury to determine whether the officers acted reasonably in forcing entry and whether the officers' actions provoked a violent confrontation for allegedly failing to de-escalate the situation.

The Ninth Circuit also held that the Americans with Disabilities Act (ADA), which requires government agencies to make reasonable accommodations for the disabled, applies to arrests.

On November 25, 2014, the U.S. Supreme Court granted a writ of certiorari. On March 23, 2015, the Court entertained oral argument.

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The Voting Rights Act: Where We've Been And Where We're Going

Friday, May 8, 2015 General Session; 9:00 – 10:15 a.m.

Sean D. De Burgh, Deputy City Attorney, Oroville
Derek P. Cole, City Attorney, Angels Camp, Oakley and Sutter Creek

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Notes:

Introduction

We have witnessed an upward trend in challenges to at-large voting systems throughout California during the last several years. These challenges have been aimed at cities and other similarly situated public agencies with significant minority populations or with a history of minority candidates losing elections. The principle issue in each of the pertinent cases has been minority vote dilution, which describes those instances where minority voters as a group, although not restricted from voting, are nevertheless unable to elect their preferred candidates as a result of being outvoted by the majority.

Historical Landscape

Challenges to at-large voting systems are generally premised on violation of the Federal Voting Rights Act of 1965 (FVRA) and/or the California Voting Rights Act (CVRA), explained in greater detail below. This paper will primarily address CVRA related issues, but some discussion of the FVRA is appropriate.

The Federal Voting Rights Act (42 U.S.C. § 1973 et seq.)

The FVRA is widely considered to be the most successful civil rights legislation in American history. The FVRA prohibits state and local governments from imposing voting laws that result in discrimination against minority groups. Section 2 of the FVRA

addresses the problem of vote dilution by prohibiting public agencies from redistricting or using methods of elections that impair the ability of a protected minority group to elect candidates of their choice on an equal basis with other voters.

Over the years, the FVRA has been amended in response to various court rulings. As one example, the Supreme Court of the United States ruled in *Mobile v. Bolden*, 446 U.S. 55, 66 (1980), that in order to prevail on vote dilution claims, plaintiffs must present proof of the voting law's discriminatory intent – a very difficult task. Responding to the *Mobile* case, Congress amended the Act in 1982 to provide that plaintiffs are not required to prove discriminatory purpose in order to establish a violation of Section 2.

A few years later, the Supreme Court articulated the test for determining whether an at-large method of election dilutes minority voting strength in the landmark case *Thornburg v. Gingles*, 478 U.S. 30, 50 (1986). Under the *Gingles* test, agencies must initially answer the following questions:

1) Is the minority group sufficiently numerous and geographically compact to constitute a majority in a single-member district?

2) Do the members of the minority group tend to vote alike? In other words, are the members of the minority group politically cohesive?

3) Does the majority vote "sufficiently as a bloc to enable it" to usually defeat the minority's preferred candidate?

Under *Gingles*, if the answer to these three questions is yes, then the court must secondarily determine whether, under the totality of circumstances, the minority group has a diminished opportunity to elect candidates of its choice. Only when the plaintiff satisfies all three *Gingles* conditions and the totality of the circumstances test must a public agency abandon its at-large method of voting and switch to district-based voting.

<u>California Voting Rights Act (Elections Code § 14025 et seq.)</u>

Similar to the FVRA, the CVRA prohibits public agencies from imposing an at-large method of election "that impairs the ability of a protected class to elect candidates of its choice or its ability to influence the outcome of an election." (Elections Code § 14027.) However, the CVRA *expands* the protections against vote dilution provided by the FVRA by eliminating the requirement that plaintiffs show a majority-minority ward or division is possible (i.e., the third prong of the *Gingles* analysis). Plaintiffs may prove a violation under the CVRA simply by proving the existence of "racially polarized voting" (see Election Code § 14028 (a)), which

is for all practical purposes, a combination of prongs 1 and 2 of the *Gingles* analysis described above. Plaintiffs are not required to demonstrate geographical compactness or concentration of the minority group to prevail under the CVRA. Presumably, the recent challenges to at-large voting have been brought under the CVRA because it does not require that the minority group be sufficiently numerous and geographically compact to constitute a majority in a single-member district in order to establish a violation. In short, it's easier for plaintiffs to make their case under the CVRA than the FVRA.

But just what does "racially polarized voting" mean? It means voting where there is a difference in the choice of candidates or other electoral choices that are preferred by voters in a protected class (minority group), and in the choice of candidates and electoral choices that are preferred by voters in the rest of the electorate (majority). For public agencies that hold at-large elections (which are many), where all voters elect each member of the governing board, bloc voting by the majority can render the minority vote meaningless. Whether racially polarized voting is occurring is determined by "examining results of elections in which at least one candidate is a member of a protected class or elections involving ballot measures, or other electoral choices that affect the rights and privileges of members of a protected class."

(Elections Code § 14028(b).) The CVRA specifically identifies the success rate of minority candidates that are preferred by the minority voting bloc as a circumstance that should be carefully considered when determining whether racially polarized voting is occurring.

Where it is determined that "racially polarized voting" exists, the prescribed remedy is for local governments to switch to district-based voting. (See Elections Code § 14029.) In a district-based electoral system, local governments split the jurisdiction into multiple majority-minority districts and allow voters only to elect candidates in the division where the candidate resides.

It is important to note that both the FVRA and CVRA allow successful plaintiffs to recover attorney fees.

Recent Developments

With this historical framework in mind, we turn to the reality that cities throughout California have been threatened or sued for alleged violations of the CVRA within the last several years. To emphasize the importance of this trend, I would note that of those cities that have had their at-large method of election challenged under the CVRA on the basis that racially polarized voting exists, I am unaware of any that have successfully defended the case. For the most part, these cases have resulted in changes to

the city's method of election and the city paying the plaintiff's attorney fees.

This rising tide of VRA claims against cities seemingly began in 2004, when the Lawyers Committee for Civil Rights (LCCR) filed suit against the City of Modesto in *Sanchez v. City of Modesto* (2006) 145 Cal.App.4th 660, on behalf of three Latino residents, claiming the city's racially polarized voting was limiting the ability of Latinos to be elected to office. At the time the City of Modesto was the fourth largest city in the state utilizing the at-large voting system. Although Latinos made up 25.6 percent of the city's population of 200,000 at the time of the suit, only one Latino had been elected to the city council since 1911. The case against Modesto ended in a settlement after citizens voted to switch from at-large to district-based voting on a ballot measure. Despite settling the case, the City of Modesto had to pay $3 million in fees to the plaintiff's lawyers and $1.7 million for its own lawyers.

Since the *Sanchez* case, cities have been on alert concerning compliance with the Voting Rights Act. Despite this alertness, many cities have been sued or threatened with suit for violation of the CVRA, including the Cities of Palmdale, Bellflower, Compton, Anaheim, Escondido, Whittier, Santa

Clarita, Merced, Ceres, Turlock, Los Banos, Fullerton, Highland, Riverbank, Santa Barbara, Tulare, and Visalia.

Application to Charter Cities

When its at-large voting system was challenged in recent years, the City of Palmdale argued on appeal that it was not subject to the California Voting Rights Act because it is a charter city. (*Jauregui v. City of Palmdale* (2014) 226 Cal.App.4th 781.) In evaluating the City's at-large voting charter provision, the Appeals Court held that while the provision addressed a municipal affair, it nevertheless stood in contradiction to state law because the evidence showed that in application the provision resulted in minority vote dilution. Thus, the court ruled that the CVRA applied to charter cities. The Appeals Court in *Jauregui* also affirmed the trial court's injunction that enjoined the certification of the city council election results pending implementation of the trial court's final plan. Therefore, *Jauregui* likely stands not only for the proposition that the CVRA's vote dilution provision applies to charter cities, but also that trial courts have wide discretion in fashioning appropriate remedies where minority vote dilution is found.

The Legislative Landscape

For those cities who wish to voluntarily transition from at-large voting to district based voting, Government Code section 34871 authorizes cities to submit the matter to voters for approval. Similar provisions exist for similarly situated public agencies, like Community Service Districts (Government Code § 61025), Water Districts (Water Code § 30730), and School Districts (Education Code § 5019).

Additional legislative fixes have been proposed or are being proposed in relation to similarly situated public agencies. For example, in the 2009-2010 Legislative Session, AB 2330 was introduced that would have imposed a claim filing requirement and 30-day response period before a CVRA lawsuit could be filed against a school district. This bill ultimately failed. However, AB 684 passed during the 2011-2012 Legislative Session, which provides a streamlined process for community college districts to change from at large elections to district based elections. Under AB 684 (now codified at Education Code § 72036), community college districts may change from at large to district based elections with only the concurrence of the California Community College Board of Governors (i.e., no need to submit the matter to the voters).

With regard to charter cities, Elections Code section 21620 confirms that upon the establishment of district based elections and thereafter, charter cities must ensure that the separate districts are as nearly equal in population in accordance with federal census data.

During the current Legislative Session, several CVRA related bills have been introduced. AB 182 would prohibit the use of district based elections that lead to minority vote dilution. In other words, AB 182 would make clear that the CVRA applies to district based elections as well as at large voting elections. A similar bill was vetoed by Governor Brown last year.

AB 245 has been introduced to make technical, non-substantive changes to the CVRA.

AB 254 would amend the Elections Code (Sections 1000, 1301, and 13112) to eliminate currently available election dates in March and April, thereby consolidating local government elections with statewide election dates.

AB 277 has been introduced in response to the *Jauregui v. City of Palmdale* case and is an attempt to codify the court's decision, as it pertains to the CVRA's application to charter cities. This bill would amend Section 14026 of the Elections Code by expressly including a charter city, charter county, or charter city and county within the CVRA's definition of "political subdivision."

AB 278, reintroduced by Assembly Member Roger Hernandez is likely the most significant pending legislation because it would force numerous cities that now elect council member through an at large voting system to switch to district based voting. Specifically, AB 278 would require a city with a population of 100,000 or more to switch to district based voting by simply adopting an ordinance and not submitting the matter to the electorate for approval. AB 278 is unsettling to many because it would force cities to change their fundamental relationship with citizens without their input (i.e., no electorate approval) and force cities where racially polarized voting do not exist to switch to district based elections nonetheless.

Unlike AB 278, that would mandate that all cities with a populations of 100,000 or more to transition to district based elections via ordinance, SB 493 would give general law cities the ability to transition to district based elections by ordinance without submitting the matter to voters for approval.

SB 437 has been proposed by State Senator Block and would simply express that it is the intent of the Legislature that elections held in California comply with the CVRA.

Several factors are impacting the CVRA's legislative landscape. Obviously, those proposing many of the bills identified herein are growing frustrated with the seemingly slow transition to district based elections. Proponents of these measures are increasingly concerned that with the growing minority populations throughout the state (especially Latino), minority voters are being disenfranchised through the utilization of the at large voting system. On the other hand, many cities and other similarly situated public agencies are understandably reluctant to make such a fundamental change to the relationship they have with their electorate. Moreover, many cities are unaware as to whether racially polarized voting is even occurring in their jurisdiction and are often only made aware of this issue if it is brought to their attention by way of a demand letter or lawsuit. Only in very recent years have we seen cities and other similarly situated public agencies proactively addressing this issue.

Another matter worthy of consideration is the role that the CVRA's attorney fee provision is playing in all of this. Many elected officials and citizens are becoming increasingly frustrated with what they perceive as extortionist tactics employed by Plaintiff lawyers bringing CVRA claims against cities and other public agencies. The amount of attorney fees being paid to Plaintiff lawyers in recently settled CVRA cases is significant and should be of concern to public agency lawyers throughout the state.[1] To illustrate this point, a recent Open Letter to Assemblymember Das Williams and State Senator Hannah-Beth Jackson was published in the Santa Barbara Independent where the concerned citizen stated the following: "Surely, this is not what the law intended; if so, it should be renamed the 'Lawyer's Get Rich Quick' Act. . . . If you and your colleagues truly believe that at-large elections are inherently discriminatory, as the California Voting Rights Act has been interpreted by the courts, then simply mandate that all cities in California be carved up into little districts. Why create a process that is nothing but a cash cow for opportunistic lawyers, at the expense of the very people the law purports to benefit?"[2] This frustration with the amount of public dollars being expended to pay plaintiff's attorney fees in CVRA

[1] The City of Palmdale was ordered to pay approximately $3.5 million in Plaintiff's attorney fees (on appeal); the City of Anaheim settled its case, but paid approximately $1.2 million in Plaintiff's attorney fees; the City of Modesto paid approximately $3 million in Plaintiff's attorney fees.
[2] http://www.independent.com/news/2015/mar/11/california-voting-rights-act-should-not-be-gift-la/

cases is not isolated and is undoubtedly impacting CVRA's legislative landscape, as well as how cities and other public agencies throughout the state are responding to the risks of CVRA related claims.

Defense Strategies

The most obvious defense strategy when your city's voting system has been challenged is to establish that there has been no occurrence of racially polarized voting, as defined in Elections Code Section 14026(e). In litigation, we refer to this as the affirmative defense of failure to state a cause of action. This can be difficult and costly as it will often require the retention of an expert to carefully comb through election data and identify statistical trends. However, if cities wait until they are threatened with suit or are actually sued to assess whether racially polarized voting is occurring, this procrastination may be costly in terms of both litigation strategy and budget. A pre-litigation evaluation of the city's voting system and voting practices of citizens will undoubtedly aid decision makers in assessing risk when or if the challenge comes, or be the impetus for making proactive changes to the city's voting system.

As alluded to herein, the devil is in the details when it comes to assessing whether racially polarized voting is occurring. To aid in the potential defense of these claims, city officials should be readily aware of not only the ethnic make-up of their city, but the voting trends of its constituency. It is recommended that cities gather and keep information relating to each election that occurs including, but not necessarily limited to, names of candidates, type of election, qualifications of each candidate, experience of each candidate, relevant newspaper or other articles, identities of supporters, and sources of financial support. This data can help identify minority electoral trends and may serve useful down the road when/if the city's electoral system is challenged.

Another consideration when a city's voting system has actually been challenged is the plaintiff's standing to bring the claim in the first place. It perhaps goes without saying, but Plaintiffs challenging the city's voting system should be from the minority group whose voting rights are allegedly being infringed upon by the existing voting system.

Additionally, some public agencies have mounted defenses based upon equal protection and substantive due process bases, but none have proved fruitful to date.

What Should Cities Do?

With the rising tide of claims against cities for Voting Rights Act violations in the legislative landscape described above, it is imperative that cities proactively assess their vulnerability to such claims. The recent flurry of cases against cities for violations of the Voting Rights Acts have primarily been initiated by private plaintiffs and brought under the CVRA because of its lesser threshold of proof; however, cities should remember that both Federal and State Justice Departments are also potential plaintiffs in this regard, as they routinely investigate and file lawsuits alleging violations of the Voting Rights Acts.

Cities with no pending threats or suits for violation of the Voting Rights Acts face several different options, the appropriateness of which will necessarily depend on whether racially polarized voting indeed exists in your City. If your City has a significant minority population and uses the at-large method of election, there is the potential that racially polarized voting exists. If your City has a history of minority candidates losing elections, or has a significant minority population with little or no minority representation on the governing board, then the likelihood of racially polarized voting is even greater, and it is recommended that you analyze voting practices to determine whether it exists. This is typically accomplished by retaining a statistical expert who

carefully combs through census and election data to ascertain the presence and/or degree of racially polarized voting. In the event the statistical study confirms that racially polarized voting exists, then your city is likely vulnerable to claims for violation of the Voting Rights Acts and should evaluate its options to minimize or eliminate the risk associated therewith.

The first and perhaps most obvious option available to cities is the status quo – to stick with the at-large system and hope that activists do not bring an action against the city or wait until the Legislature potentially forces you to transition to district based elections. After all, many feel at-large voting offers citizens more power and holds candidates more accountable since voters have the ability to elect all, rather than just one, governing official. However, I would note that for those cities where racially polarized voting is occurring, continuing the status quo is probably comparable to playing Russian roulette, as it may only be a matter of time before a plaintiff's lawyer sends a demand letter.

Another option available to cities is to voluntarily convert from an at-large method of election to district-based elections using the process set forth in Government Code 34871. The switch to district-based voting will ordinarily involve carving out majority-minority districts, which can be a difficult logistical task to complete. Though the effort to transition from at-large voting to

district-based voting takes considerable time and money in the present, the transition (if done correctly) will immunize the city from the harm that could arise from a lawsuit. This option also ensures that the power to control the redistricting process will lie with the elected representatives and local voters, rather than the courts. Nonetheless, it should be remembered that with this approach you still run the risk that the electorate could reject the change to district-based elections and leave the city vulnerable to a CVRA lawsuit thereafter. This is likely one of the risks that lawmakers have sought to address with bills like AB 278 (Cities with 100,000+ population switch to district based elections with ordinance) and AB 493 (allow general law cities to switch to district based elections via city ordinance).

Alternatively, cities may consider blended elections (i.e., a combination of at-large and district-based voting). This option is likely to be more challenging administratively, and seats elected through the at-large method remain at risk of a lawsuit. However, this risk is lower than maintaining an all at-large board. Other voting systems, like cumulative voting, where each voter has as many votes as there are open seats and can distribute them among several candidates or give them all to one candidate, are experimental at this stage and are not proven remedies.

In summary, if your city has a significant minority population and/or there is concern that racially polarized voting may be occurring, your city should seriously consider the rising tide of Voting Rights Act claims against cities and other public agencies. Have an expert analyze your census and election data and confirm whether racially polarized voting exists in your city. The lawsuits briefly described herein are extremely costly and garner negative publicity. Because of the attorney fee provisions under both the CVRA and FVRA, plaintiffs have nothing to lose and much to win, regardless of whether the case goes to trial. This no-risk litigation environment for plaintiffs makes jurisdictions highly susceptible to Voting Rights Act claims, and cities should take steps now to evaluate and minimize their exposure to such claims.

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Labor And Employment Litigation Update

Friday, May 8, 2015 General Session; 10:30 a.m. – 12:15 p.m.

Timothy L. Davis, Burke, Williams & Sorensen

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Notes:

EMPLOYMENT LAW UPDATE FOR MAY 2015 LEAGUE OF CALIFORNIA CITIES CONFERENCE

Timothy L. Davis
BURKE, WILLIAMS AND SORENESEN, LLP
www.bwslaw.com

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CASELAW UPDATE

Discrimination

Horne v. District Council 16 (2015) 234 Cal.App.4th 524.

Plaintiff Raymond Horne applied to be a union organizer with Defendant District Council 16 International Union of Painters and Allied Trades (District 16). District 16 is a labor organization comprising of 16 local unions of drywall finishers, glaziers, painters and floor coverers. One member union is Glaziers Local No 718 and Mr. Horne served as a member of the executive board. Mr. Horne who is African-American was denied the position of union organizer from District Council 16 and Caucasian applicants were selected instead. Mr. Horne sued for race discrimination under the Fair Employment and Housing Act (FEHA).

During discovery, Mr. Horne admitted to being convicted of possession for narcotics for sale and served a prison sentence. Unbeknown to Mr. Horne, this conviction meant that federal law precluded Mr. Horne from being a union organizer under the Labor-Management Reporting and Disclosure Act. District 16 was also previously unaware of Mr. Horne's criminal history and as a result this did not factor into the decision not to hire Mr. Horne as a union organizer. District Council 16 moved for summary judgment on the grounds that Mr. Horne could not maintain a discrimination action under FEHA for failure to hire because he was not qualified to hold the position. The Superior Court granted the summary judgment motion, the Court of Appeal affirmed the decision and the Supreme Court transferred the matter back to the Court of Appeal.

The Court of Appeal noted that the adequacy of discrimination claims are initially a question of law for the trial court to resolve under the well established McDonnel Douglas burden shifting standard. Under this standard, the Court of Appeal further noted that generally to establish a *prima facia* case of discrimination for failure to hire, Mr. Horne would need to show: 1) he was a member of a protected class; 2) he was qualified for the position he sought; 3) he suffered an adverse employment action such as denial of an available job; and 4) some other circumstance suggests a discriminatory motive.

In this case, the parties did not dispute that 3 out of the 4 elements for Mr. Horne's *prima facia* case was met. District Council 16 relied on the after-acquired evidence doctrine and moved for summary judgment on the grounds that Mr.

Horne was not qualified for the position of union organizer based on his narcotics conviction. The Superior Court agreed with District Council 16 and granted the motion for summary judgment on the grounds that Mr. Horne failed to meet the element that he was qualified for the position since he was disqualified as a matter of federal law.

Mr. Horne argued that the after-acquired evidence doctrine could not be relied upon to obtain summary judgement. Relying on the 2014 California Supreme Court decision in *Salas v. Sierra Chemical*, 59 Cal.4th 407, the Court of Appeal agreed with Mr. Horne. As in the *Salas* decision, the Court of Appeal noted that the after-acquired evidence doctrine or unclean hands defenses are not complete defenses to a worker's claims under the FEHA, although they do affect the availability of remedies. Since District Council 16 was not aware of Mr. Horne's disqualifying narcotics conviction at the time it denied him the position of union organizer, the Court of Appeal reversed the trial court's decision to grant summary judgement.

Weaving v. City of Hillsboro (9th Cir. 2014) 763 F. 3d 110.

Plaintiff Matthew Weaving was employed as a police officer for the Defendant City of Hillsboro in the State of Oregon (City). Mr. Weaving was terminated after three years of employment for interpersonal problems between him and other police department employees. After his termination, Mr. Weaving brought suit under the Americans with Disability Act (ADA) and contended that he was covered by the ADA because his ADHD "substantially limited" his ability to engage in two major life activities: working and interacting with others. He further claimed that the City fired him because of his disability in violation of the ADA. The matter proceeded to a jury trial and the jury returned a verdict in Mr. Weaving's favor. The City appealed the decision after its motions for judgment as a matter of law and new trial were denied.

During his employment application process, Mr. Weaving disclosed that he had a childhood history of ADHD but stated that he did not believe that ADHD continued to affect him. Mr. Weaving also passed his pre-employment psychological examination. Approximately one year after his employment, Mr. Weaving applied for and received a promotion to sergeant. During the application process for the promotion to sergeant, Mr. Weaving received a "psychological leadership assessment," conducted by an off-site psychologist. The assessment was documented in a six page report. The report noted that although Mr. Weaving

would tend to be dominant in interpersonal relationships, he "projects a comfortable social presence." Mr. Weaving also received positive remarks in his first annual performance evaluation and it noted that his conduct toward the public was positive. It also noted that his communication style with coworkers came across as arrogant.

A year after his promotion, Mr. Weaving issued a disciplinary notice on one his subordinate officers. The officer believed that the discipline was disproportionate and filed a grievance with the City's human resources department. In response, Mr. Weaving was placed on administrative leave with pay while an internal affairs investigation was conducted.

While on administrative leave, Mr. Weaving testified that it occurred to him that his interpersonal difficulties at work may have been due to his ADHD. He met with a psychologist who subsequently diagnosed him with adult ADHD. His psychologist communicated this diagnosis to the City's police chief in a letter. The following day, Mr. Weaving sent a letter to the City's human resources director enclosing the letter from his psychologist. In his letter, he also noted that with continued treatment he could improve his performance and requested "all reasonable accommodations" including reinstatement to his position.

The internal affairs investigation included interviews of 28 employees of the police department. The investigation concluded that Mr. Weaving was described as "tyrannical, unapproachable, non-communicative, belittling, demeaning, threatening, intimidating, arrogant and vindictive." The investigation concluded that Mr. Weaving's communication style "suggests he does not possess adequate emotional intelligence to successfully work in a team environment, much less lead a team of police officers."

On the recommendation of the lieutenant who conducted the internal affairs investigation, the City conducted a medical evaluation and fitness for duty examination. Two doctors found Mr. Weaving fit for duty despite his ADHD diagnosis.

The Court of Appeal noted that a qualifying disability must "substantially limit a major life activity as compared to most people in the general population." Noting applicable regulations under the regulations of the ADA, the Court of Appeal stated that determining whether an impairment is substantially limiting a major life activity requires an individualized assessment.

In this case, the Court of Appeal reaffirmed that the ADA recognizes work and interacting with others as major life activities. In rejecting that Mr. Weaving's ADHD diagnosis substantially impaired his ability to work, the Court of Appeal concluded no reasonable jury could conclude this in light of Mr. Weavings employment record which proved he could the perform the job. With respect to the major life activity of interacting with others, the Court of Appeal noted:

> "Recognizing interacting with others as a major life activity of course does not mean that any cantankerous person will be deemed substantially limited in a major life activity. Mere trouble getting along with coworkers is not sufficient to show a substantial limitation…"

The Court of Appeal went on to note that the inability to get along with others must be sufficiently severe and characterized on a regular basis with severe problems, "for example consistently high levels of hostility, social withdrawal, or failure to communicate when necessary." For reasons similar to its holding that Mr. Weaving's ADHD did not substantially limit his ability to work, the Court of Appeal determined that as a matter of law no jury could find he met this standard for interacting with others.

Reasonable Accommodation

Swanson v. Morongo Unified School District (2014) 232 Cal.App.4th 954.

Plaintiff Lauralynn Swanson is an elementary school teacher with over 30 years' experience teaching kindergarten through sixth grade. Ms. Swanson was initially hired as a technology/reading specialist and computer laboratory teacher at one of the elementary schools in Defendant Morongo Unified School District (District). In the summer following her first year of employment, Ms. Swanson was diagnosed with breast cancer and underwent a mastectomy. Following the surgery, Ms. Swanson missed most of the school year while on medical leave for chemotherapy treatments.

When she was ready to return to work, the District offered her a fifth grade classroom assignment. Instead, Ms. Swanson objected to this assignment on the grounds that her health prevented her from learning a new assignment and stated her preference to be assigned to an open second grade teacher assignment. Ms. Swanson explained that since she recently taught second grade at another school

district and it would be easier for her to perform that assignment. Because the District had plans to fill the second grade classroom position, the District offered her a kindergarten teacher assignment. Ms. Swanson expressed concern about this position and explained that working with these small children could negatively impact her health in light of her weakened immune system. After she reluctantly accepted the kindergarten teacher assignment, Ms. Swanson became ill and went on another leave of absence. Incidentally, Ms. Swanson attributed her illness to working with the small children in kindergarten. After returning to work from her leave of absence, she received poor evaluations and her contract was not renewed. She filed an action against the District in the Superior Court for, among other things, failure to accommodate in violation of the FEHA. The District brought a motion for summary judgement on the grounds that it approved all Ms. Swanson's leave of absences and provided reasonable accommodations to her. The Superior Court granted the summary judgment motion and Ms. Swanson filed an appeal.

In overturning the granting of the motion for summary judgment, the Court of Appeal noted several principles regarding an employer's obligation to reasonably accommodate an employee with a disability. The Court of Appeal noted that when providing a reasonable accommodation, the employer does not have to create a new job, reassign another employee or promote a disabled employee. The Court of Appeal also noted that the FEHA does not obligate an employer to choose either the best accommodation or the specific accommodation an employee seeks, but rather only a reasonable one.

The District argued that it met its obligation under the FEHA when it approved all Ms. Swanson's leave of absence requests and offered her the kindergarten teaching assignment which Ms. Swanson accepted. The District also argued that it was not obligated to grant Ms. Swanson's preferred accommodation for the second grade teacher assignment. The Court of Appeal disagreed and noted that an employer does have a mandatory obligation to reassign a disabled employee to a vacant and funded position at the same level. In addition, the Court of Appeal reaffirmed that a disabled employee seeking reassignment to a vacant position is entitled to preferential treatment over other qualified workers. Accordingly, the trial court's granting of summary judgment was overturned because the District did not assign Ms. Swanson to the open second grade teacher assignment.

Nealy v. City of Santa Monica (2015) 234 Cal.App.4th 359.

Plaintiff Tony Nealy was a solid waste operator for Defendant City of Santa Monica. Mr. Nealy injured his knee on the job and underwent two surgeries.

Initially, his physician determined him to be temporarily totally disabled. After a period of time, he was released to "light duty" and the City engaged in the interactive process with him. The City used an interactive process committee comprised of representatives from human resources, risk management, the City attorney's office and someone from the department where the injured employee worked. During this process, the City advised Mr. Nealy that it could offer him either a lateral transfer or demotion. In response, Mr. Nealy requested to be placed in a grounds-keeper position. Mr. Nealy's treating physician reviewed the job description for the grounds-keeper position and concluded that Mr. Nealy could perform the essential functions of the position. The City accepted his request to be transferred to this position. While performing the duties of his new position, he had trouble climbing which was an essential function of the job and then he injured his lower back when his previously injured knee buckled.

Thereafter, Mr. Nealy was placed on temporary total disability for a period of weeks and then "released to light duty, semi-sedentary office work." If light duty was not available, Mr. Nealy's physician stated that he would be temporary totally disabled. After several more meetings with the interactive process committee, all sides agreed that Mr. Nealy could not perform the essential functions of the grounds-keeper position. While Mr. Nealy agreed he could not perform the grounds-keeper position, he stated during the interactive process that he did not agree with all his physician's work restrictions and believed that he could perform the functions of his prior position as a solid waste operator. Based on the current restrictions Mr. Nealy's physician provided in his medical reports, the City identified a number of essential functions of the solid waste operator position that Mr. Nealy could not perform. The City also concluded that the restrictions were so severe that it believed that it could reasonably accommodate Mr. Nealy in either the grounds-keeper or solid waste operator position.

Having determined that it could not accommodate Mr. Nealy, the City then reviewed with him all vacant and available positions. The City identified four vacant positions, three would have been promotions and one position in the planning department would have been a lateral move. The City informed Mr. Nealy that he could apply for any of them that he believed he was qualified and to monitor the City's website for future listings of open positions. Additionally, the City gave Mr. Nealy a deadline to apply for a position or it would apply for a disability retirement on his behalf through Cal-PERS. Mr. Nealy did in fact apply for the open position in the City's planning department. During the application process, the City's human resources department determined that he did not meet the minimum qualifications for this position and he was not offered the position.

The City then proceeded with the employer generated disability process though Cal-PERS.

Mr. Nealy filed an action in Superior Court based on, among things, that the City failed to reasonably accommodate him in his prior solid waste operator position and failed to transfer him to the open and available position in the planning department. The City brought a motion for summary judgment which was granted by the Superior Court. Mr. Nealy appealed.

On appeal, the Court of Appeal noted that Mr. Nealy arguably raised a triable issue of fact whether one of the job duties the City contended he could not perform was in fact an essential function of the solid waste operator position. Nevertheless, the Court of Appeal stated that this alone was not a sufficient basis to overturn the ruling because the City also presented evidence that there were other essential functions of the job that Mr. Nealy could not perform and he did not raise triable issues on those. In particular the Court of Appeal noted:

> "The fact that one essential function may be up for debate does not preclude summary judgment if the employee cannot perform other essential functions [of the position] even with accommodation."

On the issue of whether the City failed to transfer him to an open vacant position, the Court of Appeal noted that in prior judicial decisions where triable issues of fact existed on this subject, the employee was able to produce evidence that there were open available positions during the period, the employee met the qualifications of at least one such position and the employer failed to offer it. Here, the Court of Appeal noted it was undisputed that Mr. Nealy was not qualified for the planning position. Accordingly, the ruling on the summary judgment was upheld.

Wrongful Termination in Violation of Public Policy

Ferrick v. Santa Clara University (2014) 231 Cal.App.4th 1337.

Plaintiff Linda Ferrick was employed with Defendant Santa Clara University as a senior administrator in its real estate asset department. Ms. Ferrick complained to her employer about multiple alleged wrongdoing by her immediate supervisor. Specifically, she complained that her supervisor sent inappropriate emails, drove the University golf cart on a suspended license, and drank alcohol on duty. More

importantly, she also complained that her supervisor violated income tax reporting laws and accepted kickbacks on new leases for University students. After an internal audit in her department, the supervisor she complained about made the decision for the University to terminate her employment. She sued on a single cause of action of wrongful termination in violation of public policy otherwise known as a Tameny claim. The Superior Court granted the University's demurrer without leave to amend on the grounds that she did not allege a violation of a fundamental public policy to support her claim and she appealed.

The Court of Appeal noted that an action in tort seeking damages for discharge from employment in violation of public policy "is an exception to the general rule, now codified in Labor Code Section 2922, that unless otherwise agreed by the parties, employment is terminable at-will." The Tameny decision stands for the proposition that when an employer's decision to discharge an employee violates fundamental principles of public policy, the discharged employee may maintain a tort action and recover damages. To prevail on such a claim, the employee would need to show all of the following: 1) the employee was employed by the employer; 2) the employer terminated the employee; 3) a violation of public policy was the motivating reason for the termination; and 4) the termination harmed the employee.

The Court of Appeal held that the public policy supporting a claim of wrongful termination must meet the following four criteria: 1) the policy must be supported by either constitutional or statutory provisions; 2) the policy must be public in the sense that it "inures to the benefit of the public" rather than serving merely the interests of the individual; 3) the policy must be articulated at the time of the discharge; and 4) the policy must be fundamental and substantial.

Applying these standards, the Court of Appeal agreed that most of Ms. Ferrick's complaints failed to meet this standard. In overturning the trial court's decision to grant the demurrer without leave to amend, the Court of Appeal held that the allegation of a kickback scheme could violate the Penal Code and as such, this allegation was sufficiently fundamental to support a Tameny claim.

Family Medical Leave Act (FMLA) and California Family Rights Act (CFRA)

Richey v. Autonation, Inc. (2015) 60 Cal.4th 909.

Plaintiff Avery Richey was an at-will employee who worked for Power Toyota Cerritos (Toyota) which is a division of Defendant Autonation, Inc. Toyota had a policy in its employment manual noting that outside work while on an approved CFRA leave was prohibited. Mr. Richey received this policy manual. A few years into his employment, Mr. Richey began plans to open a restaurant. While employed for Toyota, Mr. Richey marketed his restaurant by distributing sample menus and business cards.

Mr. Richey injured his back while working at home. In accordance with the FMLA and CFRA, Mr. Richey submitted a note from his physician which stated he could not work. Toyota approved his leave and extended it on multiple occasions. Toyota also sent Mr. Richey a letter informing him that employees on leave could not pursue outside employment and he could contact his supervisor if he had any questions. Mr. Richey stated that he did not contact his supervisor regarding this letter because he believed that the letter misstated company policy and the policy did not apply to him because he did not accept employment with another company but rather was working as the owner of his own business.

After being informed that Mr. Richey was working at this restaurant, Toyota sent an employee to observe him. The employee testified that he observed Mr. Richey sweeping, bending over, and hanging a sign using a hammer. Mr. Richey admitted to having handled orders at the front counter and answering the phone at the restaurant while on leave, but claimed that these tasks were within the limited light duties his doctor authorized.

Toyota fired Mr. Richey for working on outside employment while on medical leave in violation of company policy. This termination occurred approximately four weeks before Mr. Richey's approved medical leave was set to end. After obtaining his right-to-sue letter from the California Department of Fair and Employment and Housing, Mr. Richey sued Toyota and his direct supervisor for claims that included racial discrimination, harassment, retaliation for taking approved leave under the CFRA, and failure to reinstate following CFRA leave.

Toyota's motion to compel arbitration was granted. After an 11-day hearing before a retired judge who served as the arbitrator, the termination was upheld. The arbitrator denied the racial discrimination and hostile environment claims and

Mr. Richey did not appeal this portion of the decision. The arbitrator also ruled that Toyota did not violate either the CFRA or FMLA when it terminated Mr. Richey while on leave because the termination was for violating company policy and not simply because he was on an approved leave. The Superior Court upheld the arbitrator's decision. The Court of Appeal reversed the Superior Court on the grounds that Toyota failed to reinstate Mr. Richey after his approved leave in violation of the CFRA. Toyota appealed the decision to the Supreme Court.

The California Supreme Court noted that the right to reinstatement under the CFRA or FMLA is "unwaivable but not unlimited." Citing to applicable regulations under the CFRA, the Supreme Court went on to note:

> "An employee has no greater right to reinstatement or to other benefits…of employment than if the employee had been continuously employed during the CFRA leave period.' This defense is qualified, however, by the requirement that 'an employer has the burden of proving, by a preponderance of the evidence, that an employee would not otherwise have been employed at the time of reinstatement is requested in order to deny reinstatement."

In overturning the Court of Appeal decision, the Supreme Court held that because Toyota proved at arbitration that it terminated Mr. Richey for violating company policy and not simply being on an approved leave, Mr. Richey's claim for retaliation and failure to reinstate under the CFRA failed as a matter of law.

Workers Compensation Exclusivity Doctrine

Wright v. State of California (2015) 233 Cal.App.4th 1218.

Plaintiff Monnie Wright was a correctional officer at San Quentin State Prison, who lived on the San Quentin premises, in a unit he rented through a lease from his employer, Defendant State of California (State). Mr. Wright was not required to live on the premises and paid market rate on his lease. Mr. Wright was injured when he fell in the course of his walk from home to his actual place of work. Following his injury, Mr. Wright sought and obtained workers' compensation for his injury. Thereafter, he filed a tort action in Superior Court. The State filed a motion for summary judgment on the grounds that workers' compensation was the exclusive remedy for his injury based on the "premises rule." The premises rule provides that the employment relationship commences once the employee enters

the employers premises and thus it is an exception to the "going and coming rule" which provides that commuting to and from work is outside the employment relationship. The Superior Court agreed with the State and granted summary judgment.

The Court of Appeal traced a line of cases going back to the early 1900s to analyze the going and coming rule. It noted that this rule was a "slippery concept" and "difficult to apply uniformly." The Court of Appeal went on to note as follows:

> "In an effort to create "a sharp line of demarcation" as to when the employee's commute terminates and the course of employment commences, courts adopted the premises line rule, which provides that the employment relationship generally commences once the employee enters the employer's premises…Succinctly put, prior to entry on the employer's premises, the going and coming rule ordinarily precludes recover; after entry, injury is generally presumed compensable (under workers' compensation) as arising in the course and scope of employment."

However, the Court of Appeal noted that the "bunkhouse rule" must be considered under the facts of this case. Similar to the going and coming rule, the Court of Appeal traced the "bunkhouse rule" line of cases back to the early 1900s. In essence, the bunkhouse rule provides that an employee's injury falls within the confines of the workers' compensation act when the employee is required to live on the employer's premises. While the Court of Appeal noted that Mr. Wright had a lease with his employer that undermined the notion he was required to live at the prison to perform his duties as a correctional officer, the Court of Appeal held there was at least a triable issue of fact on this issue and the summary judgment ruling was overturned.

NEW LAWS EFFECTIVE IN 2015

Fair Employment And Housing Act (FEHA)

AB No. 1443

Effective January 1, 2015, this amendment to the FEHA expressly covers unpaid interns and volunteers. This amendment also expressly extends the FEHA's provisions on religious beliefs and accommodations to unpaid interns and volunteers. Employers should update their harassment, discrimination and retaliation policies and include unpaid workers in their training.

AB No. 1660

Effective January 1, 2015, this amendment to the FEHA expands the national origin protected category to include discrimination on the basis of possessing a driver's license issued to an undocumented person who can submit proof of identity and California residency. AB No. 1660 also provides that any driver's license information obtained by the employer must be treated as private and confidential and exempt from disclosure under the Public Records Act. However, actions taken by an employer that are required to comply with federal I-9 verification requirements under the Immigration and Nationality Act do not violate California law.

AB No. 2053

Effective January 1, 2015, this amendment to the FEHA requires that prevention of "abusive conduct" be included in FEHA's required sexual harassment training. Abusive conduct is broader than the "protected categories" harassment under the FEHA. It is defined as "conduct by an employer or employee in the workplace, with malice, that a reasonable person would find, hostile, offensive, and unrelated to an employer's legitimate business interests." It also expressly provides that it may include:

> "Repeated infliction of verbal abuse, such as the use of derogatory remarks, insults, and epithets, verbal or physical conduct that a reasonable person would find threatening, intimidating, or humiliating, or the gratuitous sabotage or undermining of a person's

work performance. A single act shall not constitute abusive conduct, unless especially severe and egregious."

Currently, the FEHA provides that there is not a private right of action for "abusive conduct." Employers should update their harassment, discrimination, and retaliation policies and provide training to address "abusive conduct."

Labor Code

AB 2751

Effective January 1, 2015, this clarifies that the $10,000 Labor Code penalty against an employer who discriminates or retaliates against an employee who complains of Labor Code violations will be awarded to the employee who suffered the violation.

Healthy Workplaces, Health Families Act of 2014

AB No 1522

Effective July 1, 2015, the Act provides paid sick leave to all employees that work 30 days or more per year at an accrual rate of 1 hour for every 30 hours works. Employers are permitted to restrict the use of the sick leave until after 90 days of employment. Employers may limit the use of paid sick leave to 24 hours or 3 days in each year of employment and can cap accrual at 48 hours or 6 days. Employers are not required to pay out any accrued and unused sick leave upon termination. Employers can set reasonable minimum increments for us, but the designated increment cannot exceed two hours. Employers are prohibited from retaliating or discriminating based on use of the leave. Employees must give "reasonable notice" if the use is foreseeable. Although the requirement to provide the use of leave is effective July 1, 2015, the posting requirements under the Act are effective January 1, 2015.

It is an open question whether the Act is unconstitutional as applied to charter cities who have exclusive authority to provide for employee compensation. See *County of Riverside v. Superior Court* (2003) 30 Cal.4th 278.

Fair Chance Employment Act

AB No 1650

Following up on the "Ban the Box" legislation in 2014 (which precludes an employer from asking about criminal convictions in the initial employment action), effective January 1, 2015, the Act requires private contractors who bid on public construction projects to certify that they will not ask applicants to disclose criminal history information at the time of the initial employment application. This new section of the Act does not apply to a position that requires an employer under state or federal law to conduct a criminal conviction history background check or to any contract position with a criminal justice agency as defined by Section 13101 of the Penal Code. This new section also does not apply when the employer obtains workers from a hiring hall pursuant to a bona fide collective bargaining agreement.

Ethics (Conflicts When Representing Multiple Boards And Confidentiality/Waiver Of Attorney-Client Privilege Issues)

(MCLE specialty Credit for Ethics)

Friday, May 8, 2015 General Session; 10:30 a.m. – 12:15 p.m.

Steven L. Dorsey, City Attorney, Buena Park, Norwalk and San Marino

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Notes:

AVOIDING CONFLICTS AND PROTECTING CONFIDENCES WHEN REPRESENTING MULTIPLE LOCAL GOVERNMENT OFFICIALS, BODIES AND ENTITIES

Steven L. Dorsey, City Attorney
Buena Park, Norwalk and San Marino

Introduction and Scope of Paper

Every attorney owes each of his or her clients an undivided duty of loyalty. This proposition is straightforward enough, but its application can be tricky, especially when an attorney has more than one client and the interests of those clients at times collide. Fully understanding the rules regarding client conflicts and the protection of client confidences is essential for all practicing attorneys.

The starting point for any conflicts analysis is defining the client and determining whether the attorney is representing or has represented any other clients with adverse or potentially adverse interests. For most attorneys, the question of who is the client does not pose much in the way of a challenge. For those representing cities, however, the issue can be complex. Not only are cities made up of multiple layers of personnel and advisory and decision-making bodies, but many cities also are part of other government entities such as joint powers authorities. The nature of local government is ripe for disputes and conflicting interests within the local entity itself and among multiple entities addressing common issues.

This paper will look at the issues of representing multiple public agencies, potential multiple clients within the same public agency and a combination of public and private clients whose interests might conflict. The paper also addresses the protection of client confidences when representing multiple clients, both before and after the representation ends. Finally, it discusses conflict waivers: when they are needed, how they must be constructed, and who can execute them.

Attorneys representing public agencies, and especially city attorneys, are faced with at least three sources of law that address their ethical conduct; the Rules of Professional Conduct, due process considerations and the various statutory public agency conflict of interest statutes. This paper will be largely limited to the Rules of Professional Conduct. It is necessary for the practitioner, however, to remember that the city attorney's obligations can be affected by due process and statutory conflicts

of interest and remember to consider these sources of law before deciding on the proper course of conduct.[1]

I. Sources of Law and Guidance

An attorney seeking to fully understand the scope of his or her professional duties under the Rules of Professional Conduct must look to: (1) the California Rules of Professional Conduct and opinions applying those Rules, (2) statutory provisions, including the State Bar Act, and (3) case law.[2]

The Rules of Professional Conduct. The Rules of Professional Conduct (the 'Rules') are adopted by the State Bar's Board of Governors and approved by the California Supreme Court.[3] The Bar maintains a Standing Committee on Professional Responsibility and Conduct, which issues formal opinions applying the Rules; some local bar associations likewise have ethics committees that issue opinions.[4]

According to Rule 1-100(A):

> Although not binding, opinions of ethics committees in California should be consulted by members for guidance on proper professional conduct. Ethics opinions and rules and standards promulgated by other jurisdictions and bar associations may also be considered.

While the American Bar Association's Model Rules explicitly contemplate their usage in establishing civil liability, California's Rules are only "designed to provide guidance to lawyers and to provide a structure for regulating conduct through discipline." Comment 2 to Rule 3-600 (citing *Ames v. State Bar* (1973) 8 Cal.3d 910). As they were not drafted to be used as a basis for civil liability, the "violation of a rule does not itself give rise to a cause of action for damages caused by failure to comply with the rule." Comment 2 to Rule 3-600 (citing *Stanley v. Richmond* (1995) 35 Cal.App.4th 1070, 1097).

Efforts to update the Rules of Professional Conduct have been ongoing for over a decade. The Commission for the Revision of the Rules of Professional

[1] The California League of Cities has several helpful resources dealing with these other ethical considerations for city attorneys. *See* Attachment A for a short list of some of these resources.
[2] Rule 1-100(A).
[3] Business & Professions Code Section 6010 and 6076.
[4] *See, e.g.*, the archive of ethics opinions issued by the Los Angeles County Bar Association Professional Responsibility and Ethics Committee, available online at http://www.lacba.org

Conduct was activated in 2001, following the American Bar Association's overhaul of the Model Rules in 2000, but the work of the Commission was essentially shelved late last year. A second Commission has now been created with direction to submit proposed rules for final consideration by the California Supreme Court no later than March 31, 2017.

Case Law. Given that violations of the Rules are "not intended to create new civil causes of action," per Rule 1-100(A), the case law that has developed in this regard is not a compendium of malpractice actions, but rather considers disqualification motions brought on the basis of alleged breaches of the duties owed under the Rules. Nearly all of the cases discussed in this paper arose as a result of such a motion.

Statutes. Rule 1-100(A) also explicitly states that other "applicable law" shall govern the conduct of Bar members, including, particularly, the State Bar Act (codified at Business & Professions Code Section 6000, *et seq*.).

A city attorney seeking clarity in this field will quickly find that these sources were largely drafted with the private sector in mind - or represent a decision-maker's best effort at applying private sector concepts to public sector representation. As one Court of Appeal decision noted, "[t]he decision we issue today is another application of rules developed in the private sector which do not squarely fit the realities of public attorneys' practice." *In re Lee* (1991) 1 Cal. App. 4th 17, 34. This disconnect can yield strained results.

II. Rule 3-310 of the Rules of Professional Responsibility

Rule 3-310 –Avoiding the Representation of Adverse Interests-governs ethical conflict of interests for all attorneys, including city attorneys.[5] While application of Rule 3-310 can be complicated, especially when determining whether a written waiver is required or mere disclosure is sufficient, Rule 3-310 can be summarized as requiring a written waiver whenever the interests of two clients conflict, or potentially conflict, the attorney obtained confidential information about a current or prior client that is relevant to the representation of another current client or the attorney is faced with a challenge to his or her undivided loyalty to a client.

Rule 3-310 also applies to situations where an attorney has or had a private "legal, business, financial, professional, or personal relationship with a party or witness in" a matter in which the attorney is representing a client." Thus, while most

[5] *See* Attachment B for the text of Rule 3-310.

full-time city attorneys will not very often face situations in which they represent adverse clients, they must keep in mind that Rule 310 also applies to their personal relationships. Of course, due process and general public official conflict of interest statutes such as the Political Reform Act and Government Code Section 1090 will also often apply to these private relationships.

In cases of *potential* conflict, the Rules allow attorneys to accept representation of more than one client in a matter in which the interests of the clients potentially conflict, provided both clients execute informed written consent. Rule 3-310(C)(1). In defining what constitutes a 'potential conflict,' the Court of Appeal has said that "[a] potential conflict is a reasonably foreseeable set of circumstances which could impair the attorney's ability to fulfill his or her professional obligations to each client in the proposed representation." *Havasu Lakeshore Investments, LLC v. Fleming* (2013) 217 Cal.App.4th 770, 779.

The Rules also state that an attorney may conceivably accept or continue representation of more than one client in a matter in which the interests of the clients *actually* conflict if informed written consent is obtained from both parties. Rule 3-310(C)(2). "An *actual* '[c]onflict of interest between jointly represented clients occurs whenever their common lawyer's representation of the one is rendered less effective by reason of his representation of the other.'" *Blue Water LLC v. Markowitz* (2011) 192 Cal.App.4th 477, 488-489 (quoting *Spindle v. Chubb/Pacific Indemnity Group* (1979) 80 Cal.App.3d 706, 713).

As stated above, the concurrent representation of two clients whose interests are presently adverse, without a written waiver, is strictly forbidden and will result in automatic disqualification of the offending attorney. Rule 3-310(C)(3), *Flatt v. Superior Court (Daniel)* (1994) 9 Cal.4th 275, 284. In this regard, the California Practice Guide on Professional Responsibility notes that "[s]imultaneous representation of parties with conflicting interests impairs each client's legitimate expectation of undivided loyalty from the attorney." Vapnek, et al., Cal. Practice Guide: Professional Responsibility, Section 4:31. In addition, the representation of two currently adverse parties in the context of a hearing or other judicial proceeding is likewise prohibited. *Klemm v. Superior Court* (1977) 75 Cal.App.3d 893. Even when such representation is permitted, local political considerations can prevent a city attorney from undertaking such matters.

Applying these standards for determining whether a conflict exists is generally fact intensive and involves the question whether the dual representation will challenge the attorney's loyalty to one or more clients or could require the disclosure of confidential information from one client to the other.

III. Identifying the Client

For purposes of governing attorney-client privilege issues, Evidence Code Section 951 defines a "client" simply as a "person who, directly or through an authorized representative, consults a lawyer for the purpose of retaining the lawyer or securing legal service or advice from him in his professional capacity..." Public entities are included in this definition through Evidence Code Section 175 (defining 'people' to include 'public entities'), and local governments are expressly defined as public entities in Evidence Code Section 200. A long line of case law supports the conclusion that public entities have the right to assert the attorney-client privilege. *See, e.g., Sutter Sensible Planning, Inc. v. Board of Supervisors* (1981) 122 Cal.App.3d 813, 824.

For an attorney representing an organization, Rule of Professional Conduct Rule 3-600 (organization as client) provides the starting point to determining the attorney's client. This rule makes it clear that the organization is the client: "[i]n representing an organization, a member shall conform his or her representation to the concept that the client is the organization itself, acting through its highest authorized officer, employee, body, or constituent overseeing the particular engagement." Rule 3-600(A).

The Rule is silent as to its application to governmental entities. Despite this omission, both the state courts and the California State Bar apply Rule 3-600 to public entities. (*See, e.g.*, California State Bar Opinion No. 2001-156 (stating that "[a]lthough this [Rule 3-600] does not explicitly indicate that a governmental entity is an organization within the scope of the rule… the rule applies to a municipal corporation and is best viewed as applicable to all governmental entities.") In addition, the California Rules of Professional Conduct are modeled on the American Bar Association (ABA) Model Rules. Rule 3-600 finds its genesis in ABA Model Rule 1.13, the commentary on which expressly states that the Rule "applies to governmental organizations."

The courts have also either assumed or held that the Rules apply to public agency attorneys. For example, California Supreme Court held in *People ex rel. Deukmejian v. Brown* (1981) 29 Cal.3d 150 that the California Attorney General was subject to the Rules of Professional Responsibility. As the Court stated,

> "We find nothing …to justify relaxation of the prevailing rules governing an attorney's right to assume a position adverse to his clients or former clients, particularly in litigation that arose during the period of the attorney-client relationship. In short, the Attorney

> General cannot be compelled to represent state officers or agencies if he believes them to be acting contrary to law, and he may withdraw from his statutorily imposed duty to act as their counsel, but he may not take a position adverse to those same clients."

Id. at 157.

A. The Client within the Client: Counseling and Representing Different Aspects of a Local Public Entity

As a practical matter, governmental organizations can only act through their officers and employees. This may involve counseling individuals in their official capacities, representing individuals sued in their official capacities in actions brought by third parties, representing the entity in actions brought by current or former officers or employees or representing a semi-independent or independent body of the entity that may develop interests adverse to the entity itself. Ethical questions thus arise as to the governmental attorney's representation of individuals or bodies within the public agency.

1. Individual Officers and Employees

Providing legal advice to the officers and employees of a given entity is one of the primary services provided by the governmental attorney. This general duty may be found in statute (*see*, *e.g.*, Government Code Section 41801 (providing that "[t]he city attorney shall advise the city officials in all legal matters pertaining to city business")), county or city charter (*see*, *e.g.*, Los Angeles City Charter Section 271(b) ("[t]he City Attorney shall be the legal advisor to the City, and to all City boards, departments, officers and entities."), and sometimes in local ordinances (*see*, *e.g.*, Beverly Hills Municipal Code Section 2-3-1002(B) (providing that "advis[ing] the council and all city officers in all matters of law pertaining to their offices" as one of the functions of the office of the city attorney)).

In carrying out these duties, governmental attorneys must take care to avoid inadvertently developing attorney-client relationships with the individuals they counsel. Subsection (D) of Rule 3-600 addresses this by providing that:

> In dealing with an organization's directors, officers, employees, members, or shareholders, or other constituents, a member shall explain the identity of the client for whom the member acts, whenever it is or becomes apparent that the organization's interests are or may become adverse to those of the constituent(s) with whom the member

> is dealing. The member shall not mislead such a constituent into believing that the constituent may communicate confidential information to the member in a way that will not be used in the organization's interest if that is or becomes adverse to the constituent.

Maintaining these boundaries can be challenging, particularly where the attorney works on a regular basis with an employee whose interests in a given situation may become adverse to the organization. The governmental attorney's clear explanation of the scope of his or her limited representation is essential in forestalling the development of an unintended relationship that could impair the attorney's representation of the organization.

In *Ward v. Superior Court*, the California Court of Appeal considered whether the Los Angeles County Counsel's office had developed an independent attorney-client relationship with the former assessor when, as a taxpayer and individual, he sued two county supervisors and other city employees for defamation and civil rights violations. *Ward* (1977) 70 Cal.App.3d 23. The former assessor claimed that the county counsel's office should be disqualified under the predecessor of Rule 3-310 from representing the county in the action because, among other things, the office allegedly had developed a separate attorney-client relationship with him by providing him legal advice during his tenure and in his capacity as the Assessor. *Id.* at 28. He further claimed that "County Counsel has counseled me on personal matters." *Id*. The county counsel's declaration asserted that "neither County Counsel nor members of his staff have represented [the former assessor] in personal matters unrelated to his duties and responsibilities as a public officer." *Id*.

Based on the record before it, the Court of Appeal determined that:

> … it is clear from the record that if an attorney-client relationship existed between the county counsel and [the former Assessor], it arose out of the county counsel's obligation pursuant to the Los Angeles County Charter to represent and advise county officers in matters pertaining to their duties and to exercise exclusive charge and control of all civil actions in which the county or any county officer is concerned or is a party.

Id. at 32. Analogizing to authority involving corporate counsel, since there was little authority applying the Rules to the public sector, the Court held that the county counsel's office had not developed a separate attorney-client relationship with

the Assessor and was able to continue its representation of the county in the action brought by the Assessor. *Id.*

Ward stands for the general rule that providing to one official or employee within a governmental entity will typically not create a separate attorney-client relationship. Managing expectations in daily dealings with the many individuals that serve a public entity is necessary, though, to avoid developing relationships that might create separate attorney/client relationships.

The city attorney should make it clear the city attorney's representation extends only to the employee working in the course and scope of employment with the city. Such information can be added to employee handbooks or included in ordinances detailing the city attorney's duties. Another approach is to include a notice in the city attorney's website alerting individuals that the city attorney's office only represents the entity itself, and its officers, directors, and employees *acting in their official capacities*. *See, e.g.*, the city attorney page for the City of Fairfield, which states, "[t]he City Attorney's Office provides legal services for the City Council, City officials, departments, and commissions *in conducting City business*."[6] (Emphasis added.) Some city attorneys send yearly memos to city employees advising them of the limit of the city attorney's scope representation.

2. Semi-independent and Independent Bodies within a Single Organization

Conflict concerns can be more complicated when a city includes boards or other entities that enjoy a degree of autonomy. These arrangements can mean that the City includes more than one potential client.

Civil Service Commission of San Diego County v. Superior Court (1984) 163 Cal.App.3d 70, addresses the conflicts issues posed by advising governmental organizations that include semi-independent sub-entities. In this case, the San Diego County Counsel simultaneously advised both San Diego County as an organization and one of its constituent parts, the San Diego Civil Service Commission, on a regular basis. The problem of representing these two parts of the county came to a head when two employees of the County of San Diego Department of Social Services made internal complaints regarding their respective assignments and classification actions taken by their department. These complaints were turned over to the commission, which was authorized to investigate such complaints and make rulings based on specified findings. Under the county's charter, the commission's decisions

[6]Available online at www.fairfield.ca.gov/gov/attorney

were final and binding on the county, "unless overturned by the courts on appeal." *Id*. at 77.

In the course of investigating the allegations, the county counsel's office, and one deputy in particular, advised both the commission and the Department of Social Services on the matter under investigation. When the commission ultimately ordered reinstatement of the two employees, the county sued to overturn the decision. Given county counsel's prior advice to the commission on the same matter, the commission sought to have county counsel disqualified.

In considering the matter, the *Civil Service Commission* court drew a "critical distinction" between that case and *Ward*. *Id*. at 77. In *Ward*, the constituent agency at issue (the assessor's office) was wholly subordinate to the government entity (the county), while here, the San Diego Civil Service Commission had been granted powers and duties that rendered it "quasi-independent" from San Diego County, as evidenced by the charter language requiring the county to abide by the commission's determinations on matters within their authority. *Id*. Thus, the court held that "[w]here an attorney advises or represents a public agency with respect to a matter as to which the agency possesses independent authority, such that a dispute over the matter may result in litigation between the agency and the overall entity, a distinct attorney-client relationship with the agency is created." *Id*. at 78. Thus, the county counsel was disqualified from representing the county in this litigation because the office had developed an attorney-client relationship with both the county and the semi-independent commission.

The California State Bar's Standing Committee on Professional Responsibility and Conduct considered *Ward* and *Civil Service Commission* in Formal Opinion No. 2001-156, WL 34029610) ("Formal Opinion 2001-156"). This opinion addressed whether advising constituent sub-entities or officials of a city on the same matter gave rise to an impermissible conflict of interest. For purposes of the opinion, the committee was asked to contemplate a hypothetical in which City of Prosperity City Attorney advised both the mayor of the charter city and the council as a whole on the legality of a proposed loan. The hypothetical mayor disagreed with the advice, which the rest of the council followed. The Mayor accused the city of attorney of having a conflict of interest in advising both the council and the mayor on the matter.

The committee analyzed the relationship between the city attorney and the city as follows:

> "The charter is a legislative enactment which reflects a policy determination that a single city attorney is responsible for all legal

> matters involving the city and that the city is a single municipal corporation with responsibility for its operations divided among various officers, none of whom is given the power to act independently of the city. As a result, neither the mayor nor the city council, independent of the city itself, established an attorney-client relationship with the city attorney by seeking legal advice on proposed ordinances, because neither had the potential to become the city attorney's client against the other. The city attorney does not represent the city council or the mayor; in advising the council and the mayor, the city attorney represents the municipal corporation as an indivisible unit. There is no attorney-client relationship formed with the component parts, because the component parts cannot function as independent entities under the City of Prosperity's charter." Formal Opinion 2001-156

The committee went on to offer the following useful two part test for determining whether a city attorney has a conflict when advising different officials or sub-entities of the city:

> "The following two-part test is a tool that can assist in determining whether a city attorney faces a potential conflict of interest governed by rule 3-310(C)(1) when asked to advise different bodies or officials within the city government regarding a matter: Do constituent sub-entities or officials (a) have a right to act independently of the governing body of the entity under the city charter or other governing law so that a dispute over the matter may result in litigation between the agency and the overall entity (footnote omitted) and (b) have contrary positions in the matter. Both elements must be present to create a potential conflict of interest governed by rule 3-310(C)(1). (Footnote omitted.) Even when both elements are present, the result for disqualification purposes is not always predictable under current law. *People v. Christian and Civil Service Commission*, as well as other cases cited above, suggest that a court might be less rigorous in interpreting the scope of the Rules of Professional Conduct relating to conflicts of interest when applied to governmental attorneys than to other attorneys." (Footnote omitted.) Formal Opinion 2001-156

In contrast to the hypothetical mayor situation addressed in the State Bar's opinion, housing authorities, rent control boards, parking authorities, and similar organizations usually are treated as part of the city organization, but actually can be

legally independent from the cities that formed them. Many of these entities can sue or be sued by their authorizing city.

As a practical matter, the risk of conflict between these entities and the city is slight where the governing body or a majority of the governing body of the independent entity is the city council. The risk of conflict increases if the governing body is made up of independent members. The city attorney, if his or her office represents the independent entity, will be presented with a likely conflict if the independent entity desires to take action that is adverse to the interests of the city. Depending upon the circumstances of the potential dispute, either a written conflict waiver will be required or outside counsel will need to be retained.

For those city attorneys whose cities have independent component parts, it is prudent to identify and prepare for this potential source of conflicts in order to head off future ethical problems. City attorneys should review their agency's organizational structure and focus on the ability of its various elements to exercise their own authority and anticipate any possible conflicts that may arise. Consider whether an ethical wall within the city attorney's office will be sufficient to safeguard the confidences and interests of the various clients served while meeting the duty of loyalty owed to each, or whether separate counsel will be necessary to adequately represent the interests of both parties.

B. Representing Clients Outside of the City Organization

A significant difference exists between the situation just discussed when the city attorney is representing a sub-client within a city organization and when the city attorney represents a separate public or private client. In the first instance, the potential ethical issues are part and parcel of the representation of the city. In the second situation, the attorney has made or will make a decision to represent the second client. Further, there is no question the attorney is representing two clients. If the interests of both clients possibly conflict, the city attorney must consider when and whether a waiver or disclosure is required and the contents of the waiver and disclosure. These issues will be discussed below.

IV. Disclosures and Conflict Waivers

As discussed above, Rule 3-310(C) allows for the concurrent representation of parties whose interests potentially or actually conflict if the parties execute "informed written consent." Not surprisingly, however, there are limitations on the actual availability of waivers in such situations. This section discusses when disclosure rather than waivers is permitted, the requirements for drafting an enforceable conflict

waiver, who may execute waivers, the availability of blanket waivers, and situations in which waivers will not be available due to the particular circumstances of the representation.

A. Written Disclosure

Rule 3-310(B) provides certain conflict situations that require written disclosure of the interest to the client or former client, but do not require written waivers. These situations are as follows:

> (1) The member has a legal, business, financial, professional, or personal relationship with a party or witness in the same matter; or
>
> (2) The member knows or reasonably should know that:
>
> > (a) the member previously had a legal, business, financial, professional, or personal relationship with a party or witness in the same matter; and
> >
> > (b) the previous relationship would substantially affect the member's representation; or
>
> (3) The member has or had a legal, business, financial, professional, or personal relationship with another person or entity the member knows or reasonably should know would be affected substantially by resolution of the matter; or
>
> (4) The member has or had a legal, business, financial, or professional interest in the subject matter of the representation.

Aside from situations involving the attorney's private interests, it can be difficult to ascertain when waivers are not required and disclosure is sufficient.[7] The most common situation in which disclosure is permitted involves prior clients of the attorney where the attorney did not obtain confidential information about the client that could be used by the new client to the disadvantage of the former client. In general, the best advice is to obtain waivers if there is any question about whether mere disclosure will be sufficient.

B. What must be included in a Conflict Waiver?

[7] Discussion points 2 through 6 under Rules 3-310 provide helpful information for determining whether disclosure will be required.

As discussed earlier, written conflict waivers signed by the affected clients are required, in general, when the interests of two clients conflict or potentially conflict. In order to secure a waiver, the Rules require obtaining from each client "informed written consent," a term it defines as meaning "the client's or former client's written agreement to the representation following written disclosure." Rule 3-310(A)(2). One court elaborated on the proper scope of such disclosures by stating that:

> Attorneys who undertake to represent parties with divergent interests owe the highest duty to each to make a full disclosure of all facts and circumstances which are necessary to enable the parties to make a fully informed decision regarding the subject matter of the litigation, including the areas of potential conflict and the possibility and desirability of seeking independent legal advice.
>
> *Klemm, supra*, 75 Cal.App.3d 893 at 901.

The California Practice Guide on Professional Responsibility offers the following sample disclosures of adverse consequences of the representation that could be included in written disclosures to clients with an actual conflict:

- That you may be tempted to favor the interests of one client over the other;
- That you may be required to withdraw from representing one or all of the clients;
- That you may not be able to present appropriate claims or defenses in the matter;
- That your obligations to one client may be impaired as a result of your obligations to the other clients;
- That you may be restricted from advocating a client's position forcefully for fear of losing the confidence of the other clients;
- That you may be required to limit your representation and not be able to give each client complete legal advice as a result of your obligations to other clients. Vapnek et al., Cal. Practice Guide: Professional Responsibility (The Rutter Group, 2014) ¶ 4:76.

In summary, an adequate conflict waiver must inform each client of the potential, specific adverse consequences that may arise from the multiple representation. This includes the risk that the attorney may need to withdraw from the representation of one or both parties if litigation results between the two clients. . Detailed information related to the specific issues involved in the representation is required. When representing a public agency, it is also appropriate to disclose potential political public relations consequences that could arise for the agency from the representation of the agency by an attorney who represents another client with interests adverse to the public agency.

When the letter addresses a potential conflict, it is necessary to address the developments that could lead to a prohibited conflict requiring the attorney to withdraw from one or both of the clients. Disclosure of the consequences of granting a waiver cannot be overemphasized.

C. Blanket Waivers and the "Hot Potato" Rule

Cities retaining law firms are sometimes presented with a "blanket waiver" requiring the city to waive in advance all possible conflicts that may arise in the future so that the law firm can continue to represent or later commence representation of other clients whose interests may conflict with the city in the future. These "blanket waivers" are more commonly presented by large private law firms that might not want to lose the opportunity to represent lucrative private clients by taking on a less lucrative public client in a small matter.

In 1989, the State Bar's Standing Committee on Professional Responsibility and Conduct issued an opinion on the propriety of requiring a potential client to execute a blanket waiver of the client's right to disqualify that attorney in any other matter, based on a breach of the attorney's duty to maintain confidences and/or to avoid conflicts of interest. Formal Opinion 1989-115, WL 253263. In considering such waivers, the committee was rather lukewarm to the concept, finding as follows:

> … the execution of an advance waiver of conflict of interest and confidentiality protections is not per se improper; that to the extent that the waiver of confidentiality is "informed," it is valid; that to the extent that a potential conflict ripens into an actual conflict, the advance waiver may or may not be sufficient depending upon the degree of involvement and the nature of the subsequent conflict; that regardless of the validity of the waiver, it cannot be

> asserted as a defense to a disciplinary proceeding charging incompetent performance of legal services; and that under no circumstances may the agreement be used for the purposes of limiting the lawyer's civil liability for malpractice.

While the opinion does not conclude that blanket waivers are invalid, it underscores the risks associated with this type of waiver.

Blanket waivers also are sometimes employed as a way to avoid application of the "hot potato" rule. This rule provides that an attorney representing two clients whose interests conflict cannot drop one client, usually the smaller one, in favor of the other client or drop an existing client in order to take on a new client whose interests conflict with an existing, usually smaller, client. *Flatt v. Superior Court* (1994) 9 Cal.4th 275, 288. Even if the attorney has no confidential information relevant to both clients, jettisoning one client to take on another may breach the attorney's duty of loyalty. *American Airlines, Inc. v. Sheppard, Mullin, Richter and Hampton* (2002) 96 Cal.App.4th 1017, 1044.

D. Who may execute a Conflict Waiver?

A question can arise within a city as to who has the authority to execute a conflict waiver on behalf of the city. There is no explicit authority addressing this issue.

Evidence Code Section 953 provides that "the client" holds the privilege. Rule 3-600(A), as discussed earlier, states that "the client is the organization itself acting through it highest authorized officer, employee, body or constituent overseeing the particular engagement." Since in most cases this is the city council, usually only the city council will have the authority to grant the waiver.

Some city attorneys take the position that they or the city manager can grant waivers. This is especially common in situations where the conflict is relatively minor in nature or the city attorney's grant of authority in the city's charter or ordinances is broad. Any uncertainty regarding the authority to grant waivers, though, and the validity of a waiver can be resolved by having the city council either approve the waiver or adopt a policy permitting waivers to be executed by a designated public official. In the absence of such an exception, the safest course of action is to have waivers approved by the city council.

E. When are Conflict Waivers Prohibited?

Rule 3-310(C) is phrased in such a way as to imply that conflict waivers are always available, even in cases of actual conflict. However, there are circumstances in which waivers will not be permitted. An excellent discussion of the myriad scenarios that fall into this category may be found in The Rutter Group's California Practice Guide on Professional Responsibility. *See*, The Rutter Group ¶¶ 4:28 – 4:159.7. For purposes of city attorneys, many of these scenarios will not apply and are thus not discussed here. However, some of the listed circumstances can be presented in the public sector and are therefore considered below.

First, as stated above, if in the course of the joint representation of two clients, the matter proceeds to hearing or trial and an actual conflict develops between the clients, the attorney cannot continue to represent both conflicting interests, and no waiver as to the conflict will be effective. *Klemm*, *supra*, 75 Cal.App.3d at 898, where the court found that "[a]s a matter of law a purported consent to dual representation of litigants with adverse interests at a contested hearing would be neither intelligent nor informed." In the public sector, such a development may ensue in instances in which a lawsuit is filed against the city, its officers, and individual employees, and discovery reveals that one or more of those individuals failed to follow the city's policies or procedures. The individual(s) will then be at odds with the city and its officers, and joint representation would no longer be permissible or, in most situations, constitute sound public policy.

Second, if a new client requests that its identity or information material to a full disclosure be kept confidential, the attorney is unable to offer complete disclosure to existing clients and cannot procure the informed consent required by Rule 3-310. A conflict waiver is also not available if the joint representation would be prohibited. For example, a city attorney who performs prosecutorial functions may not serve as defense counsel. *People v. Rhodes*, (1974) 12 Cal.3d 180. Further, an attorney after having acted as a public prosecutor is prohibited from "advising in relation to or taking any part in the defense" of the same matter under Business & Professions Code Section 6131.

A client who is not capable of giving consent cannot offer informed consent and no waiver involving such a client will be effective. *See* Los Angeles County Bar Association Formal Opinion 471 (1993). Similarly, "a client cannot waive a conflict that makes it unlikely that the lawyer can represent the client competently." *Ibid*.; s*ee* also Rule 3-110(A), which provides that a member of the State Bar "shall not intentionally, recklessly, or repeatedly fail to perform legal services with competence."

Finally, a conflict waiver involving joint representation of two or more clients on the same matter should discuss Evidence Code Section 962. Evidence Code Section 962 provides that where two clients are jointly represented on a matter of common interest, neither may assert the attorney-client privilege to prevent disclosure to the other jointly-represented client of communications made to their shared attorney within the scope of the representation.

F. Examples of Waiver Situations

In general, cities are obligated to defend and indemnify city employees. *See*, Government Code Sections 825, 995 and 995.2. Thus, there is no inherent conflict presented by a city attorney or outside counsel representing both an employee and the city. Nevertheless, a conflict might develop in the future. For example, the attorney might learn during the development of the case that the employee committed fraud, performed services beyond the scope of employment or engaged in some other action that would create a possible cause of action by the city against the employee. Since it is necessary to let the employee know that the attorney will no longer be able to represent the employee if one of these factors should come to light, a written waiver under Rule 3-310(C)(1) is required to defend both the city and the employee. These limitations should be clearly explained in the waiver.

The situation is somewhat different with an independent sub-client within the city organization. Here, as discussed above, there is a greater likelihood that the city attorney might be representing the board or commission as a separate client from the city. Usually this relationship does not give rise to an ethical conflict. However, the possibility of a conflict should be anticipated, and the city attorney should have a plan for handing this situation before it arises.

Normally, representation of the sub-entity will be a part of the duties the city attorney assumes upon taking office. If disputes in the future seem probable and the office is sufficiently large, the city attorney might consider assigning specific attorneys to the sub-entity and establishing an ethical wall. Similarly, the city can establish a legal office separate from the city attorney charged with the duty of representing that entity. Alternatively, the city attorney can consider retaining outside counsel to represent the entity on an on-going basis or on those matters that appear most likely to create an ethical conflict. Whatever approach is selected, it is important that the city attorney not allow a situation to develop where the city attorney's office is precluded under the Rules from representing the city in a dispute with the sub-entity.

The ethical issues involved in representation of a separate public or private client are fairly obvious as it is always clear that the attorney represents two separate clients. Although the method for resolving the ethical issues are the same whether representing separate public or private clients, the political aspects of these situations can be markedly different.

Representing a private entity with interests adverse to a city is more likely to give rise to political and practical problems for the city attorney than representing a potentially adverse public agency. Waivers can be more difficult to obtain and, even if obtained, the credibility of the city attorney is more likely to be called into question than when representing a public agency client. Thus, it is important for the city attorney to carefully analyze the potential conflicts that can arise before retaining a private client and determine whether the consequences of retaining the client warrants having to resolve these potential ethical and legal issues if a conflict could develop in the future.

If the city attorney decides to represent the client and obtain waivers, it is critically important, as discussed earlier, that the waiver letters disclose all potential repercussions that can be presented to the city by approving the waiver. This disclosure can even extend to informing the city that the city attorney's credibility could be called into question due to the existence of the ethical conflict.

Conflicts involving two public entity clients are usually not as politically charged. Nevertheless, it is equally important that the waiver letters fully disclose all ethical issues involved in representing two public entities whose interests might conflict in the future.

It is unlikely that a full-time city attorney will be presented with a situation involving private or public clients with adverse interests to his or her city because the full-time city attorney will usually represent only the city. Joint powers authorities are one example, though, that can present conflicts for both full-time and contract city attorneys.

A city attorney might be asked by his or her city to draft a joint powers agreement, which will be a separate legal entity from the authority's members. This will usually not involve ethical considerations unless the city attorney represents other parties to the joint powers agreement or is expected to represent the joint powers authority once it is created. In the first situation, the city attorney will need waivers from both cities to represent the first city in drafting the agreement. In fact, depending on the terms of the joint powers agreement, this might be one of the rare situations where an attorney can obtain waivers and represent both parties. This will

usually not create any political problems because both cities will share common interests and normally will be adverse in only the most technical terms.

Drafting the agreement with an expectation that the attorney will end up representing the joint powers authority after it is created presents a different ethical issue. In this case both the full-time and part time city attorney must disclose to the city that is retaining the attorney to draft the agreement that the attorney has a potential conflict due to this potential financial consideration. It would also be advisable for the attorney to obtain a waiver from the city.

Finally, a city attorney might be asked to serve as general counsel to a joint powers authority whose membership includes his or her city. Such representation is possible from a practical standpoint if the members of the joint powers authority have formed the authority based on a common purpose.

Typically there will be no conflicts between the member city and the authority when the authority is formed. For that reason, written disclosure of the representation might be sufficient under Rule 3-310(B). However, careful consideration needs to be given to potential areas of disagreement that can develop down the road. For example, a member city might become so disgruntled that it desires to withdraw from the authority. If the authority's counsel is the city attorney of the disgruntled city, a conflict exists. Thus, even in this example, a waiver might be advisable because it is not always possible to ascertain that no conflict is likely to develop.

Since the joint powers authority is a separate legal entity, the entity members of the authority will not become clients of the authority general counsel. Thus, the general counsel should not need to obtain waivers when representing the authority or any of his or her other clients in a matter adverse to a member entity merely because that entity is a member of the joint powers authority.

V. Protecting Client Confidences

Whether serving public or private sector clients, an attorney's duty to preserve the confidentiality of client information involves public policies of paramount importance. *In Re Jordan* (1974) 12 Cal.3d 575, 580. This section of the paper will discuss the practicalities of carrying out this duty.

A. The State Bar Rule and Statutory Provisions on Confidences

The duty of an attorney to protect client confidences is addressed in Rule 3-100(A) and Government Code Section 6068, subdivision (e)(1).

Rule 3-100(A) provides that "[a] member shall not reveal information protected from disclosure by Business and Professions Code section 6068, subdivision (e)(1) without the informed consent of the client, or as provided in paragraph (B) of this rule." As Comment 2 to Rule 3-100(A) states:

> The principle of client-lawyer confidentiality applies to information relating to the representation, whatever its source, and encompasses matters communicated in confidence by the client and therefore protected by the attorney-client privilege, matters protected by the work product doctrine, and matters protected under ethical standards of confidentiality, all as established in law, rule and policy.

B. Practical Steps in Protecting Confidences

California's Rules of Professional Conduct are silent with respect to the measures attorneys should employ to maintain client confidences. The corresponding Model Rule, however, includes commentary offering parameters for determining the reasonableness of an attorney's efforts to protect client information:

> Factors to be considered in determining the reasonableness of the lawyer's efforts include, but are not limited to, the sensitivity of the information, the likelihood of disclosure if additional safeguards are not employed, the cost of employing additional safeguards, the difficulty of implementing the safeguards, and the extent to which the safeguards adversely affect the lawyer's ability to represent clients (*e.g.*, by making a device or important piece of software excessively difficult to use).[8]

How such considerations are implemented will necessarily differ between city facilities and private law firms. In many city halls, it is not uncommon to share file storage space between or amongst departments, an arrangement that may render confidential information vulnerable to inadvertent disclosure. Similarly, it may be the case that administrative assistant vacancies or absences are handled by sharing staff from other departments. These individuals may not have adequate training on

[8] Comment on Model Rule of Professional Conduct 1.6.

maintaining client confidences. A short list of possible steps to take to protect client confidences in a public setting include the following:

- Obtain secure storage space for confidential information and materials. Ensure that only city attorney department staff has access.

- Work with the city's information technology department to arrange a separate network drive for city attorney work. The drive should not be accessible by employees outside of the department.

- If the city attorney's department is not separated from the remainder of city hall by a locking door, equip each office with locks and make it a practice to lock all such doors at the end of each business day.

- Keep highly sensitive material, such as police reports, out of public view.

- Prepare a handout for use by staff from other departments that may lend administrative assistance when necessary. The handout should inform them of the duty of confidentiality that the city attorney's office owes its client and advise on their duty on maintaining the confidentiality of any information obtained in the course of their work for the department. Have employees sign an acknowledgment of having been so advised.

- Use a shredder for drafts of sensitive documents, rather than simply relying on the city's recycling service, if recycling bins are accessible to others.

- Be mindful of where sensitive conversations take place.

C. The Duty to Protect Client Confidences Survives the Conclusion of Representation

The city attorney's duties to his or her client do not end when the representation concludes. Rule 3-310(E) prohibits, in the absence of an adequate waiver, employment adverse to a *former* client where, by reason of the representation of the former client, the attorney has obtained confidential information material to the current employment. In determining whether successive representations of clients with adverse interests merits disqualification in a given matter, "the trial court must balance the current client's right to the counsel of its choosing against the former

client's right to ensure that its confidential information will not be divulged or used by its former counsel." *City and County of San Francisco v. Cobra Solutions, Inc.* (2006) 38 Cal.4th 839, 846 (discussed below).

Perhaps the first case applying this to a public agency attorney is *People ex rel. Deukmejian v. Brown* (1981) 29 Cal.3d 150. Here, Attorney General George Deukmejian counseled Governor Jerry Brown to sign a new bill recently passed by the Legislature. Shortly thereafter, the Governor signed the bill, and it went into effect the following year. Six months after its effective date, a group of challengers sought a writ of mandate to compel Governor Brown and the State Personnel Board, among others, to carry out their constitutional and statutory duties, notwithstanding the new law, which they contended was unconstitutional. A week after the writ petition was filed, the Attorney General met with the State Personnel Board to discuss the matter. In the meeting, the Attorney General, "as counsel to the board, outlined the legal posture of the board and described four legal options available to it." *Id.* at 154. This, as the California Supreme Court characterized it, "was a classic attorney-client scenario." *Id.* Despite having provided this advice, one week later, the Attorney General initiated a writ proceeding against Governor Brown and other state agencies, including the State Personnel Board, essentially seeking the same relief sought by the earlier petitioners. Not surprisingly, the Governor sought to have him disqualified.

The California Supreme Court stated that "[t]he issue then becomes whether the Attorney General may represent clients one day, give them legal advice with regard to pending litigation, withdraw, and then sue the same clients the next day on a purported cause of action arising out of the identical controversy." *Id*. at 155. This, said the Court, was unacceptable. "Unquestionably the Attorney General is now acting adversely to the position of his statutory clients, one of which consulted him regarding this specific matter." *Id*. at 156. The Court held that the Attorney General was disqualified even if he obtained no confidential information. It was sufficient that he had the opportunity to obtain such confidential information. It is interesting to note that the dissent in this case would not have disqualified the Attorney General since he had obtained no confidential information adverse to the State Personnel Board.

D. Ethical Walls and Disqualification

Having disqualified the Attorney General in the *Deukmejian* case, the Supreme Court did not discuss whether the remainder of his office was likewise conflicted from representing the Governor, although the implication was that the entire office was conflicted. More recent cases offer guidance on how the

disqualification of one government attorney from a matter involving a former client may or may not necessitate the disqualification of that attorney's entire office.

In 2004, the Court of Appeal considered a matter of first impression in this regard. In *City of Santa Barbara v. Superior Court* (2004) 122 Cal.App.4th 17, the Court of Appeal reviewed a disqualification challenge brought against the entire city attorney's office after it hired a new deputy city attorney. The case was premised on the following facts: "an attorney with direct, personal knowledge of client confidences goes to work for the clients' adversary while the litigation is pending, moving from a private law firm to the public law office representing the adversary, which office has established an ethical wall to prevent the disclosure of confidential information." *Id*. at 22. All parties agreed that that the attorney herself was disqualified. The issue in question was whether the entire office was disqualified.

After explaining the ethical wall that had been put in place in the city attorney's office, the Court considered an attorney's ethical duties, generally, as well as case law stemming from private practice disqualifications that extended to the private attorney's entire firm. It also, however, noted the public policy concerns that divide public and private sector work, including (1) the lack of financial interest public attorneys have in their work, (2) the burden vicarious disqualification imposes on public agencies deprived of their in-house counsel, (3) the potential difficulty public agencies would have recruiting competent counsel if vicarious disqualification were to be imposed, and (4) the concern that the increased costs associated with vicarious disqualification might drive litigation decisions, rather than such decisions being dictated by the public interest. *Id*. at 24-25.

It concluded by finding that the screening measures established by the city attorney were both "timely and effective" in protecting the former client's interests and vicarious disqualification was thus unnecessary. *Id*. at 27. The assistant city attorney who oversaw litigation for the office constructed an ethical wall to prevent the new attorney from accessing any information about the litigation. These measures included:

- Separate reporting chains for the new attorney and the assistant city attorney handling litigation;
- Separation of litigation staff members and the new attorney;
- Instructions to everyone in the office to forbear discussing the matter with the new attorney;

- Segregation of litigation files from non-litigation files on which the new attorney worked; and
- Reporting on litigation matters in meetings that did not include the new attorney.

Id. at 21.

Two years later, in 2006, the California Supreme Court took up another conflicts case involving a city attorney's office and a former client. In *City and County of San Francisco v. Cobra Solutions, Inc.* (2006) 38 Cal.4th 839, however, the attorney in question was the city attorney himself.

In that case, Cobra Solutions, a technology company that had a contract with the City of San Francisco, retained a law firm to represent it in matters related to "difficulties" the company had encountered in its performance of the contract. The law firm also provided Cobra Solutions with more general legal advice. The year after Cobra Solutions retained the firm, one of the firm's named partners was elected San Francisco City Attorney. When he assumed office, he adopted a policy "of not participating in any matter involving his former law firm or any of its clients regardless of whether he had a conflict in any particular matter." *Id.* at 844.

Roughly a year and a half after his election, the city attorney filed a civil complaint on behalf of the city against a building inspection department employee who had been the subject of an investigation that was pending when the city attorney was elected. As the investigation continued, it was learned that Cobra Solutions was possibly implicated in the matter. Given his discovery of his former client's involvement in this matter, the city attorney took steps to erect an ethical wall within his office to screen himself from the case. These measures included staff attorneys' use of locked files and computerized records to which he had no access and were in place when the city amended its complaint to add Cobra Solutions as a defendant.

Cobra Solutions swiftly moved to have not only the city attorney but also his entire office disqualified, claiming that Cobra had confided to the future city attorney "'confidential aspects of Cobra's business' in the course of a representation that was 'broad' enough to include 'advocacy with City officials,' review of contracts, advice on corporate structure, and drafting of standard agreements, forms, and policies." *Id.* at 845. The trial court agreed that the city attorney's conflict should be imputed to the remainder of his office, a determination ultimately affirmed by the California Supreme Court, which distinguished the case from its *Santa Barbara* predecessor by noting that there "the attorney who was subject to ethical screening was simply one of

the attorneys in the government office, not, as here, the City Attorney under whom and at whose pleasure all deputy city attorneys serve." *Id*. at 853.

The *Cobra* case, like other conflicts cases that arise in the context of a city attorney's duties, cites to two cases that involved county agencies, *Castro v. Los Angeles County Board of Supervisors* (1991) 232 Cal.App.3d 1432, and *In re Lee* (1991) 1 Cal.App.4th 17. However, this comparison highlights the problems inherent in comparing cases involving cities to cases involving counties.

Both *In re Lee* and *Castro* involved organizational clients that had structural divisions set in place which substantially limited the interaction of counsel between and amongst the divisions. The court in each case ultimately decided that these divisions, coupled with public policy concerns, made disqualification of the challenged attorneys unnecessary.

The problem arises in applying the broad policies relied on by the courts in these county agency cases to the much more porous structure of most cities. Keep in mind how very fact-dependent each conflicts analysis is before relying on cases that concern organizations that are structurally and functionally distinct from most cities.

Accepting the representation of a party that stands in an adverse position to a former client is a serious matter that can carry significant consequences. The *Santa Barbara* court reminded the attorney at the crux of that case of this by warning that the use of her former client's confidential information against the client "would be a recipe for financial and professional suicide." *Santa Barbara, supra*, 122 Cal.App.4th at 27. Utmost care must be taken to ensure that the duty of loyalty owed to and expected by each client is jealously guarded.

VI. Government Code Section 1090 Contracting Issues

As discussed earlier, this paper is largely limited to conflicts that can arise under the Rules. There is one area, though, that needs to be briefly discussed because it makes unlawful certain representations that would be explicitly allowed under the Rules.

Government Code Section 1090, in general, prohibits public agencies from entering into contracts in which one of the members of the legislative body has a financial interest and prohibits public officials who are not on a legislative body from participating as a public official in contracts in which they have a financial interest.

Government Code Section 1091 provides certain specified "remote interests" which permit a legislative body to approve a contract in which a member of the legislative body has one of the listed "remote interests." This provision technically does not apply to staff members, including city attorneys, but is does mean that any staff member having one of the "remote interests" in a contract cannot participate in the making of that contract.

Government Code Section 1091.5 contains a list of non-interests that permit public officials having one of the designated non-interests to fully participate in the contract if certain procedural rules not relevant to this discussion are followed. This provision applies equally to staff and members of the city council.

Subsection (b)(6) of 1091 provides that the following financial interest is considered remote:

> That of an attorney of the contracting party or that of an owner, officer, employee, or agent of a firm that renders, or has rendered, service to the contracting party in the capacity of stockbroker, insurance agent, insurance broker, real estate agent, or real estate broker, if these individuals have not received and will not receive remuneration, consideration, or a commission as a result of the contract and if these individuals have an ownership interest of 10 percent or more in the law practice or firm, stock brokerage firm, insurance firm, or real estate firm.

Subsection (a)(10) of Section 1091.5 provides that the corollary non-interest:

> That of an attorney of the contracting party or that of an owner, officer, employee, or agent of a firm which renders, or has rendered, service to the contracting party in the capacity of stockbroker, insurance agent, insurance broker, real estate agent, or real estate broker, if these individuals have not received and will not receive remuneration, consideration, or a commission as a result of the contract and if these individuals have an ownership interest of less than 10 percent in the law practice or firm, stock brokerage firm, insurance firm, or real estate firm.

These provisions are far from clear, but there are a few conclusions that can be drawn from them that are relevant to this paper. First, a city attorney cannot work on a contract involving a client of his or her law firm if the attorney owns ten percent of the firm. Secondly, the city attorney cannot work on the contract if he or she will

"receive remuneration, consideration, or a commission as a result of the contract." This is true even if the attorney has obtained waivers, which is the reason these provisions are relevant to this discussion.

It is unclear what the term "receive remuneration, consideration, or a commission as a result of the contract" means. It could mean that the attorney cannot be paid by the city for drafting or implementing the contract. However, this does not seem to be the intention. The better reading would seem to be that the attorney cannot receive remuneration from the other client as a result of implementation of the contract.[9] After all, contract city attorneys can normally earn fees to draft and implement a contract on which they represent the city without violating Section 1090.

These provisions appear to be addressing the divided loyalties than can exist if the attorney will obtain remuneration from implementing the contract for the other contracting party. If this interpretation is correct, the attorney not only needs to obtain appropriate waivers, but needs to apply these exceptions to determine which side the attorney can represent in the transaction.

By way of example, a city attorney who also is an attorney for a joint powers authority of which his or her city is a member could represent, with appropriate waivers, the city on a contract between the joint powers authority and the city if the contract will not generate more work for the attorney from the joint powers authority. Similarly, a city attorney can represent the city on a contract, again with appropriate waivers, with one of the attorney's private clients if the private client will not provide the attorney or his or her firm with additional work to impellent the contract. Of course, all of this assumes that the city attorney does not own ten percent or more of the firm.

These provisions would appear to only rarely apply to full-time city attorneys. First, the full-time city attorney usually is not practicing through a law firm, so the attorney does not own any percentage of a law firm. Secondly, and more importantly, it seems that it would only be on rare occasions that a full-time city attorney will receive any remuneration as a result of implementing the contract.

It needs to be stressed there is no authority interpreting these rather ambiguous provisions. This brief discussion is provided, though, so that city attorneys do not

[9] This result is also consistent with *People v. Gnass,* (2002) 101 Cal.App.4th 1271 and *People v. Vallerga* (1977) 67 Cal.App.3d 847. In each of these cases, a public official was convicted of violating Section 1090 as a result of participating in the making of a contract with an understanding that the official would be compensated by the other party for services related to implementation of the contract by the other party.

inadvertently rely on waivers to address all conflict issues when representing a party on a contract between two of the city attorney's clients. The conflict of interest statutes will need to be carefully considered, even if waivers have been obtained, before deciding whether to represent either party and, if representation of one of the oparties is permitted, which one.[10]

Conclusion

Conflict questions are highly fact-dependent and while the Rules on their face may be relatively clear, the given facts of any particular set of circumstances may make their application difficult. It is important for the city attorney to stay abreast of his or her duties in this area in order to avoid unwittingly becoming ensnared in a conflict that may result in disqualification and embarrassment.

[10] It is also be necessary to consider the application of the Political Reform Act (Government Code Section 8100, et. seq.) to this situation. Application of the PRA to these fact scenarios will be much easier than application of Section 1090 and is discussed in *Practicing Ethics: A Handbook for Municipal Lawyers* (2d ed., 2014) League of California Cities.

Attachment A

Further Resources for Conflicts Issues

1. *City Attorney Ethics: The Client, Confidentiality and Misconduct*, Gregory W. Stepanicich (May 2011) League of California Cities

   Available online at http://www.cacities.org/Resources-Documents/Member-Engagement/Professional-Departments/City-Attorneys/Library/2011/5-2011-Spring-Gregory-W-Stepanicich-City-Attorney

2. *Constructing Ethical Due Process Walls Following Sabey & Howitt*, Amy Greyson and Ariel Pierre Calonne (September 2013) League of California Cities

   Available online at http://www.cacities.org/Resources-Documents/Member-Engagement/Professional-Departments/City-Attorneys/Library/2013/2013-Annual-Conference-City-Attorneys-Track/9-2013-Annual-Amy-Greyson-Ariel-Pierre-Calonne-Con

3. *Common Issues in Quasi-Judicial Hearings*, Adam Lindgren (September 2013) League of California Cities

   Available online at http://www.cacities.org/Resources-Documents/Member-Engagement/Professional-Departments/City-Attorneys/Library/2013/2013-Annual-Conference-City-Attorneys-Track/9-2013-Annunal-Adam-U-Lindgren-Common-Issues-in-Qu

4. *Due Process in Local Administrative Hearings After the California Supreme Court's Opinion in Morongo Band of Mission Indians v. California State Water Resources Control Board, 45 Cal.4th 731 (2009)*, Manuela Albuquerque (May 2009) League of California Cities

   Available online at http://www.cacities.org/Resources-Documents/Member-Engagement/Professional-Departments/City-Attorneys/Library/2009/5-2009-Spring-Manuela-Albuquerque-Supreme_Court_Up

5. *Procedural Due Process Limitations on the Municipal Lawyer Combining Quasi-Judicial and Prosecutorial or Investigatory Functions*, Manuela Albuquerque (May 2004) League of California Cities

   Available online at http://www.cacities.org/Resources-Documents/Member-Engagement/Professional-Departments/City-Attorneys/Library/2004/5-2004-Spring;-Albuquerque-Admin-Hearings-and-Due

6. *Practicing Ethics: A Handbook for Municipal Lawyers* (2nd ed., 2014) League of California Cities

   Available online at http://www.cacities.org/Resources-Documents/Member-Engagement/Professional-Departments/City-Attorneys/City-Attorney-Ethics-Resources/Practicing-Ethics_-A-Handbook-for-Municipal-Lawyer

7. *Ethical Principles for City Attorneys* (October 2005) League of California Cities

   Available online at http://www.cacities.org/Resources-Documents/Member-Engagement/Professional-Departments/City-Attorneys/City-Attorney-Ethics-Resources/Ethical-Principles-for-City-Attorneys

8. *"When In Doubt, Sit it Out" – Government Code Section 1090 Update*, Steven Dorsey (May 2011) League of California Cities

   Available online at http://www.cacities.org/Resources-Documents/Member-Engagement/Professional-Departments/City-Attorneys/Library/2011/5-2011-Spring-Steven-Dorsey-When-In-Doubt_Sit-(1)

9. *Selected Statutes Regarding Discipline of Attorneys and Duties of Members of the State Bar of California* (2014) State Bar of California

   Available online at http://rules.calbar.ca.gov/SelectedLegalAuthority/Statutes.aspx

10. California Rules of Professional Conduct

    Available online at http://rules.calbar.ca.gov/Rules/RulesofProfessionalConduct.aspx

11. Ethics opinions issued by the American, State, and local Bar associations*

    State Bar of California Committee on Professional Responsibility and Conduct (1965-2015) http://ethics.calbar.ca.gov/Ethics/Opinions.aspx

    American Bar Association Standing Committee on Ethics and Professional Responsibility: http://www.americanbar.org/groups/professional_responsibility/publications/ethics_opinions.html

    Los Angeles County Bar Association Professional Responsibility and Ethics Committee: http://www.lacba.org/showpage.cfm?pageid=427

    San Diego County Bar Legal Ethics Committee: https://www.sdcba.org/index.cfm?pg=LegalEthicsOpinionsIndex

    Bar Association of San Francisco Ethics Committee: http://www.sfbar.org/ethics/

Orange County Bar Association Professionalism and Ethics Committee:
http://www.ocbar.org/AttorneyResources/EthicsOpinions.aspx

* California Rule of Professional Conduct 1-100(A) provides that "[a]lthough not binding, opinions of ethics committees in California should be consulted by members for guidance on proper professional conduct. Ethics opinions and rules and standards promulgated by other jurisdictions and bar associations may also be considered."

Attachment B

Rule 3-310 Avoiding the Representation of Adverse Interests

(A) For purposes of this rule:

(1) "Disclosure" means informing the client or former client of the relevant circumstances and of the actual and reasonably foreseeable adverse consequences to the client or former client;

(2) "Informed written consent' means the clients or former clients written agreement to the representation following written disclosure;

(3) "Written" means any writing as defined in Evidence Code section 250.

(B) A member shall not accept or continue representation of a client without providing written disclosure to the client where:

(1) The member has a legal, business, financial, professional, or personal relationship with a party or witness in the same matter; or

(2) The member knows or reasonably should know that:

(a) the member previously had a legal, business, financial, professional, or personal relationship with a party or witness in the same matter; and

(b) the previous relationship would substantially affect the member's representation; or

(3) The member has or had a legal, business, financial, professional, or personal relationship with another person or entity the member knows or reasonably should know would be affected substantially by resolution of the matter; or

(4) The member has or had a legal, business, financial, or professional interest in the subject matter of the representation.

(C) A member shall not, without the informed written consent of each client:

(1) Accept representation of more than one client in a matter in which the interests of the clients potentially conflict; or

(2) Accept or continue representation of more than one client in a matter in which the interests of the clients actually conflict; or

(3) Represent a client in a matter and at the same time in a separate matter accept as a client a person or entity whose interest in the first matter is adverse to the client in the first matter.

(D) A member who represents two or more clients shall not enter into an aggregate settlement of the claims of or against the clients without the informed written consent of each client.

(E) A member shall not, without the informed written consent of the client or former client, accept employment adverse to the client or former client where, by reason of the representation of the client or former client, the member has obtained confidential information material to the employment.

(F) A member shall not accept compensation for representing a client from one other than the client unless:

(1) There is no interference with the member's independence of professional judgment or with the client-lawyer relationship; and

(2) Information relating to representation of the client is protected as required by Business and Professions Code section 6068, subdivision (e); and

(3) The member obtains the client's informed written consent, provided that no disclosure or consent is required if:

(a) such nondisclosure is otherwise authorized by law; or

(b) the member is rendering legal services on behalf of any public agency which provides legal services to other public agencies or the public.

Discussion:

Rule 3-310 is not intended to prohibit a member from representing parties having antagonistic positions on the same legal question that has arisen in different cases, unless representation of either client would be adversely affected.

Other rules and laws may preclude making adequate disclosure under this rule. If such disclosure is precluded, informed written consent is likewise precluded. (*See, e.g.*, Business and Professions Code section 6068, subdivision (e).)

Paragraph (B) is not intended to apply to the relationship of a member to another party's lawyer. Such relationships are governed by Rule 3-320.

Paragraph (B) is not intended to require either the disclosure of the new engagement to a former client or the consent of the former client to the new engagement. However, both disclosure and consent are required if paragraph (E) applies.

While paragraph (B) deals with the issues of adequate disclosure to the present client or clients of the member's present or past relationships to other parties or witnesses or present interest in the subject matter of representation, paragraph (E) is intended to protect the confidences of another present or former client. These two paragraphs are to apply as complementary provisions.

Paragraph (B) is intended to apply only to a member's own relationships or interests, unless the member knows that a partner or associate in the same firm as the member has or had a relationship with another party or witness or has or had an interest in the subject matter of the representation.

Subparagraphs (C)(1) and (C)(2) are intended to apply to all types of legal employment, including the concurrent representation of multiple parties in litigation or in a single transaction or in some other common enterprise or legal relationship. Examples of the latter include the formation of a partnership for several partners or a corporation for several shareholders, the preparation of an ante-nuptial agreement or joint or reciprocal wills for a husband and wife, or the resolution of an "uncontested" marital dissolution. In such situations, for the sake of convenience or economy, the parties may well prefer to employ a single counsel, but a member must disclose the potential adverse aspects of such multiple representation (*e.g.*, Evid. Code, Section 962) and must obtain the informed written consent of the clients thereto pursuant to subparagraph (C)(1). Moreover, if the potential adversity should become actual, the member must obtain the further informed written consent of the clients pursuant to subparagraph (C)(2).

Subparagraph (C)(3) is intended to apply to representations of clients in both litigation and transactional matters.

In State Fenn Mutual Automobile Insurance Company v. Federal Insurance Company (1999) 72 Cal.App.4th 1422 [86 Cal.Rptr.2d 20], the court held that subparagraph (C)(3) was violated when a member, retained by an insurer to defend one suit, and while that suit was still pending, filed a direct action against the same insurer in an unrelated action without securing the insurers consent. Notwithstanding State Farm, subparagraph (C)(3) is not intended to apply with respect to the relationship between an insurer and a member when, in each matter, the insurer's interest is only as an indemnity provider and not as a direct party to the action.

There are some matters in which the conflicts are such that written consent may not suffice for non-disciplinary purposes. (*See Woods v. Superior Court* (1983) 149 Cal.App.3d 931 [197 Cal.Rptr. 185]; *Klemm v. Superior Court* (1977) 75 Cal.App.3d 893 [142 Cal.Rptr. 509]; *Ishmael v. Millington* (1966) 241 Cal.App.2d 520 [50 Cal.Rptr. 592].)

Paragraph (D) is not intended to apply to class action settlements subject to court approval.

Paragraph (F) is not intended to abrogate existing relationships between insurers and insureds whereby the insurer has the contractual right to unilaterally select counsel for the

insured, where there is no conflict of interest. (*See San Diego Navy Federal Credit Union v. Cumis Insurance Society* (1984) 162 Cal.App.3d 358 [208 Cal.Rptr. 494].) (Amended by order of Supreme Court; operative September 14, 1992; operative March 3, 2003.)

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Speaker Biographies

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Alison Alpert

Alison D. Alpert is a partner and practice group leader of the Labor & Employment group at Best Best & Krieger LLP. Ms. Alpert represents private and public employers in a broad range of employment litigation including harassment, wrongful termination, retaliation and discrimination based upon gender, race, national origin, age and disability. Ms. Alpert also frequently advises clients concerning employee handbooks and employment policies related to harassment, wage and hour issues, workplace violence, drug and alcohol testing, privacy, discipline and termination. Ms. Alpert additionally has significant experience in representing and advising clients on issues related to public access and accommodation under the Americans with Disabilities Act. Ms. Alpert also regularly participates as a speaker in labor and employment seminars, speaking on issues of family and medical leave, drug and alcohol policies and disability issues. Ms. Alpert graduated from Pomona College with a degree in Government in 1995. She received her law degree from the University of California at Davis, King Hall in 1998. While attending UC Davis, she was an intern for the United States Attorney's Office Eastern District of California and participated in a civil rights clinic.

Michael Colantuono

Michael G. Colantuono is a shareholder in Colantuono, Highsmith & Whatley, a municipal law firm with offices in Los Angeles and Nevada County. Chief Justice Ronald M. George presented him with the 2010 Public Lawyer of the Year award on behalf of the California State Bar Association. The Los Angeles Daily Journal named him one of "California's Top Municipal Lawyers" every year since its list began in 2011. He is Treasurer and a Trustee of the State Bar of California, the agency responsible for regulating the practice of law in our State. The State Bar has certified him as an Appellate Specialist and he is a member of the California Academy of Appellate Lawyers, a prestigious association of fewer than 100 of California's most distinguished appellate advocates. Michael is one of California's leading experts on municipal revenues and has appeared in all six Courts of Appeal in California. In addition, he has argued five recent public finance cases in the California Supreme Court: Richmond v. Shasta Community Services District (2004), Bonander v. Town of Tiburon (2009), Greene v. Marin County Flood Control & Water Conservation District (2010) and Alhambra v. County of Los Angeles (2012) and McWilliams v. City of Long Beach (2013). He helped brief a sixth: Ardon v. City of Los Angeles (2011). Michael served on the committee that drafted the League of California Cities' Proposition 218 Implementation Guide and chaired the subcommittee that drafted what became the "Proposition 218 Omnibus Implementation Act of 1997." He also chaired the League Committee which drafted the Proposition 26 Implementation Guide (April 2011) and is now participating in the first appeals under that measure. Michael is City Attorney of Auburn and Grass Valley; General Counsel of the North Yuba Water District and of a number of special districts. He previously served as City Attorney of six other cities and as general counsel of several special districts and other local government agencies. He serves as special counsel to counties, cities and special districts around California. Michael served as President of the City Attorneys Department of the League of California Cities in 2003–2004 and established its first Ethics Committee. He served on the Commission on Local Governance in the 21st Century, the recommendations of which led to substantial revisions of the Cortese-Knox-Hertzberg Local Government Reorganization Act. Michael is General Counsel of the Calaveras, San Diego and Yuba LAFCOs and serves as outside counsel to the Nevada, Orange, and Yolo County LAFCOs. Michael graduated magna cum laude from Harvard College with a degree in Government and received his law degree from the Boalt Hall School of Law of the University of California at Berkeley. He frequently posts comments on local government and municipal finance topics to Twitter (@Mcolantuono) and LinkedIn (Michael Colantuono).

Derek Cole

Derek Cole is a co-founder and partner of Cota Cole LLP and specializes in municipal law. Mr. Cole is a city attorney for three cities and regularly advises his firm's other public agency clients. Mr. Cole also specializes in municipal litigation and has represented public clients in a wide range of matters in judicial and administrative forums.

Timothy Davis

Mr. Davis is chairman of the firm's Labor and Employment Law and a partner in our Trial and Advocacy Practice Groups. Mr. Davis has negotiated numerous labor agreements between cities and their employee groups, including police, fire, general employees, and management groups. Additionally, his practice includes internal investigations of employment complaints involving discrimination and harassment as well as the presentation of seminars on how to prevent discrimination and harassment and investigate allegations of discrimination and harassment. He also trains Human Resource professionals and managers regarding proper investigation techniques. His practice also includes development of personnel rules and policies including discipline and grievance procedures, and the investigation of grievances. Mr. Davis is also an experienced litigator who has tried to verdict several employment cases in federal and state courts and conducted over 60 employment arbitrations. Mr. Davis routinely defends employers in litigation matters in actions involving state and federal law, including but not limited to Title VII, California Fair Employment and Housing Act, Americans with Disability Act, Age Discrimination and Employment Act, Family and Medical Leave Act, California Family Rights Act, California Pregnancy Disability Act, Public Safety Officers Procedural Bill of Rights, and wage and hour issues. His practice also includes the representation of public employers before state, federal, and local administrative proceedings, including Department of Labor, local civil service commissions, PERB, EEOC, and OSHA. His litigation practice, with substantial emphasis and experience in labor and employment, encompasses all aspects of litigation, including trial, all phases of trial preparation, arguing law and motion matters, taking depositions, preparing and responding to pleadings, drafting and responding to written discovery, and research. Mr. Davis' reported decisions include Alhambra Police Officers Association v. City of Alhambra, (2003) 113 Cal.App.4th, 413. Mr. Davis received his B.A. degree cum laude in Integral Studies from Saint Mary's College of California in 1992 and his J.D. degree from the University of the Pacific, McGeorge School of Law in 1995. Mr. Davis' commitment and experience in public law began in law school, where he co-authored the article Does a Public Law Attorney Owe a Duty to Third Parties, which appeared in the summer 1994 issue of the Public Law Journal.

Sean D. De Burgh

Sean De Burgh is an attorney with Cota Cole LLP, servicing clients out of both the Roseville and Ontario offices. Mr. De Burgh represents public and private clients in a wide array of matters in both state and federal courts. Mr. De Burgh's practice includes litigation, non-litigation advice and general counsel work for numerous public agencies and private clients. His litigation experience has emphasized employment, general liability defense, civil rights, and commercial matters. Mr. De Burgh currently serves as District Counsel for the Olivehurst Public Utility District, Deputy City Attorney for the City of Oroville, and Deputy General Counsel for the San Bernardino International Airport Authority for which he provides the full range of general counsel and litigation services. Mr. De Burgh also serves as Special Counsel for the City of Ontario and was recently appointed as special counsel to the West San Gabriel Joint Powers Authority, a school insurance pool serving school districts located in the San Gabriel area of Los Angeles County. Upon graduating from Brigham Young University, Mr. De Burgh received his law degree from the University of the Pacific, McGeorge School of Law. At McGeorge, he was a finalist in regional Client Counseling competitions, and earned honors in Persuasive Legal Writing. He was also on the Dean's Honor Roll. Mr. De Burgh is dedicated to the diligent, cost-efficient, service oriented practice of law with the highest standards of ethical responsibility. He excels in achieving positive results for his clients faced with complex legal issues and disputes. Mr. De Burgh is a member of the State Bar of California, and is admitted to practice before all California courts and the U.S. District Courts for the Central, Eastern and Northern Districts.

Steven L. Dorsey

Steven L. Dorsey is a shareholder in the Public Law Department at Richards, Watson & Gershon. Since joining the Firm in 1973, Mr. Dorsey has specialized in public agency law. He currently is City Attorney for the Cities of Buena Park, Norwalk and San Marino. He also serves as counsel for several joint powers authorities. Mr. Dorsey is very active in the League of California Cities and has served as a member of the League's Board of Directors. He also has been President of the City Attorneys' Department, chair of the Department's Legal Advocacy Committee, a member of the Department's Legislative Committee and chair of the City Attorneys' Department Fair Political Practices Commission committee. He currently serves as the League Parliamentarian. Mr. Dorsey was a member of the editorial board that wrote the first edition of the League's Municipal Law Handbook, and personally edited the chapters on Public Property, Public Works and Public Utilities. Mr. Dorsey was also a member of the City Attorneys' Department committee that authored Practicing Ethics: A Handbook for Municipal Lawyers and chaired the committee that updated this publication in 2014. Previously, he chaired the committee that drafted the Ethical Principles for City Attorneys. Mr. Dorsey's practice emphasizes representation of public agencies on conflict of interests and ethics issues. Mr. Dorsey has lectured on these topics on many occasions, including providing a series of presentations with members of the Los Angeles County District Attorney's Public Integrity Division.

David Gehrig

David assists public agency clients with legal issues related to public works construction projects. His clients include cities, transit districts, health care districts and water districts. He has worked on numerous large-scale infrastructure projects from the drafting of the contract specifications, through the bid process, to contract completion and claims resolution. He has considerable experience with contract award disputes, prevailing wage laws, subcontractor substitution issues and bidder pre-qualification. He has also successfully resolved several stop notice lawsuits for public agency clients. David is also well versed in design-build construction, and other alternative project delivery methods. He has prepared contract documents for three high profile public design-build project, each with unique approaches and challenges. David also assists public agency clients with a wide variety of other legal issues. He works on Public Records Act compliance, record retention issues, open meeting laws, and professional service agreements and communication site leases. He serves as general counsel to the Purissima Hills Water District

Clare M. Gibson

Clare Gibson has been advising clients on bid protests for her entire career. She is the immediate past chapter chair of Chapter 7, Public Contracting, of the The California Municipal Law Handbook. Clare recently submitted an amicus brief and successful request for publication on behalf of the League in the Bay Cities Paving case, which upheld a city's broad discretion to waive immaterial bidding errors. She is a partner of the law firm of Jarvis Fay Doporto & Gibson in Oakland, where her practice is focused on public contracting and construction law. Clare also serves as Assistant City Attorney for the City of Hercules. She is a graduate of U.C. Berkeley's Boalt Hall.

Eugene Gordon

Eugene P. Gordon is a Deputy City Attorney in the San Diego City Attorney's Office. Since February 2008 when he retired from the City, he has been working as a volunteer on a part-time basis in the City Attorney's Office. He is assigned to the Trial Unit in the Civil Division where he specializes in the defense of personal injury cases brought against the City and its employees. Such litigation involves alleged dangerous conditions of public property, such as highway design and trip-and-fall cases, police K-9 bite cases, false arrest and excessive force cases, including section 1983 cases, and City vehicular accidents.

From 1971 to 1978, Mr. Gordon was Legal Advisor to the San Diego Police Department where he was instrumental in providing legal in-service training programs, including the publication of legal training bulletins for police officers. He provided on-the-scene legal advice to police supervisors in the proper handling of civil demonstrations and disturbances, was available to supervisors and officers in the field for consultation on legal matters, and played an important role in drafting legal policies and procedures. While Police Legal Advisor, Mr. Gordon was a member of the Legal Officers Section of the International Association of Chiefs of Police, and in 1976 he was General Chairman of the section. He was also a contributor to the "Chief's Counsel," a legal column in the "Police Chief Magazine," a monthly publication of the International Association of Chiefs of Police.

Mr. Gordon was a prosecutor in the Criminal Division of the City Attorney's Office from 1969 - 1971 where he prosecuted a variety of misdemeanor cases. He served as Assistant Chief Criminal Deputy for one year prior to becoming Police Legal Advisor in May 1971. Mr. Gordon has taught extensively at the San Diego Regional Public Safety Training Institute at Miramar College in San Diego on the subjects of civil and criminal liability of law enforcement officers, constitutional law, and use of force to police recruits, advanced officers and Field Training Officers. He was an instructor in the San Diego Sheriff's Department Academy at Southwestern College on the subject of civil and criminal liability of law enforcement officers, and he taught the sixteen-hour course on search and seizure at the San Diego Police Academy from 1972-1979.

Mr. Gordon has lectured at numerous seminars for police administrators sponsored by the International Association of Chiefs of Police on the subjects of police discipline, civil liability and discovery of police officers' personnel records. He has also lectured on municipal tort liability at NIMLO and League of California Cities conferences. Mr. Gordon has provided legal updates at numerous PRIMA and PARMA conferences.

In 1992, Mr. Gordon served on the California Commission on Peace Officer Standards and Training (POST) Committee on "Police Use of Force," Executive Report, July 1992. In 1996, he assisted POST in revising the Police Supervisory Course curricula. Admitted to the California State Bar in 1968, Mr. Gordon received his legal education at Hastings College of Law in San Francisco. He received his B.A. degree from the University of California, Riverside.

Gregory Hurley

Mr. Hurley is a member of the Attorney Settlement Officer Panel for the U. S. District Court for the Central District of California, having first been continuously appointed to the Panel every year since 2003. He holds a masters certificate from the National Institute of Trial Advocacy, and has tried many national class actions alleging discrimination and violations of the Fair Housing Act and the Americans With Disabilities Act. He has advised the California Supreme Court (through the Administrative Office of the Courts), Covenant Care, Home Depot, Intrawest, Ralph's / Kroger's Grocery Stores, Starbucks, Tarsadia Hotels, the Denver Broncos, the San Diego Padres, the U.S. District Court for Eastern District of California, and, the Superior Courts for the Counties of Riverside, Los Angeles, and Alameda on these claims. He has represented the Los Angeles Superior Court System, Taco Bell, KFC, and Pizza Hut, Little Caesar's Pizza, Home Depot, The Irvine Company's Retail, Office and Resort Properties, 23 Irvine Apartment Communities, Welk Resorts, Live Nation/TicketMaster, Winco, Michaels/Aaron Brothers Craft Stores, Kroger & Ralphs Grocery Company, Regal Entertainment Group, Landmark Theaters, the National Association of Theater Owners, The National League of Cities, The California Hotel & Lodging Association, with respect to access discrimination claims.

Greg's trial experience includes trying state and nation wide class actions: He represented California in the largest class action certified against the State, involving more than 10 Million claimants against 4000 miles of Caltrans pedestrian routes and 90 Park & Ride facilities; He defended a class action brought by the ACLU against the entire Los Angeles Superior Court System; A national action brought by the United States Department of Justice against AMC Theaters; A national class action against 80 golf courses owned and operated by Marriott; He is currently defending statewide class actions against Starbucks, In-N-Out Burgers, Auto Club of Southern California, Ralphs Grocery Stores; Adir/La Curacao Store; Sport Chalet; Regency Theaters; and The Irvine Company. In 2012, he successfully de-certified a damage class action against more than 200 Taco Bell stores. Greg's experience includes substantial appellate work, where, against numerous amici and the US DOJ, he argued and won landmark Ninth Circuit cases: Lonberg v. Sanborn Theaters; Oliver v Ralphs Grocery Store; and Lonberg v. City of Riverside. He authored United States Supreme Court briefs and Ninth Circuit Appellate briefs for the National Association of Theater Owners, The California and National Restaurant Associations, the California and National League of Cities, and more than 200 California cities. Greg is a nationally recognized attorney on disability law, and the author of the Wiley Law Publications text, Defending Disabled Access Claims, a comprehensive survey of state and federal laws relating to the rights of individuals with disabilities. Greg sat on the committee advising the California State Legislature on revisions to California's discrimination laws and drafting of the new SB 1186 statute. In his 27 year career, Greg has spoken at more than 100 conferences and written more than 30 articles on access laws.

Michael Jenkins

Mike currently serves as City Attorney for the cities of Hermosa Beach (since 1996), Rolling Hills (since 1982) and West Hollywood (since 1984) and as General Counsel to the Antelope Valley Mosquito & Vector Control District, Los Angeles County West Vector Control District, San Gabriel Valley Mosquito and Vector Control District, the South Bay Cities Council of Governments and the Westside Cities Council of Governments. He served as President of the City Attorneys Department of the League of California Cities (1993) and chairs the League's Brown Act Committee. He served as Editor for Open & Public IV, the League's manual on the Brown Act. Mike also served as President of the City Attorneys Association of Los Angeles County and Member of the Executive Committee of the Public Law Section of the State Bar (and Editor of the Section Newsletter). He teaches local government law at the University of Southern California Law Center. Mike has been practicing law for 36 years, most of that time in the area of municipal law. He was admitted to the State Bar in 1978 immediately following his honors graduation from Duke University School of Law, where he served as Executive Editor of the Duke Law Journal. Mike graduated with highest honors from Haverford College.

Lauren Langer

Ms. Langer is a municipal lawyer at Jenkins & Hogin, LLP. She serves as Assistant City Attorney for the Cities of Lomita and Hermosa Beach, including serving as counsel to their planning commissions. She also regularly advises the West Hollywood Planning Department and Malibu Environmental Programs Department. In addition to general municipal law matters, Ms. Langer specializes in land use, planning and environmental law, such as Clean Water Act and CEQA compliance. Ms. Langer also handles enforcement and regulatory matters with the State and Regional Water Boards, and litigation for her firm's clients. Ms. Langer currently serves on the League of California Cities City Attorneys' Department Medical Marijuana Committee.

J. Stephen Lewis

Stephen Lewis is general counsel for the City of Santa Monica Rent Control Board, a municipal agency established by Santa Monica's city charter. His work includes advising and representing the elected rent control board, and advising and representing Board members and staff in their official capacities. Previously, Mr. Lewis served for eleven years as a staff attorney for the City of West Hollywood, in which capacity he advised and represented the city in general municipal law matters under the direction of the city attorney.

Christian Marsh

Christian Marsh is a partner in the San Francisco office of Downey Brand LLP. He advises public and private clients, including cities and counties, on natural resource and land use matters involving water rights, the public trust doctrine, endangered species, wetlands, California planning and zoning law, and NEPA and CEQA review. Among a variety of projects, he has advised clients on small and large-scale residential, commercial, and mixed-use real estate developments, renewable and traditional energy projects, surface and underwater mining operations, and surface and groundwater supply projects throughout California. Christian conducts trial and appellate-level litigation in each of these areas, and was an attorney of record for the prevailing parties in two recent CEQA cases before the California Supreme Court.

Shawn M. Mason

Shawn M. Mason Shawn Mason has served as the City Attorney for the City of San Mateo since 2003. Shawn previously served as the City Attorney for the City of Rancho Mirage and the City Attorney for the City of Benicia, and as the Deputy and Assistant City Attorney for the City of Thousand Oaks. Shawn presently serves as the Chair of the City Attorneys' Department's FPPC Committee. Shawn has previously served on the Municipal Law Handbook Committee, the Legal Advocacy Committee, and the Nominating Committee.

Chris McKenzie

Chris McKenzie was appointed in 1999 as the sixth executive director of the League of California Cities, the private nonprofit corporation founded in 1898 that advocates for cities before the Legislature, Governor, and federal and state courts as well as in statewide ballot measure elections. The League also provides extensive training and education services to city officials. Born and raised in St. Louis, Missouri, McKenzie holds a masters degree in urban planning as well as a law degree. His over 30-year career includes stints as a local and state government administrator and attorney as well as statewide association work. He reports to the 52-member League board of directors, comprised of city officials from all regions of the state.

Neil Okazaki

Neil is a deputy city attorney for the City of Riverside and currently serves as legal advisor to the City's Police and Fire Departments. Since joining the office, his practice area has involved litigation in the federal and state courts, including matters that have gone before the United States Supreme Court (certiorari petition), the California Supreme Court, the Ninth Circuit Court of Appeals, and the California Court of Appeal.

Neil received his B.A. from U.C. Riverside. He earned his J.D. from Loyola Law School on a partial scholarship and was a Note and Comment Editor of the Loyola Law Review. Neil's published law review article was cited by the California Court of Appeal, the Texas Court of Appeals, American Law Reports (A.L.R.), and California Criminal Law (Witkin). Since being sworn in as an attorney, Neil has tried 18 cases (including 15 as sole trial counsel) and completed nine binding arbitrations as sole trial counsel.

For eight years, Neil was been a member of the Leo A. Deegan Inn of Court. For the past four years, he has served on the Attorney Settlement Officer Panel for the United States District Court for the Central District of California. Neil has spoken at the League of California Cities Annual Conference, Legal Secretaries, Inc. (two quarterly conferences), UCR Extension, and UCR Law Day. He has prepared updates to the California Municipal Law Handbook and the LSI Law Office Procedure Manual. Additionally, Neil served five years as a member of the UCR Chancellor's Advisory Committee for Asian Pacific Islanders. Since January of 2013, he has served on the Board of Directors of the Riverside County Bar Association.

Randy Riddle

Mr. Riddle advises and represents public sector clients on a wide range of government law issues. Mr. Riddle possesses a unique combination of election law experience, having served as the Richmond City Attorney, Chief Counsel to the California Secretary of State, and counsel to a county registrar of voters. Mr. Riddle provides advice on a wide range of public agency law, including constitutional issues, conflict of interest law and other governmental ethics matters, open government requirements, initiative, referendum and recall petitions, administrative law, the legislative process.

Craig Steele

Craig A. Steele is a shareholder in the Public Law Department at Richards, Watson & Gershon and serves on the Firm's Management Committee. Mr. Steele has over 20 years of experience practicing local government law and has worked in government and politics for 30 years. Mr. Steele is the City Attorney for the Cities of Highland and Monrovia. He serves as Counsel to the Successor Agency to the redevelopment agencies in both cities and also the former redevelopment agency for the City of Indio. Mr. Steele also serves as General Counsel to the Los Angeles County Children and Families First Proposition 10 Commission ("First 5 LA"). He served as Agoura Hills City Attorney from 1999-2012 and Interim CEO of First 5 LA throughout 2012. In addition to his public agency practice, he has represented candidates for local, state, and federal offices and other private interests on a variety of election and political law matters. He is the author of several local ballot measures, including open space preservation, local taxes, fireworks regulation and transportation. Mr. Steele concentrates on the representation of public agency clients in a wide range of government law areas and has spoken and written extensively on open government issues including Campaign Finance Regulation, Lobbying, Public Records, Open Meeting Laws and Conflicts of Interest Law. His article "The Rules on Lobbying: What Every Local Official Should Know" was published in the January, 2010 issue of Western City Magazine. He is a past member of the FPPC Committee of the League of California Cities' City Attorneys Department and also served on a task force of the Institute for Local Government drafting a resources book on open space acquisition by cities. Mr. Steele is a past President of the Board of Directors of the Community Center of La Cañada Flintridge, a member of the Board of Directors of the Spartan Boosters, and served for seven years as Chair of the La Cañada Unified School District's Bond Oversight Committee.

Harriet A. Steiner

Harriet Steiner is a partner in the Municipal Law practice group of Best Best & Krieger LLP. Prior to joining the firm in 2010, she was a shareholder with McDonough Holland & Allen in Sacramento. Ms. Steiner's practice focuses on public law, representing cities, special districts and joint powers agencies as city attorney, general counsel and special counsel. Her areas of specialty include land use, environmental law, telecommunications law and cable television franchising, wastewater and municipal water, and public financing. Ms. Steiner has worked on air quality and transportation matters, including the Clean Air Act and federal transportation requirements and funding, agreements between local governments and Indian tribes, and agricultural and habitat conservation easements. In addition, Ms. Steiner advises public agencies on land use approvals, including negotiation of development agreements, compliance with the California Environmental Quality Act, public financing and Proposition 218 compliance. She has represented public agencies in CEQA and land use litigation, election challenges, public financing and development impact fee challenges, and Proposition 218 litigation. Ms. Steiner has served as city attorney for the City of Davis since 1986. She has assisted the City in the development of its agricultural mitigation ordinance for farmland and habitat preservation, its Affordable Housing Ordinance and its Middle Income/Work Force Housing Inclusionary Housing Ordinance. Ms. Steiner serves as general counsel to the Sacramento Metropolitan Cable Commission, which holds the cable television franchise for the county and the cities within the county. She also represents the City of Modesto on cable and telecommunications matters, as well as other local franchising entities. She has negotiated cable franchise renewals and transfers, franchises with cable overbuilders, and represented franchising entities in cable and wireless cellular tower litigation. She is currently representing municipal clients related to distributed antenna system (DAS) disputes. Ms. Steiner has been liaison to the League of California Cities' Committee on Revenue & Taxation. She is a member of the Southern California and Nevada chapters of the National Association of Telecommunications Officers and Advisors and a past president of the Sacramento County Bar Association Public Law Section. Ms. Steiner is a member of the State Bar of California and the League of California Cities. She is a past member of the Legal Advocacy Committee, the City Attorneys' Legislative Committee and the Bond Financing Ad Hoc Committee related to legal counsel opinion letters, and past co-chair of PG&E's Re-Franchising Committee.

Gregory Stepanicich

Greg Stepanicich is a shareholder in the Public Law Department of Richards, Watson & Gershon, and manages the firm's San Francisco office. Greg has represented cities and a wide range of other local public agencies for over 37 years. He is the City Attorney of Fairfield and Mill Valley and Town Attorney of Ross. Greg formerly was the City Attorney of Agoura Hills, Beverly Hills and Seal Beach.

Patrick Sullivan

University of San Diego School of Law, J.D. 1992. UC San Diego, B.A. 1992. Patrick has been with the City Attorney's Office since 1996. He has done rotations in criminal prosecution, civil litigation, and general support. When he is not at work, he can be found on a field somewhere coaching his four children. His amazing wife is holding down the fort while he is at the League's Spring Conference.

Stephen E. Velyvis

Specializing in complex public litigation, land use and environmental issues, Mr. Velyvis provides wide-ranging expertise and unique problem solving skills and advice to a diverse body of municipal and public agency clients in administrative proceedings and before state and federal trial and appellate courts. His extensive experience with land use and environmental matters allows him to guide clients through an array of complex issues and disputes, including issues related to sustainable development and climate change. His expertise extends to the California Environmental Quality Act (CEQA), the National Environmental Policy Act (NEPA), and the California Coastal Act, as well as the state and federal legal and regulatory frameworks governing clean water, clean air, endangered species and electricity generation and transmission. He also represents clients in land use-related matters including local and state planning and zoning laws, the Subdivision Map Act, timber harvests/timberland conversions, and vineyard expansions. No stranger to the courtroom, Mr. Velyvis has successfully litigated numerous mandamus actions and attorneys' fees disputes for both private and public agency clients. Most recently, Mr. Velyvis has represented various cities and counties in disputes ranging from challenges to a lot line adjustment ordinance and an exclusive debris-box franchise award, to wrongful termination and whistleblower claims. He also represents and advises school districts on complying with their obligations under CEQA, charter school facilities issues, and other land use matters.

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