General Municipal Litigation Update

Thursday, May 7, 2015 General Session; 10:45 – Noon

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Notes:

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1. Nature of Municipal Corporations

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.

2. Open Government and Ethics

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.

Analysis and Holdings:

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]."

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.

10. Land Use

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]