General Municipal Litigation Update

Thursday, October 17, 2019 General Session; 1:00 – 2:30 p.m.

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Notes:_____

General Municipal Litigation Update

Cases Reported from May 10, 2019
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League of California Cities
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City Attorney's Department Track

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I. Finance

City and County of San Francisco v. Regents of Univ. of California, 7 Cal.5th 536 (2019)

Holding: Charter city may require state agencies to assist in the collection and remittance of parking tax.

Facts: The city imposes a 25 percent parking tax, which drivers pay to parking lot operators, in addition to the parking fee the operator charges. The operator collects the parking and remits it to the city. The parking tax ordinance applies to public and private entities. In 2011, the city directed three state universities with parking lots in San Francisco to begin collecting and remitting the parking tax. The state universities refused, arguing that, as state agencies, addressing matters of statewide importance, their parking lots are beyond the reach of the city's parking tax. The city then filed a petition for writ of mandate seeking compliance with the ordinance, and the city also offered to reimburse the state universities for administrative costs in collecting and remitting the parking tax. The trial court denied the writ petition, finding the state universities were exempt from the parking tax ordinance. The Court of Appeal affirmed the denial, and the California Supreme Court granted review.

Analysis: The Supreme Court reversed, concluding that charter cities may require state agencies to assist in the collection and remittance of municipal taxes. First, the court found the parking tax ordinance was valid as applied to drivers who park in paid university lots – even though the tax would have some secondary effects, such as increased costs to park for university staff, students, and guests. Next, the court found the city's interests (as a charter city) in raising revenue to be "weighty" and more compelling than state universities' interests. To that end, the court held that the city's parking tax collection requirement does not violate the state sovereignty embodied in the California Constitution.

***Plantier v. Ramona Municipal Water District,* 7 Cal.5th 372 (2019)**

Holding: Where a Proposition 218 plaintiff challenges a local agency's method used to calculate a fee (but not the fee itself), participation in a protest hearing is not a prerequisite to suit.

Facts: The district assesses sewer charges based on an Equivalent Dwelling Unit (EDU), generally assessing residences 1.0 EDU, and commercial properties based upon a variety of factors. The district notified Plaintiff, a restaurant owner, that the EDUs assigned to his parcel were increasing from 2.0 to 6.83, significantly increasing his sewer fees. Plaintiff submitted an administrative claim, which was rejected, and Plaintiff filed a class action lawsuit, alleging that the EDU assignment method violates Proposition 218. At the first phase of a bench trial, the trial court concluded Plaintiff failed to submit a protest in relation to the public hearings on EDU assignments over a three-year period, barring his suit. The Court of Appeal reversed, and the California Supreme Court granted review.

Analysis: The Supreme Court affirmed, finding the suit is not barred by Plaintiff's failure to participate in the district's public hearings on sewer rate adjustments. The court's holding is a narrow one, concluding that a party may challenge the method used to calculate a fee (but not the fee itself), without first having participated in a Proposition 218 protest hearing. The court noted that if it were to require a party to protest the district's methodology before suit, all the district could do is formulate a new fee proposal, and initiate a separate public hearing, subject to its own notice requirements – an "oddly burdensome" requirement. The court made clear it was leaving open the broader question of, aside from methodology, whether a party may bring suit to challenge a fee or charge without first participating in the Proposition 218 protest hearing.

II. Land Use / California Environmental Quality Act

***Knick v. Township of Scott, Pennsylvania*, 139 S.Ct. 2162 (2019)**

Holding: When government takes property without just compensation, property owner may bring Fifth Amendment takings claim under 42 U.S.C. Section 1983 in federal court, without first pursuing an inverse condemnation action in state court.

Facts: Plaintiff lives in a single-family home on 90 acres of land. The property includes a small graveyard where ancestors of Plaintiff's neighbors are allegedly buried. Family cemeteries, such as Plaintiff's, have long been permitted in Pennsylvania. The township passed an ordinance requiring all cemeteries to be open to the public during daylight hours. When the township found grave markers at Plaintiff's property, they cited her for violating the ordinance. Plaintiff filed suit in state court, seeking only declaratory and injunctive relief, asserting a taking of her property – but Plaintiff did not seek damages under an inverse condemnation cause of action. The township then withdrew the notice of violation, and agreed to stay enforcement of its cemetery ordinance while the state court litigation was pending. The state court declined to rule on Plaintiff's case, as there was, at that point, no ongoing enforcement action. Plaintiff then filed a 42 U.S.C. Section 1983 suit in federal court, seeking damages for the township's alleged violation of the Takings Clause of the Fifth Amendment. The District Court dismissed the action, as Plaintiff had not first pursued an inverse condemnation action in state court, as required by *Williamson County Regional Planning Comm'n v. Hamilton Bank of Johnson City*, 473 U.S. 172 (1985). The Third Circuit affirmed the dismissal, and the U.S. Supreme Court granted certiorari.

Analysis: The Supreme Court, in a 5-4 opinion, vacated the Third Circuit's opinion, and remanded the litigation. The court also overruled *Williamson County*'s state-litigation requirement for takings claims, concluding that a property owner may bring a takings claim under Section 1983 in federal court upon the taking of property without just compensation. The court recognized the effect of its holding is that "it will simply allow into federal court takings claims that otherwise would have been brought as inverse condemnation suits in state court."

***Union of Medical Marijuana Patients, Inc. v. City of San Diego*, ___ Cal.5th ___, 250 Cal.Rptr.3d 818 (2019)**

Holding: Zoning amendment to allow medical marijuana dispensaries was a project under CEQA.

Facts: The city adopted an ordinance authorizing the establishment of medical marijuana dispensaries, amending existing zoning regulations to specify where new dispensaries may be located. The city found that adoption of the ordinance did not constitute a project for purposes of CEQA. Petitioner filed a petition for writ of mandate, alleging that the failure to conduct environmental review violated CEQA. The trial court denied the writ petition. Petitioner appealed. The Court of Appeal concluded that the ordinance was not a project under CEQA, because it did not have the potential to cause a physical change in the environment. The California Supreme Court granted review.

Analysis: The Supreme Court reversed, noting the term "project" is a defined term in Public Resources Code Section 21065, and that definition applies to Section 21080 and the remainder of CEQA. To that end, Section 21080, which lists several discretionary public agency activities (including zoning amendments), does not declare <u>every</u> zoning amendment to be a CEQA project as a matter of law – on this point, the Supreme Court disapproved of *Rominger v. County of Colusa*, 229 Cal.App.4th 690 (2014) (relying on Section 21080 to find approval of tentative subdivision map to be a project as a matter of law). In analyzing the city's ordinance here, the court found it was a project under CEQA. The zoning amendment would allow a "sizable number" of marijuana dispensaries, "an entirely new type" of business. This could foreseeably result in new retail construction, and possibly citywide changes in vehicle traffic patterns, as well. While the court found the city's ordinance to be a project, it did not express any opinion on CEQA exemptions and/or the appropriate level of environmental review.

III. Torts

***Huckey v. City of Temecula*, 37 Cal.App.5th 1092 (2019)**

Holding: Trivial defect defense appropriate where sidewalk rise was as high as 1.21875 inches.

Facts: While walking on a city sidewalk, Plaintiff tripped, fell, and was injured. A rise in the city sidewalk caused Plaintiff's injuries. Plaintiff filed suit against the city, as well as the adjacent property owner. The city then filed a Motion for Summary Judgment. Plaintiff's expert calculated the height of the rise at as one and 7/32 inches (1.21875 inches) high at the sidewalk's far edge at the time of Plaintiff's fall. The trial court granted the city's motion, finding the city met its burden of proof, and the rise in the sidewalk was a trivial defect. Plaintiff appealed.

Analysis: The Court of Appeal affirmed. The court found the city made a prima facie showing that the rise was not a tripping hazard, as (a) where Plaintiff likely tripped, the rise was not greater than one inch in height; (b) the edge of raised sidewalk did not have broken or jagged edges; and (c) the city was not on notice that anyone other than Plaintiff tripped at the rise. Additionally, the court found the rise was a trivial defect, citing several cases holding rises between three-fourths of one inch to one and one-half inches to be trivial defects. The court also indicated that, even if the rise were assumed to be the 1.21875 inches (the highest point of the rise), it still would have reached the same conclusion – the rise did not pose a substantial risk of injury to a pedestrian using "due care."

***Lee v. Dept. of Parks & Recreation*, 38 Cal.App.5th 206 (2019)**

Holding: Stone stairway from parking lot to campground at state park is within the scope of the trail immunity statute, Government Code Section 831.4.

Facts: A parking lot at Mt. Tamalpais State Park in Marin County offers two ways to access a campground: by way of a stone stairway, or through a longer ADA-compliant path. Plaintiff slipped and fell on what she claimed was an "uneven portion" of the stone stairway, and she filed suit, asserting the stairway was a dangerous condition of public property. The trial court granted the State Parks' Motion for Summary Judgment, finding the stairway within the scope of trail immunity. The trial court also awarded the State Parks their attorney's fees and costs in the amount of approximately $22,000 pursuant to CCP Section 1038, finding the action was filed without reasonable cause and good faith. Plaintiff appealed.

Analysis: The Court of Appeal affirmed, in part, and reversed, in part. The court found that the trial court properly concluded that trail immunity applied to the stairway. Both the design and use of the stairway suggest it is a trail. Additionally, the stairway is integral to a trail. Here, Plaintiff used the stairway to access a campground – and campgrounds are covered by the trail immunity statute. Additionally, a sign at the base of the stairway indicates it is a path to access hiking trails – and hiking trails are also covered by the statute. The court also found that the stairway did not lose trail immunity status where there existed an alternative ADA-compliant path. Separately, the court reversed the award of fees and costs to the State Parks, finding that, while Plaintiff's arguments were not convincing, there was previously no case law that addressed (except in dictum) whether stairways may be trails.

***Quigley v. Garden Valley Fire Protection District,* 7 Cal.5th 798 (2019)**

Holding: Statutory immunities in the Government Claims Act, such as firefighting immunity, operate as an affirmative defense – not as a jurisdictional bar – and must be pleaded and proved.

Facts: As a result of a wildfire at Plumas National Forest, a base camp for firefighters was set up at a local fairground. Plaintiff, a U.S. Forest Service employee, was run over by a water truck servicing the shower unit at the base camp. Plaintiff sued three base camp managers and two fire protection districts,

alleging they created a dangerous condition of public property. Defendants asserted 38 affirmative defenses, one of which was an "omnibus" general allegation that Defendants were immune as a result of "all defenses and rights granted to them" by the Government Claims Act. Defendants did not specifically assert firefighting immunity under Government Code Section 850.4. At trial, after Plaintiff's opening statement, Defendants moved for nonsuit on firefighting immunity, raising it for the first time. The trial court granted the motion, and denied Plaintiff's post-trial motions, finding the immunity cannot be waived, and, in fact, was not waived here – due to Defendants general allegation of immunities under the Government Claims Act. Plaintiff appealed, and the Court of Appeal affirmed. The California Supreme Court granted review.

Analysis: The Supreme Court reversed, finding that firefighting immunity operates as an affirmative defense (subject to principles of forfeiture and waiver), and not as a jurisdictional bar. The court noted its opinion is consistent with case law already holding that design immunity (Government Code Section 830.6) operates as an affirmative defense. Additionally, the court disapproved of a series of cases, "to the extent they suggest that statutory immunities in the [Government Claims Act] deprive courts of fundamental jurisdiction." In other words, statutory immunities like firefighting immunity <u>can</u> be waived or forfeited, in the Supreme Court's view. The court remanded the case to the Court of Appeal to consider whether Defendants' general allegation of Government Claims Act immunities sufficiently pled firefighting immunity.

***City of Oroville v. Superior Court of Butte County,* ___ Cal.5th ___, 250 Cal.Rptr.3d 803 (2019)**

Holding: City not liable in inverse condemnation where sewage backs up onto private property because of city sewer main blockage, where no backflow valve exists, and property owner was legally required to install and maintain a backflow valve.

Facts: A dentists' office building suffered a sewage backup in its private sewer lateral. Since 1984, the city has adopted the Uniform Plumbing Code, which

requires property owners to install backflow valves (to prevent sewage backups into buildings) on private sewer laterals, where necessary. The property owner and its insurance company sued the city for, among other things, inverse condemnation. The trial court denied the city's Motion for Summary Judgment on the ground that the property did not have a backflow valve. The property owner then filed a legal issues motion (pursuant to CCP Section 1260.040), asserting the same positions of the parties at summary judgment. The trial court granted the motion, finding the city liable for inverse condemnation. The city filed a petition for writ of mandate with the Court of Appeal, which was denied. The California Supreme Court granted review.

Analysis: The Supreme Court reversed. The court held that a causal connection between a public improvement and property damage, by itself, is insufficient to establish inverse condemnation liability, disapproving of *Cal. State Automobile Assn. v. City of Palo Alto*, 138 Cal.App.4th 474 (2006) ("[h]ow or why the blockage occurred is irrelevant"). Rather, as applied here, the property owner must prove that the inherent risks of the sewer system, as deliberately designed, constructed, and maintained, (a) manifested; and (b) were a substantial cause of the damage. This approach avoids treating inverse condemnation "as a species of strict or 'absolute liability.'" Applying that rule here, the court concluded that the city acted reasonably in (a) requiring backflow valves as part of its gravity flow sewer system; and (b) presuming private property owners would comply with the law. Here, had the property owner installed a backflow valve, it "would have prevent or substantially diminished the risk of the mishap that spawned this case."

IV. Civil Rights

***American Legion v. American Humanist Association*, 139 S.Ct. 2067 (2019)**

Holding: 32-foot-tall cross honoring World War I veterans, sitting on government property and maintained with public funds, does not violate Establishment Clause.

Facts: In 1925, the American Legion erected a 32-foot-tall Latin cross on a pedestal, with a plaque listing 49 local veterans who died in World War I. Since then the cross is the site of patriotic events honoring veterans. Other memorials honoring veterans have since been installed in the surrounding area. In 1961, the Maryland-National Capital Park and Planning Commission, a two-county agency, acquired the cross and land on which it sits. The Commission spent $117,000 to maintain and preserve the cross over the next 50 years. In 2012, Plaintiffs, three residents and a non-profit group, filed suit, alleging the cross's presence on public land, and the Commission's use of public funds for maintenance of the cross violate the Establishment Clause. The District Court granted summary judgment in favor of the Commission and the American Legion. The Fourth Circuit reversed, and denied rehearing *en banc*. The U.S. Supreme Court granted certiorari.

Analysis: In a 7-2 decision, the Supreme Court reversed, finding the cross does not violate the Establishment Clause. In the four-judge plurality opinion, the court noted that the cross at issue has come to represent much more than just a Christian symbol, including a symbolic resting place for ancestors who did not return from World War I, a place to gather and honor veterans, and a historical landmark.

***Knight First Amendment Institute at Columbia University v. Trump*, 928 F.3d 226 (2d Cir. 2019)**

Holding: President Trump's Twitter account is a public forum, and his blocking of users from his Twitter page for their criticisms of the President or his policies amounts to viewpoint discrimination, in violation of the First Amendment.

Facts: In 2009, while a private citizen, Donald Trump established his Twitter (social media) account. In 2017, Mr. Trump was inaugurated as President of the United States, and he continues to use the same Twitter account. The Twitter page now shows as registered to the President, and the lead photographs show President Trump engaging in official presidential duties, such as signing executive orders, delivering remarks at the White House, and meeting with foreign dignitaries. In 2017, the White House press secretary stated President Trump's tweets should be

considered "official statements." Additionally, the National Archives has concluded that President Trump's tweets are official records that must be preserved under the Presidential Records Act of 1978. Several months after President Trump was inaugurated, he blocked each of the individual Plaintiffs from his Twitter account because the Plaintiffs posted replies in which they criticized the President or his policies. By blocking the users, they could not (a) view future tweets by the President; (b) directly reply to the tweets; and/or (c) use the President's Twitter page to view comment threads associated with his tweets. The individual Plaintiffs and the Knight Institute filed suit against the President and three White House staff members, alleging the President's blocking from his Twitter account violated the First Amendment. The District Court granted Plaintiffs' Motion for Summary Judgment. Defendants appealed.

Analysis: The Second Circuit affirmed. First, the court concluded the President was a government actor with respect to his use of the Twitter account. Second, the court concluded the President's opening of his Twitter for public discussion when he assumed office, as well as his use of Twitter's interactive features, created a public forum. Finally, the court found the President's blocking of individuals Plaintiffs from his Twitter account to amount to viewpoint discrimination, rejecting Defendants' arguments that various "workarounds" on Twitter can still allow Plaintiffs to view the President's tweets.

Practice Pointer: The area of government use of social media continues to develop, and two other circuits also issued earlier opinions this year on the topic. *Davison v. Randall*, 912 F.3d 666 (4th Cir. 2019) (county supervisor's banning of constituent on Facebook page amounted to viewpoint discrimination); *Robinson v. Hunt County, Texas*, 921 F.3d 440 (5th Cir. 2019) (assuming sheriff's Facebook page were a public forum, concluding viewpoint discrimination claim was sufficiently pled through sheriff banning Facebook user from sheriff's page, and deleting user's comments).

***Park Management Corp. v. In Defense of Animals*, 36 Cal.App.5th 649 (2019)**

Holding: The unticketed, exterior portions of Six Flags Discovery Kingdom are a public forum under the California Constitution's liberty of speech clause.

Facts: Plaintiff operates a privately-owned Six Flags amusement park in Vallejo, having purchased the park property from the City. Seven years later, Plaintiff revised its free speech policy, indicating that the entire park property is not open to the public, and no protests would be allowed anywhere on park land. After the new policy took effect, approximately eight people protested against the park's treatment of animals at the front entrance area, with a ninth person handling out leaflets in the parking lot. Plaintiff filed suit, seeking an injunction against protests anywhere on park property, including parking lots, driving and walking paths, and entrance and admission areas (the unticketed, exterior portions of the park). An animal rights protestor (who was not originally a defendant) intervened as a Doe defendant, asserting a right to protest. On Cross-Motions for Summary Judgment, the trial court granted Plaintiff's motion, and denied the animal rights protestor's motion – entering an injunction barring the protestor from protesting at the unticketed, exterior portions of the park. The animal rights protestor appealed.

Analysis: The Court of Appeal reversed. The court noted this was a "difficult, close case," the "California Supreme Court's decisions in this area are hard to synthesize," and its holding here pertains to this park only. With that said, however, the court found the park's interest in restricting free expression in the exterior portions to be "minimal," as, among other things, the park has allowed the animal rights protestor and others to peacefully protest there for at least seven years. On the other hand, the public's interest in engaging in free speech at the exterior portions of the park is strong, as over 15,000 patrons come to the park daily – and relegating protestors to a public sidewalk (outside of the park) is not an adequate substitute.

***Edge v. City of Everett*, 929 F.3d 657 (9th Cir. 2019)**

Holding: Ordinances addressing bikini barista stands survive due process (vagueness) and First Amendment (free speech) challenges.

Facts: After bikini barista stands had been operating in and around the city for five years, the city passed ordinances (a) enacting a dress code ordinance, applicable to drive-throughs and coffee stands; and (b) broadening the definition of "lewd act" and creating the crime of facilitating lewd conduct. The dress code ordinance included factual findings that there were a proliferation of crimes of a sexual nature occurring at bikini barista stands in the city, and that the minimal clothing worn by baristas contributed to the criminal conduct. Plaintiffs, the owner of a bikini barista stand and five baristas, filed suit, asserting due process (vagueness) and First Amendment (free speech) claims against the ordinances. The District Court granted Plaintiffs' Motion for Preliminary Injunction, finding that Plaintiffs had demonstrated a likelihood of success on their claims. The city appealed.

Analysis: The Ninth Circuit vacated the District Court's decision, and remanded the case. First, the court held that the District Court abused its discretion in finding that Plaintiffs were likely to succeed on their due process challenge to the lewd conduct amendments. The definition of "lewd conduct" requires certain body parts to be covered in public, a person of ordinary intelligence can be informed by that definition, and the definition does not rely on the subjective assessment of an enforcing officer. Second, the court rejected Plaintiffs' due process and First Amendment claims regarding the dress code ordinance. The dress code ordinance does not vest police with impermissibly broad discretion, and is not open to arbitrary enforcement that triggers due process concerns. And as to the First Amendment claim, the court found "wearing pasties and g-strings while working at" drive-throughs and coffee stands is not expressive conduct under the First Amendment. The court noted that the baristas were not asserting they were engaging in nude dancing and erotic performances, disavowing First Amendment protections available for that type of conduct. Therefore, the District Court should have evaluated the ordinance for whether it "promote[s] a substantial government interest that would be achieved less effectively absent the regulation" – and not

through "secondary effects" analysis, which applies to regulations that burden speech that is otherwise entitled to First Amendment protection.

V. Miscellaneous

***Gates v. Blakemore,* ___ Cal.App.5th ___, 2019 WL 3987584 (2019)**

Holding: Trial court properly conducted pre-election review and invalidated proposed ballot measures that would have infringed on authority delegated to the Board of Supervisors by the California Constitution.

Facts: After the county received notices of intent to circulate for signatures with respect to a total of nine initiatives, the county counsel declined to prepare ballot titles and summaries for six of them. Among other things, the measures would have (a) eliminated the existing chief executive officer position, moving many of those duties to the chair of the Board of Supervisors; (b) limited compensation and budget expenditures of Board of Supervisors members; (c) limited the number of county employees; (d) required the county to maintain a minimum ratio of patrol deputies to residents served. Two lawsuits between the ballot proponents and county officials were filed, relating to the county counsel's declination to prepare the ballot titles and summaries. The trial court addressed the litigation through a single hearing, issuing a judgment finding the proposed measures invalid, and excusing the county counsel from the duty to prepare a ballot title and summary. The proponents of the measures appealed.

Analysis: The Court of Appeal affirmed. At the outset, the court held that the trial court properly conducted pre-election review of the proposed measures in this case, due to the "serious questions" about the measures' validity, noting "it was proper for county counsel to seek declaratory relief" as to these measures. As to the merits, the court found the proposed measures were invalid as, among other things, they infringed on authority delegated to the Board of Supervisors by the California Constitution, which reserves for governing bodies of charter counties the authority to set the number of employees, their duties, and their compensation.

***Monster Energy Company v. Schechter*, 7 Cal.5th 781 (2019)**

Holding: An attorney signing a settlement agreement "approved as to form and content" does not absolve attorney from being bound by confidentiality provisions that, on the face of the agreement, apply to the attorney.

Facts: Attorney Schechter represented the plaintiffs in an underlying wrongful death lawsuit involving an energy drink. That lawsuit settled, and the parties entered into a settlement agreement, which had confidentiality provisions – such as those imposing confidentiality on "Plaintiffs and their counsel of record." The agreement was signed by the parties. Their attorneys, including Schechter, signed under the notation "Approved as to Form and Content." Shortly after the settlement, an online article appeared, quoting attorney Schechter, who discussed that the case settled for "substantial dollars," that Monster wanted the settlement confidential, that Schechter believes that the energy drink was unsafe, and that he has three additional lawsuits pending against Monster. The article concluded with contact information for "Monster Energy Drink Injury Legal Help." Monster sued Schechter and his law firm for breaching the settlement agreement. Schechter filed an anti-SLAPP Motion to Strike. The trial court denied the motion, finding that Schechter was a party to the contract, and that the suit could proceed. The Court of Appeal reversed as to the breach of contract claim. The California Supreme Court then granted review.

Analysis: The Supreme Court reversed. At the outset, the court noted that it was undisputed that Schechter established that Monster's suit arises from (Schechter's) protected activity under the anti-SLAPP statute. As to the second step of reviewing at the anti-SLAPP motion, the court found that Monster met its burden of showing the breach of contract claim had "minimal merit" sufficient to defeat Schechter's anti-SLAPP motion. While "approved as to form and content" means that the attorney has read the agreement, and perceives no impediment to the client signing the agreement, that will not end the court's inquiry as to whether an attorney is bound by the agreement. For example, even though Schechter was not a party to the settlement agreement, he did sign the agreement, and "[i]t is the substance of the agreement that determines his status as a party <u>to the contract</u>, as opposed to a party to the lawsuit." In the end, courts should examine the substance

of the provisions at issue – here, the confidentiality provisions. With that in mind, the court determined that Schechter was bound the confidentiality provisions.